haysmacintyre

SCHOOLS BRIEFING

AUTUMN 2024

Contents

Welcome from the editor

Welcome to the Autumn 2024 edition of our Schools Briefing for independent schools, where we provide updates and insights on accounting, tax, reporting and governance for school bursars and Governors.

With the plan to levy VAT on independent school fees and boarding from 1 January 2025, schools now have a number of questions and considerations to make to support their financial future planning.

To begin, Phil Salmon, Partner and Co-Head of VAT, shares an update on what the HMRC draft guidance means for independent schools. The two papers that have been published, which may be subject to change, provide information on VAT registration, and on charging and reclaiming VAT. Phil hones in on various elements of the guidance to include composite supplies, welfare, and bursaries, the changes that will be coming, and how schools will be impacted.

Our first guest author article penned by Jean Tsang, Charity Partner and Head of Education, Richard Jess, Real Estate Senior Associate, and Hannah Bignell, Charity Solicitor, at Bates Wells, gives an overview of some top tips for schools when considering a merger. On the back of the Budget update, there has been an uptick of schools reconsidering their current position, and their long-term vision. This article includes a seven step guide covering due diligence and legal structure amongst others, to ensure the process runs smoothly.

Continuing on with the pressures felt by the introduction of VAT on school fees, Louise Veragoo, Not for Profit Tax Director, gives an in depth account of the direct tax implications of non-educational income. With various ways to generate extra income outside of the core educational offering, Louise considers the benefits of summer camps, room letting and building rental, to name a few, to support schools efforts.

Cyber security and the threat of an attack has been a constant for schools. Our second guest author, Simon Bulleyment, Director at Sibrossa Ltd, describes the trends he is seeing across the sector, the evolving techniques used to launch a successful attack, and gives support on how to plan and implement an Incident Response Plan. As with auditing financial controls, Simon goes on to highlight the importance of taking a similar approach for your cyber security.

Finally, Nick Bustin, Director, sheds light on the Supreme Court ruling on Professional Game Match Officials, and the long anticipated decision concerning the employment tax status of football match officials. This case gives an insight into the outcome, the criteria which must be met to quality for a contract of service, and the final judgement. With the ongoing HMRC off-payroll worker campaign, Nick advises it is important for schools to review all polices and procedures in full.

I hope you enjoy this edition and find these articles both useful, and of interest. Do feel free to let the authors, me or your regular contact know if you have any questions concerning the matters discussed.

Lee Stokes
Partner
020 7969 5656
lstokes@haysmacintyre.com

What the HMRC draft guidance means for independent schools

Further to the announcement on 29 July about the introduction of VAT on fees for independent schools and the comments that HMRC would produce further guidance in due course, the latest draft guidance has now been released as of 10 October 2024.

Two papers have been published, and the first of these gives guidance on VAT registration, whilst the second is guidance on charging and reclaiming VAT. Unfortunately, neither of them are as helpful as they might be, though they do contain some useful points.

The first point to note is that they say they are based on the Technical Note issued on 29 July 2024, but that they will be updated if there is any policy or legislative change announced in the Budget. Given that the Budget is on 30 October 2024, issuing guidance which may be subject to change 20 days later does not give much certainty that the guidance can be relied upon.

Composite supplies

Turning to the guidance on where VAT should be charged, the first problem is the section headed "Supplying education services that include other elements (such as school meals and transport)". This section confirms the problem I highlighted in the last in this series of articles, where I pointed out that the way that the draft legislation had been introduced and the policy desire to continue to allow closely related goods and services, like school meals and transport, to remain exempt from VAT did not sit comfortably with the principles of composite supplies.

A composite supply arises where two or more goods or services are supplied, and there is a principal supply to which the other supplies are ancillary, or a means to better enjoy the principal supply. Where this is the case then the ancillary supplies take on the same VAT liability as the principal supply.

The HMRC guidance acknowledges this and goes on to say that you should not "artificially split the package to create separate supplies with different VAT liabilities"; and it goes on to say "When you supply a package of education for a single fee this will normally be a single supply for VAT. This package could include a number of elements (such as transport or meals) alongside the main element of education." It goes on to confirm that this would be a single composite supply with a single VAT liability.

The very next paragraph goes on to say that if you provided education and school meals for separate fees, then they would be separate supplies with the school meals being exempt from VAT.

But the glaring hole in the guidance is whether HMRC are saying that if a school chose not to charge for separate items prior to the General Election, and instead charged a single inclusive fee, but now decides to charge separately, that is artificially splitting the package and would retain a single VAT liability, notwithstanding the Government's clear intention to allow closely related supplies to be treated differently.

Welfare

The second area of uncertainty is in the section headed "Supplying education and welfare together". The guidance says that if the two are supplied together then you need to decide whether you are supplying education or welfare. It goes on to seemingly say that for it to qualify as welfare that it must be the largest element of the supply, but then confusingly says an example of a supply of welfare is supervision and guidance provided to a vulnerable person to develop a capacity to live independently and complete everyday tasks which "may be listed in an Education Health Care Plan".

But given that HMRC have clearly said that VAT should be charged for pupils who are on an EHCP , are they now saying that part of a supply of education incorporating the above aspects can be treated as exempt welfare, and are we back to whether there is a single composite supply or separate supplies?

Bursaries

The guidance is also somewhat unclear as to its comments on bursaries. On the face of it, it seems to be taking the same view that we have, in that if a bursary payment is made for a specific named pupil then that is third party consideration for the supply of education and subject to VAT.

But the language is unclear as it talks about schools making bursary payments to themselves which are outside the scope, so it is unclear whether HMRC are talking about bursaries being provided by a third party such as an endowment and is saying that these are subject to VAT even when they are provided as a block of funding which the school internally allocates towards pupils.

Invoicing

The guidance helpfully confirms that it is possible to issue a single invoice for supplies which are subject to different rates of VAT, and it also confirms that if a class contains a mixture of children who are below compulsory school age and others who are above it, then the whole class is subject to VAT.

Recovering VAT on expenditure

As regards recovering VAT on costs the guidance mainly restates basic principles. It makes no comment as to whether an override calculation would arise as a result of Fees In Advance payments having been made prior to 29 July.

However, the guidance does seem to contradict guidance elsewhere in the HMRC manuals when it talks about recovering VAT incurred prior to registration.

This new guidance says that VAT incurred on goods in the four years prior to registration may need to be apportioned over the economic life of the goods (normally five years) based on the taxable period of use and the exempt period of use.

This is in contrast to the HMRC manual which says that you can only recover VAT incurred prior to registration to the same extent you could as if you had been registered at the time the goods were bought.

In most cases the goods would have been used in making exempt supplies when they were bought meaning you could not have recovered any VAT. This new guidance seems to envisage that if you bought the same goods two years ago, then you could potentially recover 3/5th of the VAT to reflect the change in VAT liability.

It is also at odds with some earlier comments by Labour shadow ministers prior to the General Election which seemed to indicate VAT recovery might be restricted.

VAT Registration

The guidance on registration is more helpful and makes it clear that any payments received from 30 October 2024 for terms starting on or after 1 January 2025 will be subject to VAT so invoices issued in December for the January term will be subject to VAT and you would therefore need to be registered to charge this VAT.

It confirms that if you already make taxable supplies you can register now on a voluntary basis. If you make no taxable supplies currently then you will be able to register from 30 October 2024, but the exact date on which you need to register will depend on the value of taxable supplies and when you receive payment.

For payments made in advance after 29 July 2024 relating to periods after 1 January 2025, the payments will be subject to VAT the later of 1 January 2025 or the first date of the school term for which they have been paid.

For payments in advance made prior to 29 July 2024 the guidance says the treatment will depend on whether a tax point has been created, so it goes no further than the comments in the previous Technical Note.

Payments made after 30 October 2024 for school terms starting on or after 1 January 2025 will become subject to VAT on the day you receive the fees.

Phil Salmon
VAT Partner
020 7969 5611
psalmon@haysmacintyre.com

Independent schools – top tips when considering a merger

The government recently announced its plans to introduce VAT on independent school fees from January 2025, as well as removing their eligibility for business charitable rates relief from April 2025. As a result, we've seen an increase in independent schools and independent school groups re-considering their long-term vision.

Independent schools may decide to merge for many reasons, including financial benefits, risk diversification, collaboration, and/or shared educational vision. Some larger school groups see mergers as a strategic opportunity to bring in smaller schools to expand its group.

When looking to merge, here are some key considerations that should be taken into account to ensure the process runs smoothly:

1. Legal structure (merger or sale)

The most common merger structure for charitable independent schools is an asset transfer without a sale price. This is where the assets and liabilities of Charity A are transferred across to Charity B.

There are other forms of merger, such as a change of control merger (where Charity A becomes a wholly owned subsidiary of Charity B) which can also be considered.

One other option is to sell the school to another organisation for an agreed price. This option tends to be the preference for non-charitable, for-profit, independent schools, or where a charitable school is sold to a non-charity.

2. How to choose a school to merge with

In our experience, the most successful mergers happen where the schools have carefully considered their reasons for wanting to merge and approach partners that have aligned educational visions and cultures.

For larger schools or school groups, mergers may be driven by the desire to create a stronger group. Many may want to strategically bring in smaller prep schools into the school group so that there are guaranteed feeder schools to ensure that pupil places can be filled in the senior schools within the group. Also, with the proposed introduction of VAT on school fees, being part of a schools group may be beneficial from a VAT perspective as there are likely to be more opportunities for the group to offset VAT on school group costs and expenses. In turn, this may result in lower fee increases than at a standalone independent school as economies of scale can be achieved and common costs are reduced.

Other key factors to consider are:

- Is the school single sex/co-ed?;
- Does the school have any religious affiliations and if so, are these aligned?;
- To what extent does the school support learners with special educational needs?;
- The proximity of the schools (are they within the same area?); and
- Whether they have any current connections (is one a feeder school to the other as an example) or do they otherwise already collaborate with each other?

3. The importance of confidentiality

Once a potential merger partner has been identified, both schools will need to make sure their dealings are confidential. At this point, the parties should enter into a non-disclosure agreement. From a practical perspective, it is important that both schools decide who needs to be privy to the potential merger discussions. Normally this would include at least the head, the bursar and the trustees (as well as the schools' professional advisors). This helps to ensure that merger news is not leaked to staff and parents which can result in misinformation.

4. Heads of Terms

Once the parties have entered into a non-disclosure agreement, it can be helpful to negotiate Heads of Terms so that the parties can agree the key commercial points of the merger and non-negotiable points such as the structure of the merger or whether and, if so, how loans are discharged. Having such commercial points agreed is likely to save time when it comes to negotiating the merger agreement.

It is important to note that the Heads of Terms are usually non-binding which means that the parties are not committed to proceeding with the merger. Therefore, it is recommended that it is made explicit which provisions are legally binding so that both parties are clear on this. Legally binding provisions tend to relate to confidentiality, cooperation/assistance provisions for due diligence purposes and costs (each party to bear their own legal costs). The Heads of Terms may also include provisions on transitional arrangements which may state how either/both school(s) is/are to be operated whilst the merger negotiations are being progressed.

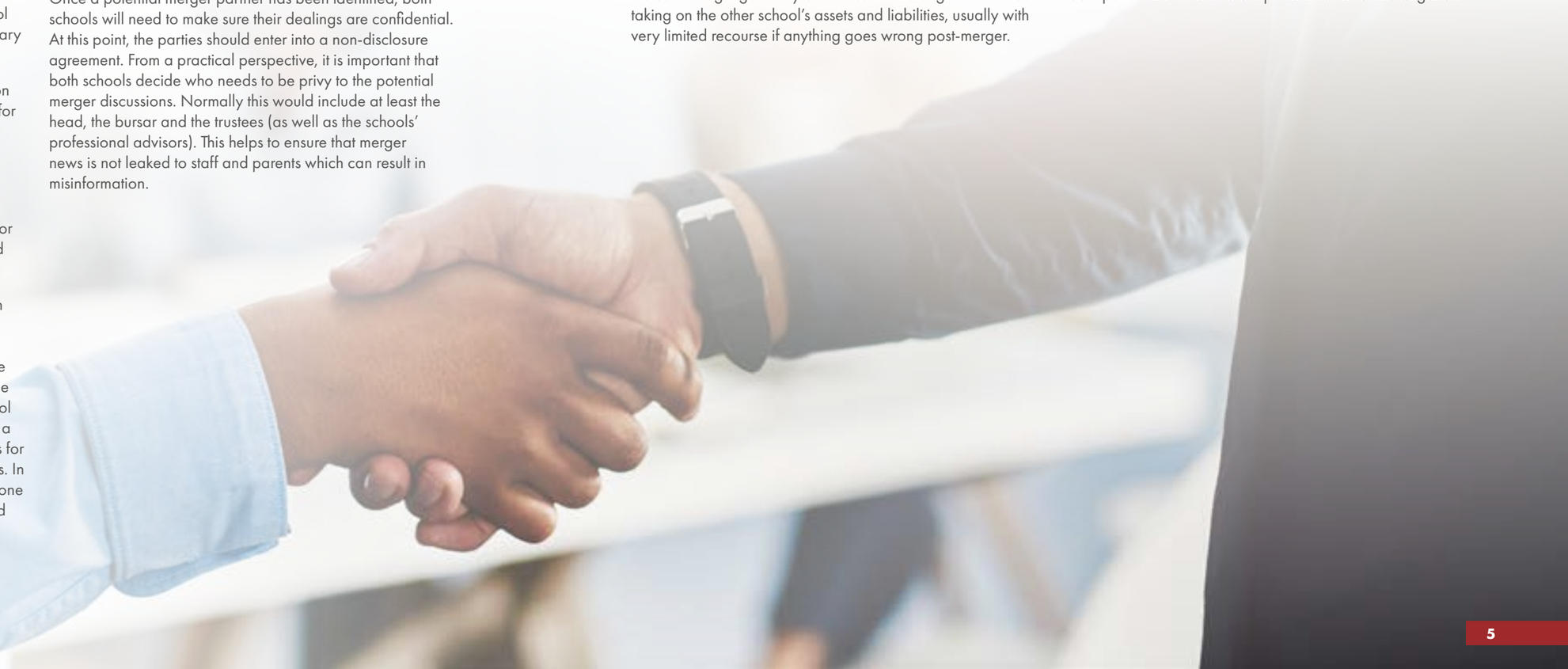
5. Full due diligence

Due diligence is a vital step in the merger process. It is a process undertaken in order to find out as much about the other party as possible in order to assess whether there are potentially any hidden liabilities, whether any matters require further investigation and (ultimately) whether or not it would be in that school's best interests to proceed with the merger. For mergers, we would usually expect the due diligence to be two-way. Due diligence will be particularly important for the continuing legal entity on an asset transfer given it will be taking on the other school's assets and liabilities, usually with very limited recourse if anything goes wrong post-merger.

There are different types of due diligence that need to be carried out, including legal, financial and commercial. Legal due diligence involves looking into aspects of a school's operations such as employment and pensions; property owned or otherwise used by the school; property arrangements with third parties (e.g. leases, licences or hire agreements granted to sports clubs or nurseries); health & safety; whether there are any ongoing disputes/litigation; intellectual property; key contracts (including parent contracts); building contracts and warranties and school compliance (including, crucially, safeguarding).

There will be other charity law issues to consider for charitable independent schools, such as whether there are any restricted funds or restrictions on the use of any school land and buildings. There could, for example, be bank charges registered against the Land Registry title of the transferring school site, or restrictions in favour of banks or other third parties prohibiting the transfer of land without prior consent.

School sites can also be subject to restrictive covenants (some of which are very old, yet still problematic) which might limit how the site can be used, and in turn have an impact on use of the land as a school. Beyond the registered title, independent school sites, particularly those that are charitable and longstanding, may have trusts which attach to and can impact the land, for example there might have been certain stipulations about how the land can be used when it was gifted in will, or set out in constitutional documents and schemes. All such points can of course be managed, but it is important that both parties have carried out prudent levels of investigation.



It will also be prudent to look at both entities' governing documents early in the merger process to check that they have the power to merge and have compatible charitable objects. This is important for many reasons, including for compliance with the Charities Act when transferring the land. If the charitable objects of the two charitable independent schools are compatible, then substantive compliance with the hurdles of the land provisions of the Charities Act will be avoided. If the charitable objects are not compatible then this can impact how the transaction is structured and the possible need for certain Charity Commission consents.

6. Negotiation of the merger agreement

When the due diligence process is complete or near complete, and the parties are satisfied with the results, the negotiations on the drafting of the merger agreement can commence. The merger agreement is the main legally binding document that governs the obligations of both parties on the merger. Unless the parties have agreed any changes to the commercial points (often resulting from the due diligence process), the merger agreement will reflect the main commercial points that have been previously agreed in the Heads of Terms, and include any other conditions that may apply to the merger and the practicalities involved in transferring ownership.

Once agreed, the parties can enter into the merger agreement to make it legally binding. Mergers will most commonly have a split exchange and completion. The means that at the date the merger agreement is signed - usually at the point that the deal is considered done, known as "exchange" – there may still be some conditions that need to be met before the merger can fully move to "completion".

Common completion conditions include:

- Confirmation that employment consultations have been carried out properly in accordance with the TUPE regulations; and
- Obtaining necessary consents such as from the Department for Education or banks (if there are any loans or charges to be discharged).

Once completion conditions have been satisfied, the parties can progress to completion which is the date on which legal title to the assets is transferred.

7. Communications and PR

A good communications strategy is key to ensure the merger announcement can land well with staff and parents and they feel positive about the benefits of merger. This can be particularly difficult to navigate when the merger is between a large schools group and a smaller standalone school, because parents and staff might be concerned about the impact of the smaller school joining the large schools group. It can be helpful to have a Q&A session with parents and staff and to pre-empt any concerns and draft responses ahead of the announcement.

In terms of timing of the announcement, there is a fine balance to be struck between the confidentiality needed, especially at the early stages of merger discussions before legal agreements have been signed, versus the desire to be as open as possible with parents/staff. The right time to announce will depend on a number of factors such as if there is to be restructuring of staff (which will require staff consultation), but schools will wish to avoid disrupting busy assessment periods or announce a merger right before a school holiday. Schools should assume that once the staff know, the news will travel to the parents!

In our experience, a common time for announcing the school merger is at exchange, when the merger agreement is signed.

For further information or advice, please contact Jean Tsang, Charity Partner and Head of Education at Bates Wells, Richard Jones, Real Estate Senior Associate at Bates Wells or Hannah Bignell, Charity Solicitor at Bates Wells.

Jean Tsang
Charity Partner and Head of Education at Bates Wells
j.tsang@bateswells.co.uk

Richard Jones
Real Estate Senior Associate at Bates Wells
r.jones@bateswells.co.uk

Hannah Bignell
Charity Solicitor at Bates Wells
h.bignell@bateswells.co.uk

Direct tax implications of non-educational income

With the introduction of VAT on school fees putting pressure on keeping fee increases low, along with increases in energy costs, schools are increasingly looking to generate extra income from a diverse range of activities outside of their core educational offering.

However, without proper planning and structuring, these activities could lead to unintended direct (corporation) tax and indirect tax (VAT) consequences.

This article focusses solely on the direct tax considerations, and with the Corporation Tax rate having recently increased from 19% to 25%, it is more important than ever for schools to review their activities carefully and seek prompt professional advice.

The basic position

Contrary to popular belief, charitable schools do not receive a blanket Corporation Tax exemption on all income.

The correct position is, in fact, that of a 'normal' company (or trust, depending on the constitution). However, most income will then fall within one of the charitable income exemptions given by tax legislation, provided the income is applied solely to charitable purposes.

It is worth noting that pure donations are normally outside the scope of Corporation Tax, however trading (broadly the provision of goods or services in return for payment), rental and investment income streams rely on specific exemptions. The most relevant exemptions used by schools include:

Charitable trading – trading activities that directly further the school's charitable objects, including charging school fees. The wider your objects, the wider the possibilities! Care should particularly be taken where your school's objects are narrow, such as only covering a certain age group or geographical area, as this could severely restrict the possibilities for charitable trading. Also don't forget that the public benefit test must also be met for this exemption to apply.

Ancillary trading – trading that is not charitable in itself but is very closely connected with / ancillary to charitable trading. For example, branded uniform sales, school lunch sales or textbook sales.

Income from Land and Buildings – passive income from land and buildings, including rental income, ground rents, licences and payment for right of access.

Small-scale trading – any non-charitable trading (or miscellaneous income) up to £80,000 turnover per year (or for charities with income <£320k – 25% of income). This is an all or nothing relief, i.e. once it is breached, all profits are taxable. However, there is a 'reasonable expectation test' available where the threshold is unexpectedly breached.

Fundraising events – fundraising events (e.g. balls, fetes, firework displays etc.) that meet the criteria for being VAT-exempt, are also exempt from corporation tax. Broadly, events must be clearly organised and held out to be for the purpose of raising money for the charity and must meet the strict requirements on annual frequency.

Commmon examples

Though we have seen some very creative income generating activities, below are some of the more common examples. Whether these fall into one of the charitable exemptions will depend on the exact nature of the activity and your own school's specific charitable objects, so please seek both tax and legal advice as necessary.

Summer Camps

A very common scenario is the generation of income from hosting of a summer school or camp. To understand the direct tax treatment of such income, it is necessary to consider the exact nature of the arrangements:

- It is worth considering if the camp being run directly by the school or is there an external provider?
- If the former, would the attendees at the camp be classified as beneficiaries of the charity?
- If the latter, what facilities, buildings and services are being provided by the school to the third party in return for the income?

In most cases, for a school directly providing educational camps, the income is likely to fall within the charitable trading exemption, due to the direct provision of education by the school. However, this will depend on the exact charitable objects of the school.

Alternatively, where a third party entity is involved in the arrangement, it will be necessary to establish what is being provided by the school and whether the profits of this activity can meet one of the exemptions or not. This can be a much more complex area and tax advice should always be sought to avoid unnecessary direct tax exposure.

Sports Facilities

If your school is fortunate enough to have a range of its own sporting facilities and grounds, the generation of income from these facilities may be a useful source of income. Typical income streams include:

- Membership income from the general public (such as gym membership).
- Adult fitness classes.
- Hire of/access to a swimming pool.
- Local schools and/or clubs using the facilities or grounds.

The first three income streams outlined above are most likely to constitute a trading activity for the school, albeit may well fall within the charitable trading exemption, depending on the exact wording of the school's charitable objects.

Where the school is letting sports facilities to other schools, clubs or groups for their own use, the direct tax treatment is more complex. Whether these activities are treated as trading or rental in nature, will depend on the level of services provided (e.g. staff) and the type of equipment made available. It is, therefore, best to understand what the tax implications might be before any arrangements are concluded and contracts are signed.

Room Letting

Even without extensive sporting facilities, your school might be letting out rooms or spaces with specialist equipment, such as an IT/conferencing suite, or perhaps a fully equipped theatre with professional equipment, with or without support staff. Again, this type of income could quite easily be viewed as trading rather than rental income by HMRC. This is due to the level of facilities and/or services that tend to be linked to such lets. Where the income is deemed to be trading in nature, it will be necessary to establish whether such trading represents charitable trading of the school (exempt), or non-charitable trading (taxable).

Onsite café

Less common, but something we are increasingly seeing, is the operation of a café that is open to the general public (even if only during certain hours). This activity is unlikely to fall within any of the direct tax charitable exemptions, except perhaps for the small-scale exemption. Where the café is restricted to students/staff at certain times, and where it is possible to separately identify sales between these users and the general public, it may be possible to treat part of the activity as exempt charitable trading. However, where this is not possible, the whole activity is likely be viewed as non-charitable trading (and potentially taxable).

Land and Buildings or Trading income?

A common question to answer the above examples is whether activities can be covered by the land and buildings exemption or the trading income exemption. This is a distinction that tends to matter much more for charitable entities than for non-charitable ones. Unfortunately, there is not a straightforward answer to this question and the answer might also be that an activity could be a bit of both!

Where the school rents out spare space on a short-term basis (e.g. hourly/daily) rather than by way of a longer term formal lease, then it is particularly important to consider exactly what is being provided to establish the correct direct tax treatment.

If all that is being provided is the use of space (whether furnished or unfurnished), then it is very likely that the income will be covered entirely by the land and buildings exemption.

As noted earlier, however, if the school is providing more than just access and/or the rental value is largely derived from the equipment or facilities within the space, then the likelihood is that HMRC will view the whole activity as trading and would need to rely on the trading exemptions instead. Services such as staffing or supervision, catering and equipment set-up are common examples of services often provided.

This can be a notoriously grey area and there is no case law particularly relevant to the charity or schools' sectors, only minimal HMRC guidance. If there is any doubt, it is normally best to assume that HMRC would view the activity as trading.

Implications of non-exempt income

Where the small-scale trading limit has been exceeded and the 'reasonable expectation test' cannot be met, then the profits from all non-charitable trading will be subject to corporation tax (if carried out directly by the charitable school).

This could be very costly, especially with the recent corporation tax rate rise and the related tax can represent an unexpected cost where not factored into the original business plans from the start.

All direct and indirect costs should be identified when calculating the profits of any taxable trading activities. This will require a suitable calculation of 'just and reasonable' costs and overheads associated with generating the income. We would recommend seeking professional advice to ensure any method chosen is acceptable to HMRC.

It should be noted that corporation tax consequences can also arise should the above calculation result in a loss, not only where a profit is derived.

Possible Solutions

So, what solutions are available where your school wishes to carry out non-charitable trading on a larger scale or you have realised that the school is already doing so?

Firstly, you should take legal advice to ensure what is anticipated can be achieved within your school's constitution. In general, under charity law, it is not acceptable for a charitable school to carry out large levels of non-charitable trading. Though there might not be much that can be done about historical activities, it is never too late to change things going forward. Though not exhaustive, two possible options you might wish to consider are:

1. Widening your charitable objects

Consider looking at your school's charitable objects and speak to your legal advisors. This might be particularly relevant where your objects have not been reviewed for a number of years. Consideration should be given to whether it is possible to widen the objects in order to bring some of the existing trading activities within the objects. As noted above, this could give far more flexibility to carry out trading activities directly within the school.

There is no financial cap on the amount of charitable trading a charity can carry out and no negative implications if these turn out to be loss making.

2. Use of a trading subsidiary

If the turnover from non-charitable trading exceeds the small-scale trading limit, then it may be possible to shelter any profits from such activities by instead routing the trading activities through a wholly owned trading subsidiary of the school. Any taxable profits generated by that subsidiary can then be donated by way of corporate donation to the parent school, within nine months of the year end, to eliminate the corporation tax liability that otherwise would have arisen.

Although this sounds like a simple solution, it is important to ensure that the correct structuring is undertaken and that appropriate agreements between the school and the subsidiary are in place to ensure this works correctly. Where the correct arrangements are not made, badly arranged group affairs can instead create other tax issues from those you are trying to avoid. For example, the subsidiary may also need funding (e.g. for working capital), which has its own set of rules for tax purposes and is worthy of an article in itself!

Conclusion

As hopefully you can appreciate, alternative income generation for charitable schools can be a bit of a minefield and there are numerous things to consider from a corporation tax perspective. The consequences can also be costly if arrangements are not structured correctly.

Therefore, if your school is thinking about any new income streams or is unsure about its existing ones, please do get in touch and we can share our experiences and offer our assistance.

Louise Veragoo
Not for Profit Tax Director
020 7969 5682
lveragoo@haysmacintyre.com

Cyber-attacks in 2024 and what schools should be doing

It's been a whole year since I wrote an article in last year's Autumn School Briefing, and sadly cyber-attacks on schools show no signs of slowing down.

As I am writing this article, three attacks on schools have been reported in the press, all in the space of a month: a ransomware attack on Fylde Coast Academy Trust (affecting 10 academies), another ransomware attack on Charles Darwin School in Bromley, and an undisclosed cyber incident affecting Canvey Island Primary School.

Across all three attacks, the trends and impact are broadly similar, including lack of access to IT systems, disruption to teaching, and the likelihood of data being compromised. The impact on staff from cyber-attacks should never be underestimated; they are always stressful for the senior management team and a heavy burden is placed on IT with recovery and restoration of systems.

In my previous article I referred to cyber criminals constantly evolving their techniques to launch a successful attack, and that continues to happen. Ever more effort is being put into stealing data, with attackers being only too aware of the reputational damage arising from pupil/staff data being leaked onto the internet, and ransomware demands continue to increase in value.

Unfortunately, schools now need to adopt a mantra of "it's not if, but when" they will experience some form of a cyber incident. If I can provide one overriding piece of advice, it is to ensure an up-to-date and well-rehearsed Incident Response Plan (IRP) is in place. Having been involved with multiple ransomware events, the early stages are always an incredibly unsettling/upsetting time and having a document to guide you through, with a structured approach, is invaluable. Many schools will have cyber insurance, with policies often providing forensic, legal and PR services, which should be incorporated into an IRP.

If you do not know where to start with writing an IRP or you simply want to check that it covers the right areas, National Cyber Security Centre (NCSC) has written the excellent "Cyber Incident: Response and Recovery" guide, available at ncsc.gov.uk. Once a plan has been written, ensuring it is regularly tested (at least annually) is vital. Once again, NCSC provides help with their "Exercise in a Box" toolkit.

Whilst ransomware becomes ever more sophisticated, there are many initiatives that can be put in place to fend off an attack. This includes having an ongoing security awareness training programme (doing this as a one-off, annual compliance exercise is asking for trouble). In addition, there needs to be regular phishing testing to ensure the training is effective. The IT team (or outsourced provider) also need to have implemented a suite of technical and process defences, including:

- Anti-malware software that can detect, and halt, early stages of ransomware or other malicious applications. Gartner, a global IT research and consultancy organisation, publish their annual "magic quadrant" that ranks and provides details about the best systems.
- Regularly (monthly) applying updates to systems and applications (attackers frequently exploit vulnerabilities that have not been 'patched').
- Email/gateway controls to filter out phishing emails, which are frequently responsible for bringing ransomware into an IT network.
- Regularly checking log files for key security systems, to detect early signs of ransomware and unauthorised access. Many schools are using the M365 platform for email (and other) services, and Microsoft provides sophisticated logging and an alerting functionality. Frequently I observe early signs of attacks within log files, that IT teams have overlooked.

As important as having the right technical controls in place is, regular testing must be undertaken to ensure they are working properly. I can recall several incidents involving organisations that had state-of-the-art anti-malware systems, only to discover they were not working or configured properly, due to the IT team becoming side-tracked with other priorities.

In the same way that many schools have their financial controls audited, a similar approach should be taken with cyber security (an external viewpoint can be invaluable for uncovering deficiencies, areas that have been overlooked or misconfiguration). Different approaches can be taken, including annual certification against a cyber framework, such as Cyber Essentials Plus (the Plus scheme adds a requirement for testing of key technical controls), internal penetration testing and cyber audits, covering human, process and technical controls.

Simon Bulleyment
Director, Sibrossa Ltd
020 3934 3255
sbulleyment@sibrossa.com

The Supreme Court ruling on Professional Game Match Officials

The question of who has control over a worker and the presence of mutuality of obligations (MOO) can have an impact on any off-payroll worker (OPW) engagements, something independent schools need to carefully consider. This article looks at the long anticipated Supreme Court decision concerning the employment tax status of football match officials.

The Supreme Court judgement (published on 16 September 2024) confirmed that the minimum requirements of MOO, which relate to the provision of a personal service are comparatively low. This is especially the case where the engager, being the employer, pay for those services and maintains control over the employee. In their ruling the Supreme Court found that the match assignment (deemed to be an individual contract for that match) created a contract of service between the National Group of Referees and Professional Game Match Officials Ltd (PGMOL).

The Supreme Court directed the First-tier Tribunal (FTT) to revisit the facts and decide whether the individual contracts are employment contracts. There is a sense of frustration that referring the case back to the FTT to revisit the facts of the engagement, whilst technically correct, will only create unnecessary delays in concluding the dispute.

Unlike other recent IR35 cases, the appeal was only asked to consider the first two strands of the Ready Mix Concrete (South East) ('RMC') v Ministry of Pensions and National Insurance [1968] 2QB497, not the third limb ('third RMC stage'). When the case is heard again by the FTT, we expect the FTT to review all three stages of RMC tests, which are now considered in more detail.

RMC tests

The tests established that, in order for there to be a contract of service (employment), certain conditions must be met:

- The worker must be subject to a right of control. If there is no right of control of any kind, then you will not have a contract of service. However, there is a caveat that, although a right of control is a key factor in determining employment status, it is not necessarily a sole determining factor;
- Personal service must be given. However, the court did make the key point that a limited right of delegation was not inconsistent with a contract of service; and
- The other factors present are consistent with a contract of service. Factors such as ownership of significant assets, financial risk and the opportunity to profit which are not consistent with a contract of service.

The three criteria are generally referred to as mutuality of obligation, control and third RMC stage.

The Judgment

The Supreme Court unanimously dismissed PGMOL's appeal, deciding that the minimum requirements of MOO and control necessary for a contract of employment between the National Group of referees and PGMOL were satisfied in relation to the individual contracts. The Supreme Court remitted the case back to the FTT for it to decide whether, in the light of all relevant facts, the individual contracts were contracts of employment.

Reasons for the Judgment were:

1) MOO

The Judge drew distinction between over-arching and individual contracts. The over-arching contracts govern continuous employment whereas individual contracts as in this case, govern single engagements. This means that in individual contracts, it is not a requirement to consider MOO before the engagement commences. We must consider instead the parties' obligations in the period from the referees' arrival at the ground on match day to the submission of their match report on the following Monday and this would satisfy the requirement for sufficient mutuality of obligations.

Additionally, the Judges opined that a referee and PGMOL were under mutual contractual obligations from the time that the referee accepted the offer of a match. He further added that,

> *'It did not matter that either party had a right to cancel the engagement without penalty; whilst the contract remained in place, the parties were under mutual obligations to each other. Consequently, the individual engagements of referees to officiate at matches satisfied the test of mutuality of obligation'.*

2) Control

The Judges contended that it is not necessary that the employer should have a contractual right to intervene in every aspect of the performance by an employee of his or her duties for there to be a sufficient degree of control. This includes the ability or legal right to intervene during the performance of the employee's duties.

What is important is there should be a sufficient framework of control as regards each contract taken separately. He added that it is not confined to the right to give direct instructions to the individuals concerned.

Whilst the case relates to football match officials, it will be interesting to see whether HMRC will consider applying the findings of this decision. Will HMRC look at individuals whose work patterns include a series of short term engagements?

We are aware of HMRC's 'Off-payroll worker' campaign within the Charity and not-for-profit sectors, which will include independent schools. Many of the points considered in the PGMOL case will no doubt be looked at by HMRC when they look at the contractual arrangements which are present within the worker supply-chain. It is important that all policies, procedures, contracts and other arrangement are reviewed in full.

Nick Bustin
Employment Tax Director
020 7969 5578
nbustin@haysmacintyre.com

Upcoming events programme

We have one of the largest charity and not for profit teams in the country: we act for over 800 clients, accounting for approximately 30% of our annual turnover. Our team of specialists host topical seminar updates and speak at other organisations' events presenting the latest developments within the not for profit sector.

A guide to VAT: Expert training and advice for independent schools
14 November 2024
10:00 - 12:30
Online

Trustee Training: introduction to charity finance and reporting
18 February 2025
13:30 - 15:30
Online

Trustee Training: roles and responsibilities
6 March 2025
09:30 - 13:30
Online

AGBIS Conference
19 March 2025
09:00 - 17:00
Queen Elizabeth II Centre

Bi-annual Schools Update
April 2025
Online

Quarterly Charities Update
5 December 2024
15:30 - 17:30
Online

ABGIS: Finance for non financial Governors
4 March 2025
10:00 - 16:00
haysmacintrye office

Quarterly Charities Update
11 March 2025
15:30 - 17:30
Online

Trustee Training: charity law update
25 March 2025
13:30 - 15:30
Online

ISBA Conference
20 May 2025
09:00 - 17:00
Manchester Central Convention Centre

To book your place at any of our events, please visit haysmacintyre.com/events

Schools team

If you need guidance on any audit and accounting, financial reporting, statutory obligations, funding, VAT, employment tax or direct tax matter you can contact any member of our Schools team as detailed below.

Tracey Young
Partner, Head of Education
020 7969 5654
tyoung@haysmacintyre.com

Jane Askew
Partner
020 7969 5683
jaskew@haysmacintyre.com

Kathryn Burton
Partner
020 7969 5515
kburton@haysmacintyre.com

Nick Bustin
Employment Tax Director
020 7969 5578
nbustin@haysmacintyre.com

Adam Halsey
Partner
020 7969 5657
ahalsey@haysmacintyre.com

Steve Harper
Partner
020 7898 3567
sharper@haysmacintyre.com

Siobhan Holmes
Director
020 7969 5601
sholmes@haysmacintyre.com

Phil Salmon
VAT Partner
020 7969 5611
psalmon@haysmacintyre.com

Lee Stokes
Partner
020 7969 5656
lstokes@haysmacintyre.com

Louise Veragoo
Not for Profit Tax Director
020 7969 5682
lveragoo@haysmacintyre.com

Richard Weaver
Partner
020 7969 5567
rweaver@haysmacintyre.com

Tom Wilson
Partner
020 7969 5697
twilson@haysmacintyre.com

haysmacintyre

haysmacintyre
10 Queen Street Place
London EC4R 1AG

T 020 7969 5500
F 020 7969 5600
E marketing@haysmacintyre.com

www.haysmacintyre.com
X @haysmacintyre

Winner: Large Firm of the Year 2023

An eprivateclient top accountancy firm 2023

Top 10 auditor to quoted companies in Adviser Ranking Listing