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transforming generosity

Stewardship Briefing Note 2013/6

Beware! GASDS banana skins when converting from charitable trust to CIO

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the issue

Churches in particular, but charities in general, are gradually getting used to the Gift Aid Small Donations Scheme (GASDS) and are beginning to put their first claims into HMRC. However, there are some slippery 'banana skins' to be avoided where a charity converts its status from charitable trust to a CIO or other form of corporate charity such as a company limited by guarantee. At the time of writing, these banana skins are not clearly highlighted in any HMRC Guidance!

Converting to incorporated status involves a change of legal entity. In the eyes of the law, an unincorporated trust and its successor incorporated charity are in fact two entirely separate organisations. This means that the successor charity will need to meet two eligibility tests in the GASDS rules before it will be able to make its first claim.

These two tests are that the (new) charity:

- has completed its 'start up period', which means the first two complete tax years during which it is recognised as a charity by HMRC.
- has made successful Gift Aid claims in two of the last four tax years and, as a minimum, at least every other tax year.

example 1

ABC Church Trust has been claiming Gift Aid for many years. It has therefore already passed the above two tests right from the beginning of the GASDS, in April 2013. But the trustees of the church decide that they should convert into a CIO as they are concerned about their trustees' exposure to personal liabilities. They do this in January 2014 and the new CIO is established on 31 January.

the normal rule

Unlike the old church charity, the new charity will be unable to make a claim under the GASDS until 6 April 2016 and only then, if the new charity has both been recognised by HMRC as a tax charity (by the trustees submitting Form ChA1) and has made successful Gift Aid claims in both of the tax years 2014/15 and 2015/16.

a solution … potentially

Fortunately, when the GASDS rules were being drawn up, with the help of Stewardship and others in the sector, this situation was contemplated and deeming provisions were included in the law to enable the new charity to 'take on' the compliance and start up history of the old charity. However, certain conditions apply. The hidden banana skins are in the detail of those conditions and, in particular the time limits for meeting them. These are well hidden in Regulations and, at the time of writing, are not clearly covered off in HMRC Guidance.

> **Tip**: *Somewhat unhelpfully, the Small Charitable Donations Act and the underlying Regulations use the term 'mergers' to refer to both traditional mergers of charities and situations where a charity's activities are taken over by another charity simply as a result of a change of its legal status.*
>
> *Therefore, in this paper, the word 'merger' is used to refer equally to the situation where a charity converts from one legal form (such as charitable trust) to another (such as company limited by guarantee, or Charitable Incorporated Organisation). We refer to them as the 'old charity' and 'new charity' respectively.*

the deeming provisions

Where the new charity (in our example, the CIO) takes over all of the activities of the old charity (unincorporated trust), and:

- the purposes of the new and the old charity are substantially similar, and
- more than half of the managers/trustees of the new charity were managers/trustees of the old charity,

the new charity can apply to HMRC for a certificate permitting the new charity to 'take on' the Gift Aid history (and the history of being a tax charity) from the old charity as if it there had been no change. In this way, the new CIO will be able to claim under the GASDS straight away. BUT, here are the banana skins:

Banana Skin One (a) – the time limit for applying for the HMRC Certificate

The application for a certificate must be made in writing to HMRC before the <u>earlier</u> of:

(a) 60 <u>days before</u> the new charity makes its first Gift Aid exemption claim;

(b) 90 <u>days after</u> the new charity began to carry on the activities of the old charity.

Careful planning will therefore be needed in the timing of the date that the new charity takes on the activities of the old charity and in the making of the first Gift Aid exemption (that is, repayment) claim in the new charity.

Since the time limit in (a) is within the power of the trustees of the new charity to determine (by making their first Gift Aid exemption claim according to their own timing), the key constraint is likely to be the time limit in (b). That said, the trustees are unlikely to want to defer their Gift Aid claim beyond the end of the tax year in the year of the change of status.

The above time limit is modified slightly where the change in status occurred before 19 April 2013.

> Tip: ***Stewardship*** *took up the point with HMRC that these time limits, although very short, are not clearly stated in any HMRC Guidance and requested them to be temporarily extended for charities that had already changed their legal status.*
>
> *As a result, they announced on 2 December 2013, that the time limit for applying for a certificate would be extended to 28 February 2014, in respect of any mergers / change of legal status that had taken place on or before 30 November 2013.*
>
> *The HMRC announcement can be viewed at hmrc.gov.uk/news/ga-small-dons-merg.htm*

example 2

Church A (constituted by Deed of Trust) has been claiming Gift Aid for many years. It establishes a Charitable Incorporated Organisation (CIO) which is registered on 30 April 2013. The CIO took over all of the activities of the Church on 31 May and began operating immediately. The trustees/directors of the CIO, not realising that that they needed to apply for a Certificate from HMRC make their first Gift Aid claim, online, on 15 September covering their first quarter. This includes a claim under the Gift Aid Small Donations Scheme (GASDS).

Strictly, the GASDS claim is not permissible. The new CIO is ineligible because it has neither completed its start up period nor does it have a 'two years in the last four' Gift Aid record. The trustees become aware of this and quickly apply for an HMRC Certificate to 'take on' the Gift Aid etc. history of the Church. Under the law, HMRC are entitled to decline a certificate because it is out of time. It should have been submitted by the earlier of:

(a) 60 days prior to 15 September 2013, or

(b) 90 days after 31 May 2013.

However, following Stewardship's request to HMRC, the trustees now have a new window of opportunity to apply for a certificate. Because HMRC's Guidance on GASDS did not make the time limits above clear, the trustees now have until 28 February 2014 in which to apply to HMRC for the necessary certificate.

Had the new charity taken over the activities of the old charity after 30 November 2013, this new window would not have been available to the trustees.

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example 3

Church B (constituted by Deed of Trust) has been claiming Gift Aid for many years. It established a new Charitable Incorporated Organisation (CIO) which is registered on 1 December 2013. The CIO took over all of the activities of the Church on the same date and began operating immediately. The church, and subsequently the CIO make their Gift Aid claims once a year towards the end of April.

What is the latest date that the trustees/directors of the CIO can apply for a Certificate from HMRC to ensure that the new CIO can claim under the Gift Aid Small Donations Scheme (GASDS) immediately?

The 'merger' of the old and new charities took place after 30 November 2013, so the trustees/directors will not be able to take advantage of the HMRC relaxation announced on 2 December 2013. Therefore, assuming that the CIO's first Gift Aid claim is made on 25 April 2014, they must apply to HMRC on or before the earlier of:

(a) 60 days prior to 25 April 2014 (that is, 24 February 2014), or

(b) 90 days after 1 December 2013 (that is, 1 March 2014).

The application will therefore need to be with HMRC by 24 February 2014. Of course, this time limit will not actually be known until the CIO has made its first Gift Aid claim, by which time it will be too late to make an application! So, in practical terms, the time limit is really 1 March 2014 unless the CIO then puts in a Gift Aid claim at any time prior to 30 April (which will, retrospectively, bring the time limit forward)!

It is therefore important that charities are very careful in these circumstances. **Once an application under the GASDS 'merger' provisions has been submitted, it seems that the law is saying "don't be too eager to put your first Gift Aid claim in!"** This seems counter-intuitive and it is difficult to see why the time limits have been structured in this way.

Banana Skin One (b) – getting the application for the HMRC Certificate right

In view of the time limits above, it is quite important to make sure that your application for an HMRC certificate is made correctly, first time. There is no HMRC form to complete. The charity simply needs to apply in writing. The application should provide the following information:

- for both the old charity and the new charity:
    - the name and address and HMRC reference number
    - the governing documents
    - the names and addresses of the 'managers' of the new charity
    - a full description of the charitable activities;
- full details of the assets transferred from the old charity to the new charity

- any other information which HMRC may 'reasonably require' in order to reach its decision on the application
- the consent to the application by the old charity, signed by two of the old charity 'managers.

Banana Skin Two: having the right 'managers' in the new charity

The old and new charities must make sure that at least half of the 'managers' of the old charity become 'managers' of the new charity. In broad terms, 'managers' are the charity's trustees (but see the Tip, below).

It may not, therefore, be an opportune time for too many trustees to stand down!

Tip: *The law defines the 'managers' of the charity as those persons 'having the general control and management of the administration of the charity'. HMRC regard this term as covering a wider group of individuals than the identical term used in the Charities Act 2011, which applies only to trustees of a charity.*

For tax purposes, 'manager' can apply to the trustees of charities, directors of corporate charities, directors of corporate trustees and any other persons having general control and management over the running of the charity or the application of its assets. For example, it may also include employees or volunteers who are able to determine how a significant proportion of the charity's funds are spent.

The old and new charities may not know with absolute certainty who HMRC may regard the 'managers' to be. We would suggest that a common sense approach is taken. In the context of making an application to HMRC under these GASDS provisions, the 'managers' will normally be limited to the trustees or directors (for example, PCC members in a parish church, deacons in a Baptist church), plus the person responsible for making Gift Aid claims to HMRC.

Banana Skin Three: 'all of the activities'

HMRC will expect all of the activities of the old charity to have been transferred to the new charity and, in checking on this, HMRC will have regard to the extent to which the property of the old charity has been transferred to the new charity.

So, a new charity formed for the purposes of a church plant will not be able to obtain a certificate under these provisions as the mother church will usually carry on its activities in the same way as it did prior to the plant church becoming independent.

There are separate provisions permitting the compliance history etc being 'taken over' where two or more charities merge into a single charity.

Banana Skin Four: timing of GASDS claims

The law does not permit both the old charity and the new charity to make Gift Aid top up claims in the tax year of the change of status.

If the old charity makes a GASDS top up claim in the tax year of change, the new charity cannot become eligible for the GASDS until the next tax year. Therefore, the trustees should consider who (old or new charity) will make any top up claim in the year of change. In normal circumstances, if the change in status is likely to occur early in the tax year, the new charity should make the claim. If the change is going to occur late in the tax year, the old charity should. This is simply in order to maximise the amount of small donations that can qualify under the GASDS.

Other factors may however come into play such as: the relative size of Gift Aid claims in the old and new charity for the year (with reference to the matching rules in the GASDS), practical considerations, special appeals and so on.

further help

Stewardship provides a series of free Briefing Papers and Briefing Notes. Related topics include:

The Gift Aid Small Donations Scheme: A practical Guide

The Gift Aid Small Donations Scheme: A comprehensive Guide

Charitable Incorporated Organisations for Church Charities

Trust, Company or CIO? A guide to the distinctions

Converting from charitable trust to a charitable company

relevant services from Stewardship

Our consultancy helpline provides unlimited specialist telephone and email advice on a range of issues affecting churches and charities including charity law, tax, payroll, accounting, property, insurance, and HR.

We also provide a charity formation service which includes helping churches and charities to convert from unincorporated to incorporated status.