The Charity First Series

THE GIFT AID GUIDE

Rules Relating to Charity Donations by Individuals

Graham Elliott
Withers LLP

spmfundessentials

The Charity First Series aims to provide practical and straightforward guidance on the challenges confronting charity operations today, with fundraising in the spotlight. Its individual subjects range from those concentrating on the UK and Ireland to non-profit issues in the EU and other jurisdictions, from traditional to digital fundraising and from basic help for those just entering the third sector to specialist areas for the more experienced.

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INTRODUCTION

This booklet covers Gift Aid on donations made by private individuals. It does not cover the specific rules relating to Gift Aid on donations made by businesses, although there is some cross-over. Traditional partnerships donations are deemed to be donations by individual partners and therefore donations by individuals and these are included, although no further separate reference will be made to this fact, since the rules are the same as for individuals.

The purpose of this booklet is to describe what Gift Aid is, how it provides benefit to the charities, what, if anything, the donor can get out of the arrangement, and what basic processes need to be followed.

Gift Aid is a valuable benefit for charities. It has only been available in this particular format since 2000. In essence, it provides government matched funding (via a tax relief) for the generosity of individual donors, by reference to a tax refund hypothecated to the charity to which the donor made the original gift. It also allows a degree of mitigation to tax for higher rate tax payers. Deployed successfully it can give an immense boost to charity resources at the expense of the public exchequer. For this reason it is particularly unfortunate that there have been some examples in recent years and months (up to 2013) of people seeking to exploit the Gift Aid Rules for convoluted tax avoidance, and even for evasion. This can only be deplored. Whatever one may think of 'tax planning' and the obvious fact that taxpayers can, within reason, arrange their affairs in a tax efficient way, any attempt to distort the original generous premise upon which the public exchequer provides this form of additional funding to charities, in order to divert resources back towards the pockets of the ostensible donors, is unjustifiable. For this reason this booklet will not touch on anything that may inspire such ideas. If the reader thinks that he sees something in this booklet that is the kernel of an idea of that kind, then the author hereby disassociates himself from that motive.

Prior to 2000 a general tax relief on individual giving could only be achieved under the covenant system or, for a period, under a Gift Aid system that required a donation of more than £250. From 2000 to the present day Gift Aid is paid to charities on any level of donation made by a sufficient payer of UK income tax and capital gains tax who completes

a Gift Aid declaration accordingly. In practice, this means that most UK-based donors are able to make tax efficient donations and, in turn this means that significant operations have been established in charities to garner this particular resource.

It will be a ready preoccupation of charity 'Gift Aid Departments' to process all of the paperwork and make the relevant submissions to HM Revenue and Customs (HMRC). For many people, that will be the most important aspect of the process. But as with all taxes, there are significant 'wrinkles' of interpretation on the boundaries between certain situations and others, and the main focus of this booklet is to look at those more legal aspects. We do not entirely ignore the process or administrative issues, but on the whole these are best reviewed in conjunction with the information publicly available on HMRC's website.

HMRC has user-friendly guidance on Gift Aid, although it is not always at the forefront of their search engine. In particular, a document within HMRC's *Detailed Guidance Notes* called 'Chapter 3 Gift Aid' does not always 'come up' when a search is made on their website, yet that is their most comprehensive document of interpretation. A great deal of the material on HMRC's website involves interpretation of the legislation rather than black and white legislation itself. Understanding HMRC's view of the legal situation is very important but it should be borne in mind that not all that they say is necessarily explicitly supported by legislation.

That is not to say that the opposite applies to the contents of this booklet. There is much that is open to interpretation, and the reader of this booklet should bear that in mind just as much for what is said here as for what is said by HMRC. To a great extent what is written here is its author's personal view, although steps are taken to indicate where an issue is clear and where it is a matter of interpretation. However, given that that is the nature of the guide, a reader should not assume that in each and every case the approach is unchallengeable. All readers seeking to apply Gift Aid rules in all but the clearest situations ought to take professional advice on their own specific area rather than relying on any general guide. This booklet is offered as a means of helping charities come to grips with the overarching issues raised by Gift Aid, and as a means of warning charities about various aspects that need to be given further consideration.

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BASIC REQUIREMENTS

Donations must be money

Gift Aid does not operate on the basis of payments in kind. The payments must be in money. If a donor has a valuable object the benefit of which he wishes to give to a charity, then Gift Aid tax relief will only apply in that case if the donor sells the goods on his own behalf to start with and then donates the proceeds received. If the donor wishes to donate the value of a service he provides, then he ought to sell the service prior to making the donation (although in this case the proceeds achieved on the sale of the service may well be subject to tax, thus creating an extra tax burden to the donor that would not have applied had he literally donated the service itself). However, donating the service is an option that falls outside Gift Aid and has a range of potential tax and VAT consequences.

A waiver of loan does *not* count as cash paid.

Oddly, a Gift Aid donation can be in any currency. This may have been introduced at the inception of the relief on the footing that the Euro would become much more important in our lives than it has subsequently become. It is not understood that very many donations are paid to charities in foreign currency, but it is worth bearing in mind that just because foreign currency is received this does not preclude Gift Aid being claimed.

Need to pay sufficient tax

In public accounting technical terms Gift Aid payments to a charity are a tax rebate, rebating some or all the tax already paid by the donor directly to the charity. It does not constitute public spending. Although this concept is wishful thinking in real terms, it explains why the process governing Gift Aid works as it does.

It includes the specific requirement that every donor against whose donation a Gift Aid claim is made by the charity should have paid enough tax either through income tax or capital gains tax in order to cover the 'rebate' made to charities. Any donor that happens not to pay any of these taxes cannot make a Gift Aid declaration, and the charity cannot claim Gift Aid on their donations. However, there can be a misconception that as long as the donor is 'a UK taxpayer' that qualifies the donation automatically as one for which the charity may claim Gift Aid. Whilst that will usually

be the case it is not strictly the position. In fact, the donor must be paying enough qualifying tax in the fiscal year in which the donations are made in order to cover the tax reclaimed on the specific donations. That is, the amount of tax paid in that particular year cannot be less than the aggregate Gift Aid rebate claimed by all the charities to which he has made donations in that year. The only relaxation of this 'matching' rule is that a donation may be set against the tax paid in the prior year as long as it is made before that year's tax return is submitted, but no later than 31 January after the end of the tax year. But this is a limited degree of 'carry back'.

To illustrate the pitfall: say a donor has accumulated a substantial amount of savings, but his income tax and capital gains tax is low in a particular year though his savings remain fairly high. He decides therefore to make the usual generous donations to selected charities but in doing so pays more to those charities than the value of the income on which he has paid qualifying tax. Each charity to which he gives (and which holds a previously issued Gift Aid Declaration) naturally assumes that it is able to make a Gift Aid claim on the full amount of his donations. However, he has not paid enough tax to 'frank' all of the Gift Aid reimbursements from HMRC.

It will be tempting to think that the fact that he has probably paid a significantly greater amount of tax in the past than has ever been covered by previous Gift Aid payments gives him some kind of cover for this, on a 'carry forward' basis. Such a sensible rule does not exist. The mere fact that the donations in the given tax year exceed the taxed income creates a problem, which is only mitigable by the limited backwards look mentioned above.

It can be seen immediately that no one charity has any way of knowing this. In fact, even if they did, none of the charities in question would know which ones should give up an amount of tax on the Gift Aid claim. For this reason the law is configured to pass the liability for uncovered taxation back to the donor. He therefore runs a risk of suffering the ignominy of having not only been very generous to the charities, at least by reference to his taxable income for the year, but to have to pay an amount back to HMRC for the tax which the charities have claimed but for which there was insufficient cover.

Plainly the lack of any carry forward is a major weakness in the Gift Aid system, which can only be tolerated because the situation arises so rarely.

That said, in past years the classic Gift Aid declaration presented to donors went no further than to indicate that the donor accepted there was enough tax paid to cover *that* particular donation. HMRC's revised guidance is for the declaration to state that the donor pays enough tax to cover all of the charitable donations for the year. This makes it clearer to the donor that he cannot have paid insufficient tax of his own to cover the Gift Aid rebates to all charities to which he chooses to give.

At the time of writing, HMRC provided comprehensive guidance on Gift Aid declarations in Chapters 3.6 – 3.10 of its Charities Guide.

Effective restricting of use of donations

There are two sets of conditions that are inadmissible if the charity wishes to claim Gift Aid. These are:

1. That the donor may be able to demand his money back (even if only subject to circumstances).

2. That the charity must use the donation to purchase property from the donor (or connected person).

Beyond this, however, certain restrictions are allowed to the donor. He can make stipulations as to which of the charitable projects carried out by the charity it may spend money on (thus setting up a 'restricted fund'). He can require the money to be paid into an endowment fund rather than being spent immediately. In all of the circumstances, however, care must be taken by the charity not effectively to invalidate the 'no reimbursement' rule by means of allowing the donor to require that any money not spent on the designated activity must return to the donor. For instance, if a charity accepts the donation towards a restricted project, but the project cannot go ahead (because, for example, insufficient donations have been raised to make the project viable) the charity may be unable to fulfil its promise to the donor to spend the money for the restricted activity. If the charity has sought to address this scenario by promising the donor that the donation will be returned to the donor, then the principal criterion of no reimbursement has failed as a matter of principle. In this case, whether or not the money is actually returned, it was 'returnable' at the time of the gift, which means that the donation cannot qualify for Gift Aid. For this reason donors who wish to have some control over what happens to their donation in case of failure of a restricted gift's purpose, should ensure that

there is a backstop provision whereby the donor has a right of consultation with the charity to identify an alternative charitable project, but should avoid imposing a requirement that a gift be repaid.

One way around this conundrum, applicable usually to wealthy and very generous donors, is for the donor to set up an independent charity, which will act mainly as a vehicle for his own donations to be received, with the broad stipulation that the donations should be used as the trustees of that charity see fit. That charity then claims Gift Aid, on the basis that the donation cannot be reimbursed to the donor, and can then make donations under restricted fund stipulations to other charities. It should be noted that the other charities cannot then claim Gift Aid since it has already been claimed by the intervening charity. However, because there is no need therefore for the charity that receives this restricted donation to fulfil the requirements of non-reimbursement, since it will not be making a Gift Aid claim, the restricted fund arrangement can be put in place without any caveats. The same effective result is available for smaller donors using publicly available platforms.

It should be noted that there has been quite a lot of somewhat ill-informed press comment to the effect that these kinds of charity are used for the purposes of tax avoidance. In particular, comment is often made that a large amount of money remains within the specially set up charity before being distributed to mainstream charities, whilst the tax rebates to that charity are also paid promptly and thereby a large amount of tax is paid long in advance of the charitable money actually being spent on causes. Whilst it may be unsatisfactory for a charity of that nature to hoard its money for very long, there is no logic to this criticism. By law the donor has lost his money completely to the charity. The charity cannot spend either his money or the Gift Aid claim in any way other than on bona fide charitable projects. The fact that it may take some time to determine which those are cannot provide a benefit to the donor. If that is all that is happening, this is not an avoidance scheme, but a prudent way of ensuring that donative intentions are managed appropriately within the Gift Aid rules.

It is also a practical means of ensuring that a wealthy and generous donor does not have to make all of the decisions himself in terms of how the money ought to be granted to charitable causes, but can share the burden of these important decisions with a board of trustees. It allows

monitoring, and competitive grant applications to be made in order to ensure the most appropriate deployment of the charitable resources in the first place.

The Gift Aid Rules also effectively preclude donations being made in ways which contribute to a benefit to a party connected with the donor. There are many situations where that can happen in ways that are not at all sinister. For instance it is possible for a parent of a child to donate towards a charity that operates an activity for many children, included amongst which is their own child. The rules do not allow hypothecation of that donation to benefit their particular child. That is not to say that their child cannot benefit at all from the donation, but the donation cannot be contingent upon their child happening to derive a benefit. However, this goes to the question of 'what is a gift?', which is dealt with in the next section.

Valid Gift Aid Declaration

For a donation to qualify to start with as a Gift Aid donation the donor must have indicated in one of the following ways that he wishes the charity to claim the tax. By far the most common of these is the paper Gift Aid Declaration. This declaration usually states that the donation being made at the time it is signed, and all future donations from that donor to that charity, will be subject to Gift Aid. Furthermore, it carries a declaration on the part of the donor that all of the donations he makes in the tax year in question are covered by sufficient income tax and capital gains tax in the manner described above. The form includes the donor's name and address. It need not include his national insurance number. The minimum information to show is the donor's house number and post code in order to be able to recreate the full address from the post office database. That full address need not be kept in the records of the charity because it can be created from the database if HMRC wishes to look into it. The donor ought to sign the document to indicate agreement with all of the statements made in the declaration. Alternatively an oral declaration may be made.

At the time of writing, HMRC provided comprehensive guidance on Gift Aid declarations in Chapters 3.6 – 3.10 of its Charities Guide.

Submitting Gift Aid claims to HMRC via 'Charities Online'

Once all the data is collected the charity has to make the actual claim. The means of the making the claim was heavily reformed in April 2013

by reference to the initiative known as 'Charities Online'. Under this approach charities were more or less forced to make their claims by means of an online submission rather than the traditional paper submissions. The online submission tool is based around an 'off the peg' HMRC spreadsheet which can be completed either by the charity typing the detail into it and submitting, or by cutting and pasting details from its own similar spreadsheet, and submitting that. The software does not allow submission until all of the fields are completed, and HMRC can deploy automatic form checking software which rejects the form until such time as errors are corrected. This allows automated rejection and acceptance of the claim which in turn is supposed to speed up receipt of the money. At the time of publishing this guide, the efficacy of these major reporting reforms is unknown. However, it seems obvious that the period between submission of the spreadsheet and the payment of the average claim is likely to be much shorter. As to whether the time it takes to actually compile a successful spreadsheet which can navigate the locked doors of completion protocols is much longer is a different matter.

This arrangement will allow submission of up to 1,000 Gift Aid claim entries per submission, and there is no limit as to the frequency of submissions that can be made.

For larger charities who wish to make submissions of many more than 1,000 entries each time, there is also an option for designing their database so that it will speak directly with HMRC's database and transfer the information without even a spreadsheet being involved. This can then accept up to 500,000 entries per submission, and can be submitted repeatedly but no more than once per day.

The existing written declaration is being phased out in favour of an alternative handwritten form which has been designed to operate similarly to a passport application. This requires the completion of the original form (not a photocopy) in a manner that a computer scanner can read it so as to automate the back end function for HMRC. It is likely to be extremely cumbersome. The form will only take up to 90 entries which would take a very long time to write out. It can only be practicable for very small charities or charities with very small volumes of Gift Aid donations. It seems likely that it will be phased out in due course so any reader of this booklet should not assume it is still extant at the time of reading.

At the time of writing, the HMRC web address for guidance for Charities Online was: http://www.hmrc.gov.uk/charities/online/claims.htm

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WHAT IS A GIFT?

The question of what constitutes a gift for Gift Aid purposes has not been explored very much at all, except perhaps in HMRC's own literature. It is an area over which, for the vast majority of situations, there really can be no particular debate or doubt. But for marginal situations it could cause some degree of potential disagreement between a charity and HMRC.

The legislation refers to the payment which may qualify for Gift Aid as being a 'gift'. It should be noted that it does not merely refer to it as a 'payment', and only uses 'payment' having stated that the 'gift' has to take the form of a payment in money. It refers to the 'gift' being (potentially) a 'qualifying donation', but this is for the purpose of introducing modifications to the definition of 'gift' rather than seeking to imply any qualification to the concept of a 'gift' in itself. The legislation goes on to define 'gift' for the purposes of the Gift Aid provisions.

It does not appear that this is supposed to be a comprehensive definition, but rather, a set of conditions that modify a more normal definition. It may conceivably be regarded as a mixture of the two, but this has not really been tested in any court decisions. It is perhaps a little unfortunate that the word 'gift' has been used instead of one more obviously redolent of charitable giving, namely 'donation'.

However that may be, the Gift Aid legislation seeks to define, or at least modify, the concept of a 'gift' by requiring that it is an amount paid for which nothing is received by its giver by way of benefit in response. A 'connected person' to the giver is included in this restriction (about which more below). However, and critically, something can be received in return by way of a benefit but the value of the benefit must fall below the donor benefit limits. We will come to how these limits are configured and how they might be approached in a later chapter, but it can be seen from this that the second plank of the modifying definition of 'gift' suggests something can be received 'in return for' a gift. But clearly it can only be a benefit at a substantial undervalue compared with the gift of money which was paid by the recipient of the benefit. This means that, when the rules are working as they ought, the donor cannot hope to achieve any overall personal gain from making the gift and must therefore effectively transfer value from himself to the charity.

HMRC's view is that the word 'gift' means precisely what it normally means, namely the payment of an amount with the expectation of nothing in return. The payment cannot be 'for' anything. But that does not square with the second limb of the modifying definition. The best that can be said is that what the donor expects in return is insufficient to amount to any kind of bargain. That said, and with the thought of abusive avoidance schemes in mind, there can be little doubt that the definition of the payment as a 'gift' has got to have meaning beyond the restrictions or qualifications. It must involve predominantly a gratis transfer of value from the payer to the charity. It would have been possible for the legislation to be drafted by avoiding a word such as 'gift' or 'donation' altogether, and simply have called it a payment and then defined the terms. As it did not, then there must be an intention that the character of the interaction between the donor and the charity is that of the provider of a gift to the charity rather than merely the provider of a payment for some other purpose.

To summarise, HMRC will say that the donor benefit limits are simply a mechanism for acknowledging a generous gift, whereas it is probably more accurate to say that the donor benefit limits seek simply to limit quite severely the amount of benefit that can be returned in consideration of the gift to the charity, such that the charity does achieve free resources from the gift. However one views that particular legal debate, the net result is that a person making a payment must lose value to a substantial degree to the charity in doing so.

I have deliberately used phrases such as 'benefits being received in return for a gift' to aid clarity. In fact, the donor benefit limits work on the premise that the benefits that might arise occur 'in consequence' of the receipt of the gift. This in some slight way reinforces HMRC's interpretation, since it seems to imply that the benefits are an incidental by-product of the gift being made, rather than something the payer sought in return. But the concept of the relevant benefits arising 'in consequence' of the gift being made does not move the situation meaningfully away from a potential bargain between the parties. A person can receive benefits 'in consequence' of making a payment on the basis that he knew he would receive them and therefore made the payment partly 'for' the benefits. That is not the same thing as saying that he made the payment solely in order to obtain the benefits. The only possible alternative interpretation, which HMRC does not apply, nor does the drafting of the legislation support,

would be that the consequence was unforeseen. The legislation does not say it should be an unforeseen consequence of making the payment, but merely a consequence of it.

Exactly what is included and not included in this concept of consequential benefits will be dealt with in the following chapter, which deals with the donor benefit situation.

As mentioned in an earlier chapter, a payment which is subject to conditions for reimbursement to the payer cannot be regarded as a gift. This is an absolute criterion and presents a problem if there is any misunderstanding between the donor and the charity as to how the gift will be deployed for charitable objectives. A gift is also specifically incapable of being hypothecated by the gift maker towards purchasing property from the gift maker himself or any party connected to the gift maker. It is worth noting at this point that the legislation specifically provides for these restrictions to apply to Gift Aid donations. That in itself could be said to reinforce the view that the word 'gift' has a slightly modified meaning in the context of the Gift Aid legislation. A genuine gift would not of course come with any such strings attached and would therefore not require that degree of extra definition.

At the time of writing the legislation covering this aspect is sections 413 – 419 Income Tax Act 2007.

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THE DONOR BENEFIT LIMITS

As a general principle, if a donor receives benefits in consequence of having made the relevant gift, it is disqualified from Gift Aid. But this is not the case if the value of the benefits derived fall below the 'donor benefit limits' (set out, at the time of writing, in section 418, Income Tax Act 2007). It is important for a charity to determine whether any benefits do or will arise in consequence of the donation made, and if so how to value the benefits.

A major trap for the unwary in this respect is to consider the value of the benefits only *after* they have been provided in consequence of the donation. That is not the right time, since a donor would be generally displeased to find that the charity had disqualified itself from Gift Aid on account of giving benefits above the limit to the donor, and nothing can be done about that if the benefits have already been provided. It also removes any opportunity for a higher rate tax payer donor to claim higher rate marginal tax relief. The charity would not want to have to contact every donor who might be a higher rate payer to inform them of the disqualification of their donation for this purpose. It follows that the charity must be confident at the outset that the benefits it provides in consequence of the donation will not in any circumstances exceed the donor benefit limits.

This chapter will concentrate on identifying what would be regarded as a benefit, on issues relating to the valuation of the benefits, and finally on determining whether in certain circumstances a benefit has arisen 'in consequence' of the donation received.

The current limits

Since the donor benefit limits may be changed by legislation at any given moment, but the principles upon which benefits are likely to be valued in the future are less prone to being changed, we will not provide information here specifically on the level of the donor benefits because to do so could encourage the reader to assume that what he is reading is up to date. However, at the time of writing the donor benefit limits are based upon a combination of proportions of the donation and fixed sums, in what is a ragged sliding scale whereby the proportionate benefit in consideration of the donation reduces the greater the payment that is made to the charity.

Charities should refer to public information on HMRC's website to find out what the current donor benefit limits are, refer to the above legal reference, or consult their professional advisor.

Typical examples of a benefit

The Gift Aid legislation does not itself define 'benefit' in all cases. HMRC has taken upon itself to give non-binding guidance as to what it will normally regard as the benefit and what is not. In general one must assume that anything which the donor might 'enjoy' would be regarded as a benefit (though that does not determine its value). But there are some exceptions, where HMRC has clarified that it does not see a benefit, but rather that the donor is either receiving information in regard to the use of the money he has provided, or nothing more than a 'thank you' by way of acknowledgement. With this in mind the following are not considered by HMRC to be benefits:

- The bare listing of the name of the donor in a document such as the annual report, a programme (such as used by theatres or concert venues), or a plaque that might be erected in a building that has been refurbished by using a particular donor's contributions. However a bare acknowledgment is in effect no more than a listing, usually in alphabetical order (although the order of generosity could also be used), where no attempt is made to promote the identity of one donor above that of the others. Only the donor can be acknowledged, not some associated parties such as the donor's company. It is certainly not possible to show a corporate logo which could encourage the view that advertising had been provided.

- By extension HMRC will not usually challenge as a 'benefit' the naming of a new building, or a new wing of a building, after a major benefactor, as long, again, as no commercial identity is associated with that. Care ought to be exercised, however, over the precise conditions relating to this naming arrangement and certainly the name that appears on the building, or wing, ought not to be so prominent as to stand out vividly to a visitor. Typically a building or wing will be known by the name of the philanthropist, but the signage will be fairly modest. A similar principle is probably applied by HMRC to the naming of an office such as a professorial chair in a university, or a particular position in, say, an orchestra. The same could apply to, say, a series of lectures or exhibitions, or even a prize to be awarded to students or competition entrants.

- HMRC will usually not regard the provision of information concerning the activities of the charity as a provision of a benefit. This was probably introduced to allow newsletters to be sent to donors to encourage them to take further interest in the charity. HMRC does not appear to take the point that the information must be limited to the actual project(s) for which the donor specifically donated, or in respect of which their money happens to have been used by the charity. Nor does HMRC appear to take a point that the information provided must be provided in the barest possible format. There appears to be scope to provide information in an attractive way, with illustrations, across the full range of the charity's activities, and for this not to be regarded as a benefit to the donor. Care needs to be exercised however, since certain charities' activities have the propensity to be expressed at considerable length and to provide information and interesting material for the reader, to such an extent that it could be construed by HMRC to be a form of entertainment. The writer knows of no particular cases where HMRC has tried to take that point with regard to material that might have such a dual purpose. It should always be borne in mind however that this kind of attack could be launched by HMRC and there would be a high level of uncertainty as to whether they would be successful.

- Certain apparent benefits are ignored for reasons that are probably explained by the valuation rules rather than rules relating to what is or is not a benefit, and an example of this can be 'priority booking'.

- There is a statutory provision that the right to view charitable property is deemed not to be a benefit, and more is said about the conditions for this 'rule' in a later chapter.

Basis of valuation of benefits

Again the Gift Aid legislation does not itself tell us how to value benefits, but HMRC applies a logical policy which ought not to be challenged without good reason. In essence they provide a hierarchical test as follows:

- If the product in question has an open market value (asking price), then the value of the benefit is the open market value.

- If there is no open market value for the product itself, but there is a similar product on the market which has an open market value, then that similar product's open market value is adopted.

- In the absence of either of the above the cost of the benefit should be ascertained and used as the value of the benefit.

- It therefore follows that if a benefit has neither an open market value nor a proxy open market value, and does not have a cost, then even if it might be construed to be a 'benefit', HMRC will normally agree that it should be ignored.

Charities often make the mistake of thinking that if they are able to procure a benefit provided by a third party, which costs the charity nothing, then there is no value because the benefit is not being provided at a cost to the charity. That is not the case. The benefit has to be valued either on the open market value or cost basis, even though it may cost nothing to the charity. That said, it sometimes happens that a third party will unilaterally offer a benefit to parties that claim that they have supported a charity, without the charity actually becoming involved at all. The charity would then not be regarded as procuring the benefit in consequence of the donation, and it is accepted that the benefit is not relevant for the donor benefit limits. This is only fair, since the charity's position should not be prejudiced by the unilateral actions of a third party. The difficulty it can present is proving to HMRC that the charity was not involved in procurement. This is particularly awkward if it turns out that somebody within the charity organisation, exceeding their authority and thinking they were being helpful, procured the arrangement. Therefore it is very important to ensure that nobody is trying to be 'helpful' in that kind of way.

When using the third test, based on cost, one often finds that the benefit in question is an invitation to an event, usually some kind of party or celebration, where there is no open market value and therefore the costs tends to be regarded as the relevant aspect. In this case it will be a cost for the activity as a whole, but this is not obviously a cost per unit per donor. HRMC usually agrees to deal with this on the basis that the overall costs can be divided into the number of donors who could qualify, by consequence of their donation, to be invited to the event. The alternative is to divide the cost between the number of donors who themselves attended, and if their consequent benefit value exceeds the donor benefit limits, their donations are excluded from Gift Aid, whilst the other donations qualify. Clearly the first of these approaches is far better because, properly managed, all donations qualify, rather than excluding some of them. Furthermore, one does not then have to contact the donor to say that his attendance at the event has cost him his upper rate marginal tax relief. (It should be noted

that the HMRC Charity Tax Guide, at 3.31.5, suggests that the divisor is the number who attended, but experience suggests they will accept the number who could have attended.)

A difficulty is that, if the mathematics does not work out, and the number of qualifying donors divided into the cost of the event produces a breach of the donor benefit limits for *all* of the donations, then all of the Gift Aid is lost. In particular, budgeting the cost of such events is a difficult ask, and care has to be taken to ensure that the budgeted costs do not exceed a level which, when divided between all of the qualifying donors, would keep the charity within the donor benefit limits.

It should be borne in mind that all benefits provided in the financial year in question have to be added together to reach an overall donor benefit value.

Certain benefits ought to be avoided on the basis that it is extremely difficult to determine what their value is and that in theory their value can exceed the donor benefit limits. This can arise in the case of offering discounts, or allowing third parties to offer discounts in consequence of the donation being made to the charity. The problem with discounts is that the value of the benefit is the amount by which the prices are reduced. If the discount is open ended then the donor can make any value of purchases at the discounted value, and quickly drive the value of the discount above the donor benefit limits.

It is often observed that many charities offer such open ended discounts without any problem for their Gift Aid. The logical justification for this would perhaps be that the degree of benefit achieved in consequence of the donation is unknowable and therefore HMRC cannot demonstrate that the limits have been breached. However, this assumes that the onus is on HMRC to prove that, whereas the onus is surely on the tax payer, since the default position under the law is that the 'gift' gives rise to no benefits. HMRC says exactly that in 3.31.7 of their Guide.

A way of dealing with this is to cap overall discounts at something below the donor benefit limits to ensure that this cannot happen.

Whether a benefit arises in consequence of a donation

As mentioned above a benefit is only counted if it has arisen 'in consequence' of the donation being made.

'In consequence' is a wide concept which includes both benefits which

the donor knew they were to receive prior to the making of the donation, and benefits which a donor may receive without expecting it. It also includes benefits which a donor receives without requesting them, and benefits which a donor receives if he does request them. In theory a benefit could arise simply in having the right to do something or receive something which is then not taken up, although it does not appear that HMRC takes that point particularly. If there is any doubt concerning possible benefits breaching the donor benefit limits against the will of a donor who does not mind whether or not he receives benefits, it would be appropriate for that donor to waive the right to benefits specifically in order that there can be no allegation that he received a benefit simply in the opportunity to have a benefit.

It often arises, however, that benefits are provided by the charity to a person who happens to have been a donor, but it is far from clear whether those benefits arose 'in consequence' of him being a donor.

Charities sometimes mistakenly think that if they say to a donor that he 'may' receive a benefit, and he then does receive that benefit, that this degree of uncertainty as to his entitlement means that he did not receive the benefit as a consequence of having made the donation. HMRC may have been convinced by this argument on certain occasions in the past, but it is difficult to see how it sits with the legislation, and HMRC does not give sanction to it in their guidance. It seems fairly obvious that whatever may be the uncertainty for the donor at the outset that he will receive a benefit, if the benefit is received in circumstances where he would not have received it had he not made the donation, then it is received in consequence of the donation. The fact that it was not an entitlement does not change that fact at all.

It is also often the case that charities presume that if a benefit is provided to any non-donors, then this negates the concept that the benefit is in consequence of a donor making a donation. Again, whatever HMRC may have said in the past, the logic is faulty. If there is a certain narrow group of people who do not need to make a donation in order to receive the benefit, but, apart from them, only donors receive the benefit, then that does not change the fact that the particular donors in question received the benefit in consequence of their donations, since otherwise they would not have received it. To give an example, if a local charity decides to afford a benefit to its local MP who has not made a donation, but otherwise the

benefit can only be enjoyed by donors, then the benefit for each donor is in consequence of the donation made, since none of the donors qualify as being the MP. The fact that the MP received the benefit without making a donation cannot change the consequential nature of the benefit in return for the donation for others.

But there are situations where a significant number of people receive a benefit, such as an invitation to an event or gathering, where donors are also invited and it may be possible to argue that the donors would have been invited even had they not made a donation. In such cases it can be a difficult point to prove that the donor was not invited in consequence of the donation but, rather, simply because they would be invited anyway. In that situation it is advisable for the charity to have clear protocols and potentially a written 'plan' concerning such events that demonstrate beyond any serious doubt that certain people could be invited whether or not they had made the donation.

This is particularly important with regard to what are generally called 'cultivation events'. A cultivation event is by its very definition based on the principle that those who are invited will make a *future* donation. HMRC can be expected generally to accept that any benefit derived by a possible future donor has not arisen in consequence of the possible future donation. It is only if the donor has specifically promised a future donation and in consequence of that promise is then invited to the event that the degree of linkage with the future donation is sufficient to bring the benefit within the scope of the donor benefit limits. However, since past donors are usually more likely than average to be future donors, and therefore an invitation list to an event will usually include past donors, the conceptual difficulty this creates is that it is a *consequence* of the past donation that they are invited to the event, despite the *purpose* being focused on the future donation. HMRC probably will not take that point against the charity if the charity has clear internal documentation to the effect that the only reason that the previous donor is invited to the event is because of an appraisal of their future potential generosity, and not because of the donation they have just made.

This is a tricky point, and it can be expected that HMRC will not feel comfortable with that interpretation if a very large proportion of donors are invited, or they are invited every year, or any documentation particularly provided to the donor implies that they will be looked after in such a way because they are a generous donor. There is no substitute for proper

professional consideration and advice on a point of this nature, and the purpose of this guidance is to encourage charities to recognise the potential for such conceptual issues and to refer it to their advisor.

Interaction with VAT

This is a counter-intuitive aspect which can prove controversial, and the following gives a flavour of the issues that need to be considered.

First, just because a payment qualifies for Gift Aid does not mean it is a donation for VAT purposes as well. It is possible for it to be consideration for supplies for VAT purposes because of the benefits that are provided which happen to be below the donor benefit limits.

And, VAT does not have any 'limit' so that, generally, VAT will apply to the entire payment. VAT is not regarded, however, as being applicable also to the Gift Aid refund from HMRC as that is not regarded as further consideration for a taxable supply to the donor.

There are some benefits which carry no open market value or cost (to any party) and are thus 'ignored' altogether for Gift Aid purposes but which are not ignored at all for VAT. A classic of that kind is 'priority booking' where there may be no cost for Gift Aid (on the contrary it encourages early payment for other services) but which HMRC nonetheless treats as a benefit for the purpose of VAT.

Conversely, a benefit can invalidate Gift Aid by being received in consequence of the donation, whereas it is not regarded as a supply for VAT simply because the donation was not paid 'for' the benefit. This can arise where the benefit is unsolicited or not known about by the donor before he made the payment. Such an unexpected benefit will not have been received in consideration of the payment and thus ought not to be a VAT supply.

5
SPLIT PAYMENT ARRANGEMENTS

The donor benefit limits work on the broad basis that the higher the donation given the lower the proportionate benefit that can arise in consequence of the donation without invalidating the Gift Aid claim. This often means that the level of 'acknowledgement' to wealthy generous donors, which a charity feels obliged to provide, will invalidate the Gift Aid claim in its entirety for both the charity and the higher rate taxpayer. To avoid that outcome HMRC accepts that the split payment arrangement can be deployed.

This works on the concept that the donor will make, in effect, two payments to the charity, being one for the value of the benefits offered, and one for a pure donation for which nothing is received in return. In that case the Gift Aid claim is limited solely to the pure donation, and the payment relating to the benefits cannot be regarded as a gift within the Gift Aid legislation.

In order for this to be acceptable the donation element has to be unconnected with the payment for the benefits, this means that the donor does not have to make the donation in order to receive the benefits. It must be possible for the donor to receive the benefits without making the donation. This in turn means that there is a risk that potential donors will decide not to make the donation payment at all, but rather make the benefits-related payment alone, and still expect all the benefits to arise. Alternatively, a donor may decide to substitute a much lower figure for the suggested donation element.

It has been the author's experience, at least up until recently, that HMRC has not required the charity to advertise the availability of the benefits without even mentioning the requested donation element in a specific manner. The benefit of that apparent earlier policy was that a charity could intimate through its careful use of language that a choice existed to pay for the benefits alone, or make a suggested additional donation, without being too 'upfront' about that. Even then, there could be nothing that suggested that the donation was 'compulsory'.

However, more recently, the author has noted that HMRC has a tendency to look for an explicit holding out of the benefits for a price in order to accept that there is a genuine split payment arrangement. Thus, it has sometimes been suggested that the benefit provided has to be a 'product'

which the charity would generally sell to the general public without any expectation of an additional donation. Furthermore there have been implications in the author's experience that the benefits in question could not be 'packaged' under the split payment arrangement unless they were held out as a 'package' to non-donation payers. Accordingly, if benefits provided included items that were generally 'sold' by the charity, and other items that were not generally sold, thus creating a bespoke bundle of benefits for which the supporter would pay (in addition to the hoped-for donation) then HMRC appeared unwilling to accept that the packaged selling price could be adopted in the split payment arrangement at all. In such cases HMRC's tendency has been to say that the split payment arrangement does not work, and that the donation element is not eligible for Gift Aid.

These have been isolated incidents, but it is difficult to see how they can logically be sustained. Whilst it may be obvious that a split payment arrangement applies to benefits where there is a general offering to the general public, and thus it is effectively impossible to construe any payment over and above those prices as other than a donation, there is no reason to argue that benefits which are created specifically to attract a certain kind of customer (who is likely to be encouraged to make a donation in addition) somehow do not qualify as products that are available. This appears to be rooted in excessive caution by HMRC as to whether there is a genuine choice for the supporter in making the donation or otherwise. One can understand HMRC's concern that the split payment arrangement is in effect a 'front' for a compulsory donation. But as long as it can be demonstrated that that is not the case, HMRC should not take the line that it sometimes has taken on this point. Any charity facing this kind of argument ought to resist it and not assume that they are wrong in their original view, that they have an effective split payment arrangement.

This does, however, put considerable emphasis on being able to demonstrate that there is a genuine choice available to the supporter, and that he or she is well aware of the fact that there is such a choice. This is conveyed by the use of certain language. As a general rule, the subtler the implications contained within the language, the more challengeable is the issue by HMRC.

HMRC usually accepts the description of the donation element as 'a voluntary donation' to imply that the donation was not required in order

to access the benefits. However, since the phrase 'voluntary donation' is a simple tautology, it could be that HMRC would challenge that form of language, so it is advisable to obtain HMRC clearance for such a wording. A phrase such as 'gratuitous donation', whilst also being a tautology, may be regarded by some as being more explicit. If the donation element is described as being 'freely given with nothing provided in return', it is more likely still to satisfy HMRC if the context is sufficiently convincing. It may, however, come across to supporters as being too pedantic. A general rule, therefore, is that the charity should discuss the use of language with professional advisors, and possibly clear it with HMRC.

It is not only the language which conveys the genuine meaning, but the sheer prominence or size of the language presented. It is tempting to hide these messages in a footnote or in microscopic print. That is not particularly wise. Fine print is often not read at all and where it is read it is sometimes regarded by the reader as having being deliberately inserted for purely legal reasons and not as a genuine message. Since many of the more generous donors are of a certain age, some of the print in question might be quite simply unreadable without a magnifying glass. The author is not aware of HMRC taking a case on this point, but it is certainly worth bearing in mind.

Split payment arrangements also have the happy benefit, if executed properly, of excluding the donation element from the VAT base, so that the value of the taxable supplies is limited to the compulsory benefits payment. Again, this only works if it is clear enough that the donation is genuinely gratuitous.

The final point to make relates to the value to be applied to the benefits. One of the sensitivities sometimes expressed by HMRC over the need for there to be a clear public offering for the benefits of those who are not expected to make a donation may be because of a fear that otherwise the value attributed to the benefits will be unrealistically low. HMRC certainly takes the view that where the benefits are sold at a value below cost, the charity could be criticised for having risked making a loss by virtue of the uncertainty of generating the donation element, whilst it has committed itself to incurring a trading loss on the benefits themselves. Indeed, there are other potential charity tax and governance consequences in deliberately carrying out non-primary purpose trading at below cost. HMRC warns that the Charity Commission might not approve of risky ventures that

involve setting prices that are far too low. This is therefore a potential bone of contention between a charity and HMRC, and a cautious but broadly applicable general principle would be that the charity should not set a price below the cost of providing the benefits, since to do so could appear to HMRC to inflate the donation and to inflate the eligible Gift Aid. It stands to reason, in particular, that if the price set for the benefits as such would bring it below the donor benefit limits, and that as a consequence it is difficult to discern why the charity chose to operate 'split payments' instead of relying on the donor benefit limits, this will suggest strongly to HMRC that the charity is not applying the appropriate value to the benefits at all.

On a point of 'form', HMRC recommends two cheques be written for the two payments, and no doubt in the modern world this could equate to two separate electronic transfers.

6
MEMBERSHIP SUBSCRIPTIONS

Gift Aid applies solely to gifts or donations, although the concept of an allowable degree of reciprocal benefit has been explored above. For this reason HMRC's basic premise is that membership subscriptions are not gifts and therefore do not give rise to Gift Aid. However, they then go on to allow, on what they appear to suggest (somewhat unclearly) is a concessionary basis, that membership subscriptions, in certain circumstances, payable to certain kinds of charity, can be treated as though they were gifts and thus subject to Gift Aid.

Key exclusions

The following two particular exclusions to the above need to be borne in mind.

- Subscriptions paid to bodies which provide benefits of a professional or job related nature to the member, which thus allows an employed or self employed member to reclaim the subscription against their own tax, cannot be eligible for Gift Aid even if the member does not make a claim against their own tax. This particularly affects subscriptions for organisations which have applied to HMRC for recognition as being professional bodies for the purpose of their own members' tax deduction (List 3), and HMRC does not in practice accept that any organisation within that list can also be eligible on such payments for Gift Aid from employed members. This is not based upon the general interpretation of 'benefit' but rather is specifically incorporated into the Gift Aid legislation as an exclusion from Gift Aid. That said, HMRC accepts that those members who could not be in a position to make such a tax deduction are making a Gift Aid donation. Hence, they agree that student subscriptions can be treated as subject to Gift Aid even though all of the working members' subscriptions cannot. This may also be true of retired members.

- The personal use of facilities. This interpretation is designed to ensure that where a member can access facilities for their own benefit or entertainment, the actual character of the membership cannot be regarded as a donation at all. The classic example is a 'members' room' in a facility which the member seeks to support. The existence of a members' room appears to give rise to using 'facilities' on a personal basis, excluding non-members in the process. Although there are some

examples where Gift Aid is claimed where there appears to be such a benefit, presumably negotiated painstakingly by the charity, this will in general terms disqualify the payment from being a donation for Gift Aid.

It could be argued that the restriction regarding the personal use of facilities is legally incorrect. It could be argued that the value of the facilities should be taken into account under the donor benefit limits, but otherwise should not preclude the treatment of the payment as a donation to start with. The author agrees with this point of view, but HMRC appears not to. This apparent disagreement is rooted in the concepts discussed in an earlier chapter seeking to define the concept of a gift.

It is sometimes possible to argue that the facilities provided to members are almost token in nature. For instance, a members' room might be a very meagre affair which allows members who occasionally visit a premises to find somewhere to stay in an idle moment, but which could not possibly accommodate any appreciable proportion of the membership itself. Or it could be access to a library which provides publications which are readily available for nothing at a municipal library. It may also be possible even to offer catering facilities which can only be accessed by members (or booked for guests of members), and thus constitutes some kind of exclusive benefit, but where it can be argued that the member pays full market price, and therefore does not derive any benefit at all. It could be demonstrated that the restriction to members is merely to ensure that the facility does not need some kind of public licensing, or may be insured more cheaply, or simply to avoid excessive demand on a limited resource. It could thus be argued that there is no benefit to the member in having access to such facilities as compared to going to a public restaurant. Again, all of these points need to be discussed with HMRC directly before any assumption is made that they work.

Beyond this issue of 'personal use of facilities', HMRC will generally accept that the subscription can be regarded as a donation if the benefits derived remain within the donor benefit limits, which means that by far the majority of the value of the membership subscription goes towards outward-facing benefits for society as a whole, rather than coming back to the member. Membership bodies therefore need to consider how comfortable they are with such an approach. In this regard most membership bodies

appear to belong to one of two basic camps:

- An organisation the majority of whose income is membership subscriptions and ancillary membership spend.
- An organisation which has a much wider charitable remit but also attracts members by way of a form of committed giving support.

True membership bodies

This kind of body, where the members' subscriptions and their discretionary spend is central to the charity's proposition, is less likely to qualify for Gift Aid on membership subscriptions, and is likely only to be able to do so if it navigates the concepts of what does and does not count as a benefit. Typically it will become possible if the predominant benefit for the members is information about the work of the charity. Indeed, the member could benefit quite substantially (if only on the basis of interest in the subject) through the provision of this information. A newsletter, whether in hard copy or e-mail, may keep them up to date with a variety of activities in which they are personally interested and wish to support, which the charity is carrying out by using their money. This tends to be regarded by HMRC as being pure information and not a benefit to the donor/member. This allows its value and cost to be stripped out of the value base leaving other benefits which may have a sufficiently low value to remain beneath the donor benefit limits.

Other benefits may be ones which each member can access, but which will appeal only to a small minority in each case. For instance, an organisation dedicated to some form of research or study may offer access to lectures to members, but expects only, say, 10% of the members to attend each lecture. Under HMRC's general approach to valuing benefits that are available to all members and which therefore have to be cost apportioned between them, it is possible to take the cost of this benefit and divide it into all eligible members, not merely those that attended (though see above for HMRC's stated policy). It is not required that there should have been sufficient capacity at the event to accommodate all members, as long as, in theory at least, all members might have been able to attend. Thus it may be possible to hire a hall that accommodates no more than, say, 150 people, but in respect of which a thousand members had the right to attend, without

there being any particular question raised by HMRC over the fact that the cost of hiring the hall was predicated on its unfeasibly small size for accommodating the entire membership. In this manner it is possible, often, for the value attributed per member to remain below the donor benefit limits even if a member takes the view that they have obtained good value in return for the money that they have spent in obtaining the membership.

Clearly, the charity will expect to be able to justify this on the basis that, whatever the member may feel he gets out of the situation, he is in fact contributing to a wider benefit to society as a whole, and that will no doubt be true. But it is important for such organisations not to overlook the opportunity for Gift Aid to apply to their subscriptions in such circumstances.

Committed giving membership

Committed giving membership is a variation on the theme of donors and donor benefits. However, there can be a distinction between a donor that happens to be given certain benefits in acknowledgement of their donation, and the formal 'member' of a charity who may even enjoy democratic powers and rights in the charity. Again, subject to all of the above, HMRC is minded to treat these as donations as long as the donor benefit limits are not breached. It appears that HMRC is not minded to take the view that the right to be involved in the governance of the charity is a specific 'benefit'. If they did take that view then the cost of the processes by which the charity engages with its members on a democratic level (for example the arrangements for the AGM) would be regarded as a donor benefit cost and thus to be apportioned between all of the eligible members. The author does not understand that HMRC tends to take this kind of view, and seems to accept that the members are actually giving of their time and are not receiving a benefit.

There is, however, a risk of extending this principle too far. Say such arrangements are made for members who are interested in certain areas of the charity's work to join in with certain focus groups or sub committees in order to seek the most desired outcome in line with their particular points of view. Does this entail a 'benefit' to that member which should be regarded as such having a value for the donor benefit limits? The answer could well be 'yes'. Therefore this is a point that does have to be considered together with a professional advisor and potentially negotiated with HMRC.

Phantom benefits

This applies as much to normal donors as to 'members', but it seems to arise commonly with structures that are described as 'membership'. It is surprising how often benefits are listed as being available through the making of some kind of membership payment when the charity has made no arrangements for those benefits to be given. The charity appears to rely on a member prompting the charity for access to the benefits at which stage the charity will consider what to do about it. Even more common is the offering of a supposed benefit to a member when in fact the entire general public can access it. As a rule of thumb, any 'benefit' which is offered to the general public as well as to the member cannot be a benefit for Gift Aid because it is not derived 'in consequence of' the membership subscription. But it does not help in making out that point if the member appears to have been drawn into the choice of paying for membership on the footing that he would thereby access that particular benefit. HMRC is unlikely to be particularly sympathetic to the comment that the general public has access and therefore there is no consequential benefit where there has been an obvious attempt to imply privity of benefit for the member. HMRC will understandably seek to demonstrate in that case that, whilst the general public did have access to the benefit, it would not have known about it. There may be publicity material available in respect of the activity which implies to a non member that it is a member-only activity. The mere technical ability for the public to access the benefit, without their having any way of knowing about that, cannot be sufficient to mean that the benefit is not one that arises in consequence of the donation. This is a surprisingly common problem and charities need to consider it carefully.

7
FUNDRAISING EVENTS

Payment for tickets

Payment for a ticket to a fundraising event is not a donation and HMRC will not accept that Gift Aid is applicable. Again, there could be a technical argument to the effect that Gift Aid might apply if the benefit entailed in the event falls within the donor benefit limits but the way that the position is 'held out' makes that argument somewhat difficult. The only moral argument in its favour is that, by the definition of the event, the ticket purchaser knows that he is paying very much over the odds for the benefits he receives, since otherwise there would be relatively little free resource to go to the charity. It is a point that could be argued, but, on the whole people tend not to do so.

The alternative, the split payment approach, allows a ticket to an event to be sold for its true value, and for a donation element, unconnected with receiving the ticket, to qualify for Gift Aid. As mentioned in the previous chapter, HMRC then looks at the price of the compulsory ticket payment closely to see that it is not sold at below cost.

Some fundraising events proceed on the basis that the tickets are given to the 'great and the good' for nothing, and then they are expected to make donations according to their generosity on the night. The question then is whether the benefit of attending the evening is given 'in consequence' of the expected donation or conversely there is no such linkage. On the whole, HMRC accepts that there is no such linkage as long as there is no compulsion on the attendee to make any donation. It seems to be accepted that he will have a strong moral obligation to make some kind of donation, but a mere moral obligation does not create the 'in consequence' linkage. However, HMRC warns that the financial case for free admission needs to be compelling to avoid the view that the cost of the event is 'non-qualifying expenditure' for the basic charity tax relief.

If the requirement is that a donation is made before the ticket is issued, then HMRC will say that the ticket is indeed issued in consequence of that prior donation. If there is a requirement to make a donation but the value of the donation is left to the donor to determine, then HMRC will say that the ticket is given in consequence of a donation, since there was a requirement to make a donation in order to obtain the ticket even though

there has been no stipulation as to the value. It is therefore important to make sure that the attendee realises that he need not pay anything, rather than stressing too much that the attendee can choose how much he wishes to pay.

Charity auctions

Again, as a general premise, a payment under an auction is a payment for the benefit in question, and therefore not a donation in HMRC's eyes. It could be argued that the special definition of 'gift' in the donor benefit legislation means that HMRC's view is incorrect as a matter of principle. However, in any case HMRC is minded to allow the payment to be regarded as a donation as long as the bidder is aware of the true open market value of the item on which he bids.

That value is not merely the 'raw material' value of the item if, say, its arguable value has been enhanced by a process such as it being signed by someone famous or having belonged to someone famous. In that case the bid money cannot be subject to Gift Aid.

Where the donor benefit limits are breached, then HMRC will accept that the 'split payment approach applies. But HMRC does not accept that the person bidding on a lot can be deemed to have made a donation under the split payment where the bidder did not know that value in the first place. The bidder must be told, in the auction catalogue, that the value of the product is £x, and then he must bid above that in order for the payment in excess of £x to be regarded as a qualifying donation. Furthermore, it is not possible to simply assert that £x is the value of the lot, since it must be available on a genuine open market for that price in order for HMRC to accept that the donation can be regarded as qualifying.

In any other scenario, HMRC does not accept that an auction bid can be deemed to be a donation and does not accept that the bidder and the charity may, later, arrange a 'split payment' position to allow any part to be treated as a donation.

Gambling related products

Fundraising events sometimes include raffles and tombolas.

A raffle will typically involve a prize several times the value of any one person's raffle ticket payment. HMRC does not accept that the value of the prize can be divided into the number of raffle ticket purchases thus

deeming all of them to be donations beneath the donor benefit limits. It treats the transaction as a gambling transaction and not a donation at all. Whilst it would be interesting to try to deploy arguments against this on the basis of normal Gift Aid practice and the donor benefits limits, one can see their point. For each and every purchaser there is a meaningful hope that they will win the full prize, and they have had the benefit of the excitement of carrying out their gambling activity. This does not appear to override a general wish to also swell the coffers of the charity.

However, there is nothing against asking those who participate in a raffle to pay above the odds for the raffle ticket they have bought, and any excess amount can be specifically treated as a Gift Aid donation subject to the usual rules.

The tombola is a different concept, whereby some kind of 'prize' is won by every ticket holder on the basis of a 'lucky dip'. If all the prizes are set at a level to meet the donor benefit limits, then notwithstanding the format of the activity as being the purchase of an opportunity to obtain goods or services from a lucky dip, this would appear to amount to a genuine Gift Aid donation which is judged under the donor benefit rules rather than anything else. Each donor had no serious prospect of obtaining items worth more than the donor benefit limits, and therefore must have known that they were effectively making a substantial donation. Some tombolas may have a minority of better prizes, and this can complicate matters.

8
VENTURE FUNDRAISING

This chapter relates to funds raised by participation in ventures such as mountain hiking, bicycle riding, and any other arduous or dangerous activity. The friends of the participant either pledge a fixed amount on the assumption that the participant will complete the designated challenge, or base payment on the extent to which it is completed. These are simply donations to the charity which hinge in some way on the conduct of the participant. In general terms, but with exceptions, all of these donations could be subject to Gift Aid subject to the usual restrictions.

However, the particular situation that arises with venture fundraising creates special rules which can be a trap for unwary charities.

'Connected person' sponsorship donations

There is at least a doubt over whether Gift Aid can be claimed on donations received from a connected person to the participant. A connected person is one of the following:

1. Spouse.
2. Sibling, parent, child, grandparents, grandchildren etc.
3. The spouse of one of the above relatives.

It therefore appears that cousins, aunts and uncles are not included in the connected category.

These sponsorship payments are tainted because of the general principle that a participant can himself gain some kind of benefit from the activity, and that his admission to take part in the activity is based upon success in raising funding through the activity. It therefore is assumed that the benefit arises by virtue of receiving payments from his family (as defined above) even though those payments go fully to the charity rather than to the individual. It is worth noting here that no such rule exists with regard to close friends, including 'social partners' but outside marriage or civil partnership. This is presumably because it would not be possible to legislate for degrees of friendship.

Since the purpose of defining 'connected persons' is to remove the element of benefit from the equation by denying Gift Aid, it is possible

to ensure these payments do qualify for Gift Aid Relief as long as the participant pays the full advertised cost of his involvement in the activity. For example, if that cost is £1,000, then the participant himself must pay that amount to the charity to eliminate any connotation of a benefit being received by virtue of the donations of other parties. In that situation, the donations from all connected (and not connected) persons will qualify for Gift Aid Relief.

However, the actual payment by the participant cannot qualify for Gift Aid Relief, in HMRC's view at least, because it is a payment for involvement in the venture, and therefore the venture is a benefit received in consideration of the payment.

HMRC acknowledges the difficulty of ensuring that all connected persons are recognised by the charity. Therefore it is sufficient for the charity to clearly advertise the rule regarding connected donors in order to ensure that the donor identifies themselves as a disqualified party.

9
RETAIL GIFT AID

'Retail Gift Aid' is a particular arrangement which is sanctioned by HMRC allowing donations of goods to be turned, in effect, to cash donations which qualify for Gift Aid.

The general problem is that, as mentioned above, Gift Aid only applies to donations in money. Therefore donations of goods cannot qualify for Gift Aid, which means that any donor of goods cannot enhance the value of their donation via Gift Aid. Whilst HMRC is unwilling to promote a change in the law, it has come to a compromise which has been found to be very effective in many cases. This is that, instead of a donor seeking to donate the goods as such, he arranges with the charity (often through a charity shop) to act as his agent in selling the goods for him. He does this with the general intention that any cash realised from the sale will be donated back to the charity, thus qualifying as a monetary donation and thus subject to Gift Aid.

In order for this to work, the donor must retain the choice of whether or not to make a cash donation of the sums in question after the goods have been sold. Of course, to the extent that the donor does not know the value of what he is giving away, there is a risk that the charity may realise a large amount of money and then the donor would be unwilling to part with any or all of it. On the whole that risk is usually perceived to be low, but it should be borne in mind, as indeed should the risk of this being used for dishonest disposal of dishonestly obtained goods.

In order to fulfil various charity legal requirements, and to ensure a favourable VAT position, the charity, or its subsidiary company, will usually set a commission to be charged to each donor for the service of selling goods on his behalf. VAT applies to that commission and allows VAT to be reclaimed on the shop operation. It is the net of the commission and the proceeds which is then technically remitted back to the donor in the hope that he will donate it to the charity.

HMRC allows the cash to be held by the charity pending confirmation from the donor that the charity will receive the cash. Furthermore, HMRC allows each donor in effect silently to assent to making the cash donation (on the sensible basis that he had delivered the goods to a charity shop and therefore expected to be making a donation rather than simply using it as a

commercial selling agency). Up until April 2013, this involved sending each and every such donor a letter from time to time telling them how much had been raised from their sales and requiring them either to intervene to claim their cash, or to remain silent for 21 days, in which case the cash would be deemed donated by the donor and thus subject to Gift Aid. From 6 April 2013 it is possible for a charity to decide not to send any such communication where the figures are below £100 in any financial year (where the charity alone is involved in the sale), or if a subsidiary company is involved, either as an agent for the charity or as the principal in carrying out the commission activity, that limit extends to £1,000. This means that the majority of donors of goods/cash will in effect never hear any more about it and will be deemed to have donated the cash balance to the charity.

Gift Aid can only be claimed on the value of the balance, and not the commission inclusive value, since the commission effectively reduces the value of the cash donation to the charity.

Charities seeking to implement Retail Gift Aid ought to bear the following practical points in mind:

1. It is unlikely that all donors can be signed up to the Retail Gift Aid model. Gift Aid is not possible without the signing of Gift Aid forms to start with and many donors of goods will want to be anonymous. Other donors simply leave their donations at the door of the shop, giving rise to no opportunity to determine whether they are signed up to the Retail Gift Aid scheme to start with, or whether they could be recruited to it. It is often not possible to convert more than 40 per cent of donors on to the scheme, but even then it is usually worthwhile.

2. In order to make a success of Retail Gift Aid, it is necessary to track which goods are from which donors to be able to relate the cash equivalent back to their Gift Aid declaration. Certain providers of proprietary systems based upon point of sale technology assist in setting up this tracking procedure. Naturally, this costs a certain amount of money both initially and on an ongoing basis, so the investment should not be made without proper assessment of the suitability of each outlet to this approach.

3. In order to keep the reduction in the donations to a minimum, it may be necessary to set the commission charged to each customer at a level which is not too high. In theory, of course, the charity should not charge less than cost to each donor for selling their goods. However, it

is often found that the value of commission that needs to be charged in order to recover a fair and reasonable cost is fairly considerable. This in itself, however, implies that, perhaps, that charity shop is used more as an advertising banner than to generate free cash resources, and that would suggest an inefficient shop which is unsuitable for Retail Gift Aid. However, HMRC has not expressed any particular concern if commission is also charged from the trading subsidiary (assuming it runs the shop) to the charity, particularly for the costs relating to the maintenance of a Retail Gift Aid system overall and tracking the cash donations to provide the data to the charity for the Gift Aid claim. In that case, part of the cost can be met by the charity without eroding the Gift Aid declaration, and part is charged in effect also to the donor. The balance between these is a sensitive matter that needs to be given full consideration taking into account all of the particular trading conditions of that outlet.

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ADMISSION TO VIEW CHARITY PROPERTY

The heritage sector in particular often benefits from the provision in the Gift Aid law that payment to view charity property is a donation and that the viewing is not a benefit. There are conditions however.

To qualify the charge must cover twelve months of continuous right of access or, if not that, the daily admission charge must be at least 10% greater than a charge made to any customer who does not intend to turn his payment into a gift aid donation. There must accordingly be a genuine choice for the visitor only to pay the lower sum (the basic 'ticket price') in order for the 10% rule to apply.

This means that a visitor would appear to have to make a financial sacrifice in order to enable the charity to obtain the Gift Aid claim. But that is not always the case. For example, a higher rate tax payer should be able to achieve a tax reduction in his tax return that more than offsets the increased payment (though many people do not bother to claim it). Beyond that, it is even possible to give the donor back the value of the increase in the form of consequential benefits. This is because the benefit limit is the lower of 25% or £25 (at the time of writing), which means that, usually, the extra 10% is worthwhile if the visitor is tempted by the benefit on offer. That benefit can be a money-off voucher for the shop. That means that the visitor effectively gets back his extra money, and it drives increased shop sales.

The fact that this is allowed by the rules is something of a surprise but it is a happy one.

But this relief only covers admission to view the property, not other benefits at the property. A musical performance or use of sports facilities goes too far and nullifies the relief. The danger therefore is in trying to make the 'experience' of the visitor more meaningful by enhancing the activity. HMRC accepts that, if admission includes the right to hear a band or chamber music players, or the ability to watch falconry or a joust, this 'historic re-enactment' should not prejudice Gift Aid (though that must surely depend on the extent). But one imagines that the ability to sample the delights of 'real tennis' would be sufficient to upset the Gift Aid arrangement despite being intended merely to bring the visit 'to life'. Whether or not that kind of point can be agreed with HMRC, they

certainly will not accept a formal ticket to a concert, or payment for, say, an eighteenth century massage experience, as qualifying for Gift Aid.

HMRC's Guide goes into great depth on other matters, such as how restricted (or not) a right of admission over the year can be, and what can be accepted under a family membership arrangement. A heritage charity should review all of HMRC's views on these points.

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GIFT AID SMALL DONATIONS SCHEME (GASDS)

Introduced in April 2013, this is a scheme aimed at allowing an equivalent to Gift Aid to apply to pure cash donations which are received without Gift Aid documentation. In other words, these are in effect anonymous donations where the normal link between the donor and the donation is effectively broken, and there is no audit trail between the tax paid by the donor and the Gift Aid claimed by the charity.

For this reason, this is treated as 'public expenditure' rather than a tax reduction, and is called rather euphemistically a 'top up scheme'.

Cash is king

This scheme only applies where the payments are in cash, meaning notes and coins. They cannot even be in money where the money is represented by a cheque or by electronic transfer.

£5,000 limit

For every charity (subject to the point about community buildings below) the maximum of aggregate cash donations that can be covered by GASDS is £5,000, giving rise (at the time of writing) to a maximum advantage of £1,250.

Maximum individual donation

The maximum individual donation is capped at £20. This means that any donation in one go of more than £20 cannot qualify for GASDS. (But a single donor can make two separate donations of £20 each to make up a greater figure, though one presumes that HMRC intends there to be at least a day between the two donations.) The relevant legislation states that the charity must 'take steps' to verify that this maximum is not exceeded. HMRC have indicated that their idea of 'taking steps' may be as little as publishing information to the potential donor requiring him to come forward and reveal where he has made a donation exceeding £20. It remains to be seen, however, whether this guidance will give way to a tougher approach whereby the charity is required to explain how it checked each and every donation. The latter would, of course, become unworkable.

The Gift Aid matching criteria

At the time of writing, and at the inception of GASDS, it would not be possible to claim more than ten times as much GASDS payment as the amount of vouched Gift Aid under the normal Gift Aid system also claimed in that year. This means that very small charities that might have wished to take advantage of GASDS alone, and not become involved in the Gift Aid regime in its fully fledged guise would simply be unable to operate on that basis. There must be at least some Gift Aid (within those tolerances) in order to allow for GASDS to be claimed. This is intended to counter fraud by ensuring that the charity cannot simply fabricate cash donations and must have some kind of normal ongoing contact with HMRC Charities. It remains to be seen whether this will survive in the future, and whether the basis upon which it is introduced (to avoid fraud) can be justified on the basis of efficacy.

This presents a practical problem that will bite in marginal cases, namely that until the appropriate amount of full Gift Aid has been claimed, a GASDS claim is not eligible to be made.

To take full advantage of GASDS a charity must have donations of at least £500 under Gift Aid. This might encourage smaller charities to seek (perhaps from a trustee) a Gift Aid donation of £500 early in the year in order to settle the GASDS criteria.

Compliance history

As mentioned above, it is imperative for a claimant of GASDS to also apply Gift Aid to some extent. GASDS will also not be allowed to any organisation which has, within the last four years, had two Gift Aid claims disqualified. Indeed, the organisation must also have had a clean sheet for the last two years as well as having fulfilled the two out of four year criterion in order to be able to claim GASDS.

Community building

It was felt, in the design stage of GASDS, that it was unfair on certain charities that were in effect a federation of local community charities, within one legal entity, to receive only a £5,000 allowance for GASDS where very similar charities, organised as several charities with loose affiliations across the country, would be allowed £5,000 per site. This was particularly troublesome in the context of churches which usually have

to be aggregated within a single legal entity either at parish, diocese, or denominational level. It was therefore decided to introduce rules whereby certain charities could benefit from an allowance of £5,000 per community building in addition to their normal central allowance of £5,000 in order to operate an enhanced GASDS scheme.

This, of course, creates significant difficulties in defining a community building. The solutions to these difficulties have yet to be tested and appear likely to be problematical. It is worth anyone with an interest in this going to the full guidance within the legislation or within HMRC's website. However, as a general rule, a community building is one that must be used predominantly for people to come in and carry out the activity that the charity represents. These are not buildings that are used to administer the charities' operations or to carry out such activities as fund raising. These are buildings which are used for a community purpose for the outward facing activities of the charity. In particular, they cannot involve principally selling goods.

The cash fund raising in question must go on inside the community building itself. It is not possible simply to hypothecate a certain amount of cash to a particular building or to say that one is fund raising elsewhere for the building in question.

Claiming GASDS

GASDS is included in the internet claiming regime known as 'Charities Online' which was introduced in April 2013, and thus included in the prescribed spreadsheet format published by HMRC.

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CONCLUDING REMARKS

The information given in this Guide is not intended to replicate readily available HMRC material but rather to give points of practice within a coherent overview and to give an element of personal commentary and opinion. I hope that the Guide will help charities and donors alike better to appreciate the issues involved, so that they can become conversant with HMRC guidance. Users are advised in all cases to seek professional advice on any issues of which they are uncertain.

About the Author

Graham Elliott is a Transaction Tax Consultant at Withers LLP. Graham mainly advises clients on VAT (Value Added Tax). He also advises on Gift Aid for charities, general charity transactions, and SDLT (Stamp Duty Land Tax). Regarding VAT, his main areas of focus are: real estate, charities and international services. Most of Graham's practice involves advising clients on what the tax law legitimately allows so that they do not pay more tax than they ought or is fair. This occasionally involves recouping (potentially substantial sums of) overpaid tax. It can also involve defending a client's existing position, or negotiating the fairest settlement where tax is due.

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