

Not for Profit eNews

August 2023



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Welcome to the latest edition of MHA Not for Profit eNews.

After a lengthy consultation, details of which have been shared in our previous editions of eNews, the Charity Commission formally released their updated CC14 guidance 'Investing charity money: a guide for trustees'. We have partnered with investment managers Cazenove to highlight some of the key changes to the guidance which will be of particular significance to any charity with investments.

We also detail the facts, decision and opportunities of a recent Upper Tribunal, *HMRC v Hotel La Tour Limited* (2023), which may be of interest for charities looking to recover VAT on the costs of fundraising events.

Finally, and following the Charity Commission's conclusion to their inquiry into charity Care4Calais, we remind Trustees of the significance of their responsibilities and steps they can take to ensure they are meeting them.

As ever, if there are any points you wish to discuss further in this issue please do get in touch.

Best Regards,
MHA Not for Profit team



CC14 – Updated Charity Investment Guidance for trustees

After several years of consultation, a court case and various delays, the Charity Commission for England and Wales have recently published updated investment guidance: **Investing charity money: a guide for trustees.**

Investment managers Cazenove, who hosted round tables with the Charity Commission and reviewed draft guidance during the consultation period, have highlighted below seven of the key changes featured in the revised guidance.

1 More accessible and practical guidance

The new guidance is more accessible for trustees, and clearly sets out trustee duties when investing charity assets. The Commission say the guidance aims to offer “greater clarity and to give trustees confidence to make investment decisions that are right for their charity”. It emphasises “that trustees have discretion to choose what is best in their circumstances and have a range of investment options open to them – provided they ultimately further the charity’s purposes.”

2 Removing the reference to “ethical investment”

The Commission has removed reference to “ethical” investment, as well as “mixed-motive” and “programme-related” investment. It has opted instead for “financial investment” and “social investment” – where the former seeks financial returns and can take into account non-financial factors such as sustainability and impact characteristics. The latter specifically relates to achieving the charity’s purpose directly through the investment (while making a financial return).

3 Permissive approach to responsible investment

The guidance is permissive towards the inclusion of “non-financial factors” being included in financial investments, explaining that it is up to trustees to determine what is in the best interests of their charity. It highlights that this might include investment approaches that avoid certain assets, seek out specific investments for their environmental or social performance and use influence to create change. The recent Butler-Sloss case is now the “leading case in relation to the law on investment decision-making by trustees”. It has been helpful to clarify that investments conflicting with the charity’s purpose or harm its reputation can be excluded, even if there are anticipated financial implications, as long as the decision is in the best interests of the charity.

Despite this permissive framing, Cazenove fed back throughout the consultation their belief that responsible and sustainable investment is under-represented in the guidance, given public benefit requirements, the fact that 83% of long term charity investors already have responsible investment policies, and the action that many charities are taking to respond to broader social and environmental shifts like climate change.

4 Investment policy guidelines

A more significant section of the guidance is dedicated to helping trustees set investment policy, thinking about returns, risk, time horizon and liquidity. It is clear that “the Commission expects all charities that invest to have a written policy”. This is a welcome change to the guidance, and Cazenove also recommend that a charity investment policy contains a statement on responsible investment approach, and how the investment policy aligns with the charity’s values and aims.

5 An expectation that all investing charities take professional advice

A new section of the guidance concentrates on taking advice and makes it clear that the Commission expects all investing charities to take professional advice when making and reviewing investments.

This advice could be given by an investment adviser or manager (like Cazenove), or by a trustee with relevant experience. It is worth noting that if a trustee is relied on for advice they are held responsible for the quality of that advice. Not all investment managers give regulated investment advice (Cazenove do), so it is important for trustees to consider how they are meeting this expectation.

6 Working with investment managers

The guidance sets out how charities might delegate to an investment manager, the types of things that trustees should consider when selecting a manager, the need to have a contract and the requirement to ‘regularly review’ the service that you are getting. The guidance is clear that this regular review can be done by trustees, and should consider performance, alignment with investment policy and ongoing suitability.

7 Empowering trustees

Trustees should feel empowered by this new investment guidance. It is written to be permissive and flexible for individual charity circumstances. It even says “the Commission is unlikely to have concerns about your investment decisions or policy if you can show that you have: complied with your trustee duties and your governing document; considered and balanced relevant factors, taken advice and reached a reasonable decision.”

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Throughout September, Cazenove are running a series of trustee training sessions on the new guidance – click [here](#) to register your interest. They have also produced a series of [checklists](#) for Trustees to consider with regards to trustee duties, developing an investment policy, selecting an investment manager, and preparing an annual report.

In light of the changes to the Charity Commission guidance, HMRC have updated the terminology they use in their ‘[Charities: detailed guidance notes on how the tax system operates](#)’ documents to ensure consistency.



Breaking the Chains: Landmark Tribunal Ruling Expands VAT Recovery Opportunities

In a highly significant decision, the Upper Tribunal has dismissed HMRC's appeal against the taxpayer's First-tier Tribunal success in the case of **HMRC v Hotel La Tour Limited (2023)**. MHA VAT and Indirect Tax Director, Glyn Edwards, summarises below the facts of the case, the decision, and how the case gives rise to opportunities for certain entities in the Not for Profit sector.

The Facts of the Case

Hotel La Tour Ltd ("HLT") incurred fees for professional services in respect of a sale of shares in its subsidiary Hotel La Tour Birmingham Ltd "HLTB"). HMRC disallowed HLT's input tax claim on the basis that the sale of shares in HLTB was an exempt supply and the VAT on the professional services was directly and immediately linked therefore to the exempt sale of shares. HLT's successful argument was that the relevant services were directly and immediately linked to HLT's downstream taxable activities.

In 2015, HLT decided to construct and develop a new hotel in Milton Keynes, costing approximately £34.5 million. That construction was partly financed by the sale of HLTB - the proceeds of the sale were to be used to fund the Milton Keynes development. HLT engaged various companies to provide professional services, with a view to obtaining the highest sale price available, which would provide for the largest sum possible to pay towards the Milton Keynes development.

The Decision

The judgment challenges HMRC's traditional view of input tax, which is that it must always be attributed to the first output in a chain and that, if the first output is VAT exempt, then the input tax is non-recoverable. That view has leant heavily on a very old judgment of the European Court of Justice in the case of BLP Group plc v Customs and Excise Commissioners - [1995]. HMRC still refer to that case in their guidance manuals for officers stating that "it confirmed that, as VAT is a transaction-based tax, the ultimate purpose of a business is irrelevant so it is only the immediate supply to which any input is a cost component that matters."

Opportunities

Whilst the decision might be appealed by HMRC, other taxpayers should take immediate action to consider whether they might benefit from this decision as potential claims are restricted to four years. The opportunity may be wider than cases akin with HLT and may expand to create VAT recovery whenever fund raising supports downstream taxable activities. This could have a positive impact, for example, on the charity sector, who have traditionally not been entitled to any VAT recovery on the costs of fund-raising events.



That guidance is proven to be incorrect by the judgment of the Upper Tribunal in *Hotel La Tour*, which specifically stated that:

subsequent decisions of the CJEU had called the BLP decision into question in the light of its developing jurisprudence attributing input expenditure on the raising of capital to the general overheads of an undertaking. Although not formally overruled, the BLP decision can no longer be regarded as representing a complete statement of the CJEU's jurisprudence in this area".



Charity Commission inquiry highlights significance of Trustee responsibilities

In late August, the Charity Commission concluded their three-year-long [inquiry](#) into Care4Calais, finding that the former trustees were responsible for several instances of misconduct and mismanagement; the Commission found that for a number of years the charity lacked appropriate governance structures, had poor internal financial controls, and inadequately handled complaints.

The detailed findings below – both positive and negative – highlight the significance of Trustees' responsibilities, and steps current Trustees can take to ensure that they are meeting theirs.

Poor internal financial controls

The inquiry was critical of the charity's financial management, notably a lack of suitable internal financial controls. Between October 2017 and August 2020, a now former trustee was reimbursed over £340,000 for charitable expenditure they had incurred to save the charity around £3,000 per year in foreign exchange fees. The inquiry concluded that while no funds were misused or misappropriated for private benefit, this arrangement was inappropriate, and put the charity's funds at undue risk.

Governance failings, poor complaint handling and dispute

The regulator found that between 2020 and 2021, Care4Calais operated with two trustees, failing to maintain the minimum number of trustees stipulated in its governing document. A dispute between board members left them unwilling or unable to resolve their conflict. The inquiry also concluded that the charity's handling of complaints was inadequate; it was found to have failed to demonstrate that complaints were handled in an impartial, fair, open and transparent way, and that it had failed to maintain records of investigations. On at least one occasion, and in breach of the charity's own policy, one trustee handled a complaint about another trustee to whom they were related, failing to identify or manage the conflict of interest and/or loyalty which arose.

Charity structure and conflicts of interest

Two of the former trustees were siblings, and the inquiry found little evidence to demonstrate that any past conflicts of interest or loyalty which may have existed had been appropriately managed. This was worsened by poor minute-taking. This amounted to misconduct and/or mismanagement. Furthermore, the founder of the charity was a trustee and also the Chief Executive Officer, bringing into question how balanced the distribution of decision-making power was.

Campaigning and political activity

As part of its inquiry, the Charity Commission reviewed the trustees' decision to issue judicial review proceedings to challenge the UK government's Migration and Economic Development Partnership with Rwanda. It found the decision was properly made, adequately documented, and was within the range of reasonable decisions open to the trustees of this charity. The activity itself served to further the charity's objects, and the inquiry determined it was in line with the Commission's [guidance on political campaigning](#). In concluding their inquiry, the Commission signpost their [CC8 guidance regarding Internal Controls for Charities](#), and their [self-check-list](#) for trustees to use to enable them to evaluate their charity's performance against legal requirements and best practice.



Charity Commission's new digital service for trustees

My Charity Commission Account (MCCA), the Commission's new digital service for trustees, went live on 31 July and so far over 79,000 charities have successfully set up on the service. Charities must submit any remaining annual returns for 2022 and all annual returns for 2023 onwards through the new service.

However, it has been [reported](#) that many customers are experiencing technical issues when setting up their account – namely regarding links received to sign up for an account not working – requiring them to contact the Commission. As a result, the Commission are experiencing high levels of incoming queries, and whilst they are dedicating more staff to address these queries, they acknowledge the inconvenience caused by the delay in accessing support.

Those charities which have not received a link will receive one before their filing deadline.

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