National Audit Office

**Report**
by the Comptroller
and Auditor General

**Charity Commission**

# The Cup Trust

**HC 814 SESSION 2013-14 4 DECEMBER 2013**

# Key facts

**£46m**

value of Gift Aid claims submitted by The Cup Trust to HMRC. These have not been paid

**£152,292**

value of donations The Cup Trust has made to charitable causes up to 31 March 2013

**£176m**

value of payments to The Cup Trust in relation to the tax avoidance scheme

**Two years** the time the Charity Commission's investigation of The Cup Trust took before the investigation was closed with regulatory advice to the Trustee

# Summary

**1** The Charity Commission (the Commission) regulates charities in England and Wales. Its statutory objectives include promoting public trust and confidence in charities and regulating their compliance with charity law. The Commission's core regulatory activities include registering charities and investigating regulatory concerns, including using its powers to protect and recover charitable assets where there is mismanagement or misconduct.

**2** The Cup Trust (the Trust) was registered as a charity by the Commission in April 2009. The Trust has a sole corporate trustee, a company called Mountstar (the corporate Trustee), registered in the British Virgin Islands.

**3** In March 2013, the Committee of Public Accounts held a hearing, attended by representatives of the Commission and HM Revenue & Customs (HMRC), to investigate concerns that the Trust was set up as a tax avoidance scheme. The Committee's report in June 2013 concluded that the Trust does not meet public expectations of a charity.[1] It also said that it was unacceptable for the Commission not to have been able to stop this instance of abuse of charitable status.

**4** On 4 December 2013, the Comptroller and Auditor General published a report *The regulatory effectiveness of the Charity Commission.*[2] The report was prepared under Section 6 of the National Audit Act 1983 for the purpose of examining the economy, efficiency and effectiveness with which the Commission has used its resources in discharging its functions. This report has been prepared under the same legislation and for the same purpose, and examines the Commission's investigation of The Cup Trust case. We set out the key stages of the Commission's investigation of the Trust, including its consideration of whether the Trust met the legal criteria to register as a charity, and the actions it took to deal with the concerns it identified.

**5** We reviewed the Commission's case records and published information, and interviewed the Commission's chief legal adviser and head of legal services (the director of legal services and compliance up until December 2011), the head of Investigations & Enforcement, and the manager in charge of the investigation team for the case. We could not interview the Commission's lead investigator or advising lawyer for the first investigation into the Trust because they left the Commission in 2012. We also took legal advice. Appendix One sets out a timeline of the case.

1 HC Committee of Public Accounts, *Charity Commission: The Cup Trust and tax avoidance,* Seventh report of Session 2013-14, HC 138, June 2013.

2 Comptroller and Auditor General, *The regulatory effectiveness of the Charity Commission,* Session 2013-14, HC 813, National Audit Office, December 2013.

## Key findings

6 **The Cup Trust submitted claims for £46 million Gift Aid on £176 million of payments from participants to the tax avoidance scheme, but it gave just £152,292 to charitable causes between April 2009 and March 2013.** HMRC made clear it did not think Gift Aid was payable in schemes of this type, and it has not paid the Gift Aid claims (paragraphs 1.3 to 1.7, 2.7 and 2.28).

7 **When registering a charity the Charity Commission, as a general rule, can only take into account an organisation's expressed purposes, not its activities or the motives of its founders.** If the trustees of a charity fail to ensure that it carries out its charitable purposes, or if it carries them out in breach of the relevant legal duties and powers, then the organisation is still charitable, but its trustees may be in breach of trust (paragraphs 1.9 to 1.11).

8 **The Commission did not properly consider whether the Trust met a key legal requirement before registering it.** Before registration, the Commission did not adequately examine whether the Trust fell within the jurisdiction of the High Court. The Commission did not obtain external legal advice until 2011 when it was investigating the Trust. It also did not identify as a risk factor the potential conflict of interest arising from having a sole corporate trustee (paragraphs 1.13 to 1.16, 2.10 and 2.11).

9 **The Commission took action when it received information from external sources.** The Commission opened an investigation in March 2010 after receiving information from HMRC. After closing the investigation in March 2012, pending HMRC determination of the Gift Aid claim, the Commission did not formally monitor the Trust until February 2013. The Commission opened a statutory inquiry in April 2013, based on its own concerns about the charity and new information from HMRC. The Commission's decision to open the inquiry and appoint an interim manager was upheld by the First-tier Tribunal (Charity) in its judgment of October 2013 (paragraphs 2.6, 2.26 and 3.7 to 3.11).

10 **In our view, there were issues that might have justified the opening of a statutory inquiry in 2011, to which the Commission did not give sufficient weight during its investigation.** Following its investigation the Commission concluded that it could not deregister the Trust on grounds of lack of jurisdiction or on the grounds that it was a sham charity. In June 2011, it wrote to the Trustee setting out its regulatory concerns about the Trust's jurisdiction, status and activities. After receiving assurances from the Trustee, the Commission decided not to open an inquiry and closed its investigation in March 2012, choosing instead to wait for HMRC to determine the Gift Aid claim. In deciding not to open an inquiry, we believe the Commission did not give sufficient consideration to issues such as the public detriment arising from the diversion of taxpayer funds and the failure of the Trust to take its own independent legal advice on whether running the scheme was an appropriate activity for it to undertake (paragraphs 2.21, 2.23, 2.24, 2.27, 2.29 and 2.34).

11 **The First-tier Tribunal (Charity) judgment of October 2013 concluded that the Commission's strategy to close the investigation and await an HMRC determination was mistaken.** The Commission has now accepted this (paragraph 3.11).

12 **The Commission was slow to appreciate the potential impact of the case on public confidence in charities, which it has a statutory duty to increase.** The Commission should have considered issues of public confidence more fully when deciding in early 2011 not to open a statutory inquiry. When it closed its investigation in March 2012, the Commission decided not to publish its findings. This was on the grounds that the case was not of significant public interest, and that public confidence in charities would not be enhanced by wider discussion of the issues. The Commission subsequently decided, on 1 February 2013, that it was in the public interest to publish a report on the case (paragraphs 2.30, 2.31 and 3.5).

13 **The Commission did not take sufficient account of the scale and nature of the tax avoidance scheme in its case strategy.** Although the Commission raised all the key issues with the Trust and sought legal advice, in reaching its decision to close the case, the Commission does not seem to have taken sufficient account of the magnitude of the avoidance scheme, or that materially all of the Trust's funding would have come from Gift Aid. This was despite HMRC making clear that it did not think that Gift Aid was payable on this type of scheme (paragraphs 2.7, 2.10, 2.15 and 2.28).

14 **The Commission was narrowly focused on the legal position and paid insufficient attention to the wider issues of public detriment which it would have been appropriate to pursue further.** Although the Commission asked the Trust about the wider issue of public detriment from diversion of funds from the Exchequer, it placed too much reliance on the view that tax avoidance schemes were a legitimate activity for charities and that it was for HMRC to pursue tax issues. Furthermore, the Commission did not adequately pursue other lines of investigation, such as potential conflicts of interest of the Trustee's directors or the fact that the Trustee had not taken independent advice on whether it was appropriate for The Cup Trust to enter into the scheme (paragraphs 2.29, 2.32 to 2.34 and 3.11).

15 **In assessing whether tax avoidance was acceptable for charities, the Commission used advice from 2001 relating to a materially different type of scheme.** The Commission is now reviewing its policy on the use of tax avoidance schemes, such as the one the Trust was involved with, and whether they are a proper activity for charities to undertake (paragraphs 2.17 and 2.18).

16 **The Commission was slow in handling the case.** The Commission took two years to investigate the Trust, including ten months to gather information. It opened a statutory inquiry into the Trust more than three years after its initial investigation began (paragraphs 2.12, 3.7 and Appendix One).

17 **From its work to date, the Commission has concluded that the register of charities does not include any other charities like The Cup Trust.** The Commission reviewed its register to identify charities with characteristics similar to The Cup Trust, such as low charitable expenditure as a proportion of income. It identified potential regulatory issues in 13 charities and is looking into these issues, but has concluded that it is unlikely that there are charities similar to The Cup Trust on the register. HMRC has confirmed to the Commission that The Cup Trust is the only charity in England and Wales included within the eight avoidance schemes involving charities that have been disclosed to HMRC (paragraph 3.12 and Figure 2).

## Conclusion

**18** The Commission's approach to The Cup Trust case was too passive. The Commission did not make enough checks when it registered the Trust in 2009 to ensure the organisation met the legal requirements to register as a charity. The Commission was reluctant to take strong action during initial investigation and did not open a statutory inquiry in 2011.

**19** The Commission took too narrow a view of its remit, seeing the scheme as something for HMRC to deal with rather than seeing the bigger picture. It did not fully appreciate the scale and nature of the Gift Aid scheme nor the potentially detrimental impact of the case on public confidence in charities. The Commission is now reviewing its policy on the use of tax avoidance schemes by charities. It has opened an inquiry and is exercising its legal powers, which has been supported by the First-tier Tribunal (Charity).