

Review of Charitable Status

Board Meeting
Ormond Quay, Dublin

January 21st, 2019

Introduction

The Board of Pobal requested that a review be undertaken to assess Pobal's charitable status; to ascertain if the status was appropriate to Pobal's role and function. An investigation into Pobal as a charitable organisation was carried out and independent legal advice was sought on the matter. It was agreed following the review, a report would be provided to the Board and dependent upon the agreed course of action, it may be necessary for Pobal's lead department, the Department for Rural and Community Development ("DRCD"), to be consulted on the matter.

Background

Pobal is a Company Limited by Guarantee with no share capital however it is also a registered charity under the Office of the Revenue Commissioners ("Revenue") and falls under the supervision of the Charities Regulatory Authority ("CRA"). A charitable organisation is one that acts for a charitable purpose only. Some registered charities, subject to Revenue's determination, are entitled to receive exemptions from a tax perspective pursuant to the Taxes Consolidation Act 1997.

Our records indicate that a tax exemption was granted by Revenue to Pobal on November 20th, 1996. A tax certificate was issued to Pobal with the following charity reference number, CHY 11102.

The Charities Act 2009 (the "Act") was signed into law on February 28th, 2009 to reform the law relating to Irish charities and to bring about a greater degree of transparency and accountability to the charity sector in Ireland. A key part of this legislation was the establishment of a new independent regulator however this was not established until more recently in October, 2014, with the investigative powers and enforcement being introduced fully in 2016. If an organisation holds a Revenue CHY number, they are deemed to be automatically registered with the Charities Regulatory Authority. Pobal is therefore registered with the CRA and complies fully with the requirements of the legislation and guidance issued by the CRA.

Criteria to be registered as a charity

Under the Act, a 'charitable organisation' is (in the case of a corporate body) one:

- (i) That promotes a charitable purpose only,
- (ii) That, under its constitution, is required to apply all of its property (both real and personal) in furtherance of that purpose, except for monies expended –
 - (a) In the operation and maintenance of the body, including monies paid in remuneration and superannuation to staff members of the body, and
 - (b) In the case of a religious organisation or community, on accommodation and care of members of the organisation or community, and
 - (c) Where none of its profit or property is payable to the members of the body (subject to some limited exceptions).

The Act specifies certain organisations who are deemed to be excluded bodies under the legislation. Pobal does not meet any of the following definitions:

- A political party, or a body promoting a political party or cause (unless it relates directly to the advancement of the charitable purpose)
- Amateur games or sports clubs
- Trade or employers unions, or chambers of commerce; or
- A body that promotes purposes that are unlawful/supporting terrorism, contrary to public morality and/or contrary to public policy

Revenue has its own criteria set to meet the requirements of a charity however it significantly mirrors the provisions of the Act.

The basis of the charitable status which Pobal retains is tied to the objects of the company which is detailed in the company's Memorandum of Association (see Appendix One).

The Memorandum of Association and Articles of Association are the governing documents of a company. The Memorandum of Association will outline the principal activities of a company. The Articles of Association set out the particular rules under which a company must govern itself.

Pobal's objects note the following:

- (a) The delivery and management of programmes which promote social inclusion, reconciliation and equality through integrate social and economic development within communities;
- (b) The delivery and management of local, community and other development programmes;
- (c) The provision of technical assistance, support and advice to the groups and beneficiaries of the programmes, which are delivered/managed;
- (d) The provision of assistance and support in the analysis and exchange of experience, leading to the communication of information and the identification and dissemination of good practice within the programmes which are delivered/managed;
- (e) Aiding, through the lessons learnt from these programmes, in the formation of Government and other policy development at local, regional and national levels and
- (f) The provision of technical assistance, support and advice to other bodies with the approval of the Minister.

These objects are clearly to promote social inclusion, to aid local communities and help those who are disadvantaged. Pobal's objects are of a charitable nature. However it is a unique organisation in that is an independent company limited by guarantee but has strong links with government as the Board of Pobal is appointed by the Minister for Rural and Community Development, on behalf of Government.

It would important to note that under Article 9 of Pobal's Memorandum of Association, it states the following:

"No alteration shall be made in the provisions of this Memorandum or in the Regulations contained within the Articles of Association for the time being in force, unless the same shall have been previously approved in writing by the Government of Ireland, after consultation with the National Social Partners"

For charitable organisations, it would be usual within the Memorandum of Association to have a clause requiring that upon dissolution or winding up of the organisation, that all of the property and assets of the organisation are distributed to an organisation with similar charitable purposes. This can clearly be recognised as important for ‘traditional fundraising’ organisations. Pobal manage and distribute funds on behalf of the Irish Government.

The applicable ‘winding up’ clause in Pobal’s Memorandum of Association notes as follows:

“If upon the winding up of or dissolution of the Company, there remains after the satisfaction of all debts and liabilities any property whatsoever, whether real or personal, no part of such property shall be given to or distributed to the members of the Company, but shall be given to the Government of Ireland or, subject to the prior agreement of the Government of Ireland, shall be given to such company, authority or body or persons as has been established by the Government of Ireland with similar objects to this Company”.

Consequences of removal of charitable status

As previously mentioned, Pobal is in compliance with the charities legislation and will continue to be so. However if it was proposed that Pobal should no longer be a charity, it would have the following implications. Some points mentioned below relate easily to traditional fundraising organisations who are deemed to be charities. It is not as straight forward for Pobal as whilst we meet the definition of a charity, Pobal does not fundraise, instead handles government monies used to administer programmes on behalf of government.

(a) Procedural implications of losing charitable status

The following consequences exist or potentially exist where a company limited by guarantee loses its charitable status:

➤ **Removal from the Register of Charities**

Below are the circumstances under which the CRA may de-register a charity from the Register of Charities:

- (a) If an organisation following engagement with the Revenue Commissioners and the CRA voluntarily agrees be removed from the Register of Charities;
- (b) If the CRA decides that an organisation (i) has become an excluded body as detailed above (ii) has changed its name without the CRA’s consent or (iii) has committed an offence, then it may provide notice in writing that it is no longer registered under the Act. The organisation will no longer be deemed to be a registered charity upon receipt of this notice; or

- (c) If the CRA is of the view that the organisation is not a charity, pursuant to Section 40 of the Act, then it must apply to the High Court for a declaration confirming same.

If the CRA decide that a body should no longer be registered, it will add a statement to the register noting same and the reasons why the body is no longer registered. The moment the name is removed from the register is the time when the organisation ceases to be a charity in law. If Pobal were to consider removal of its charitable status, it would be carried out as per point (a) mentioned above.

➤ **Changes relating to company information**

It would be necessary for any organisation who is removed from the register to change all identifying information which relates it to being a charity. So for example, in Pobal's case, it would be necessary to remove any reference to Pobal being a charity from our letterhead, website and other public information. It is an offence under the Act for an organisation who is de-registered to mislead the public into thinking that it is a charitable organisation.

If Pobal were to lose its charitable status, this task could be undertaken by the Communications division of the company.

➤ **Withdrawal of charitable tax exemption**

An organisation must maintain its charitable status with the CRA in order to obtain the benefit of the charitable tax exemption. If an organisation loses its charitable status, Revenue may withdraw the charitable tax exemption. Revenue does have the power to withdraw it from the date it was originally granted and may claw back the relief already used.

One must note however that for Pobal it was not the case that the criteria for being a charity was not met or that incorrect information was provided to Revenue or the CRA. Revenue issued Pobal with a charity number having considered our Memorandum of Association and the full activities of the organisation. In that light, if Pobal were to no longer have charitable status, it would seem appropriate that Revenue would withdraw the charitable tax exemption from the date the CRA confirm that Pobal was no longer a charity. Confirmation, however on this point, would need to be sought with Revenue if that were a route that Pobal wished to take.

The financial consequences, and in particular from a tax perspective, of losing the charitable tax exemption will be dealt with at a later stage in this paper.

➤ **Potential application of the Cy-Pres Scheme (or similar)**

If a charitable trust (holding something for the benefit of another) fails, the CRA are empowered to frame a cy-pres scheme. An example being, if a charitable trust has met the purposes for which it was set up or had ceased to be charitable in law. The word 'cy-pres' in a legal context means 'as near as possible'. In the context of losing charitable status, the CRA can direct that residual funds and/or property are applied to another organisation for purposes as near as possible to the organisation losing its charitable status. This application of cy-pres law is

governed by the Charities Act 1961, which refers to its application in relation to charitable gifts. The CRA, therefore may under this legislation frame a cy-pres scheme in relation to any charitable gift that fails, however there is no specific authority to frame a cy-pres scheme where a company ceases to be a registered charity. The CRA does however have decision making powers over how property is to be distributed on the dissolution of a CLG which has lost its charitable status.

The applicability of the cy-pres scheme is very evident to a typical fundraising organisation however Pobal would not receive charitable gifts. It would be helpful however to receive confirmation from the CRA that they do not consider the funds used by Pobal to be funds which would fall under their remit to distribute where Pobal to lose its charitable status.

➤ **Questions as to whether or not the loss of charitable status compels the dissolution of the CLG**

Dissolution of an entity is usually dealt with by company law. In certain circumstances, a loss of charitable status by a company will lead to a dissolution of that company. This would be, for example, if the constitution provided for this process. There is no such clause in Pobal's constitution. Another example which could lead to dissolution would be, where a company which was incorporated as a charity and raised funds for charitable purposes cannot agree with the CRA on how to divest itself of charitable assets in a manner which maintains the solvency of that entity. If a company had ceased to be a charity but maintains charitable assets, it does not necessarily compel dissolution of that entity, but would compel engagement with the CRA and Revenue.

In Pobal's case, if Pobal were to consider no longer being registered as a charity, it would be prudent to engage with the CRA to seek clarity relating to monies which are in Pobal's possession and which would continue to be in Pobal's possession post loss of charitable status. An assumption could be made that the CRA would recognise that these were government monies and not the typical raised or donated assets and therefore would not apply.

It does not appear, without particular breaches of the Act, that the CRA would have the legal authority to compel the dissolution of Pobal, if it were to lose its charitable status. As mentioned above, the status of assets would need to be considered.

De-registration by the CRA

There are circumstances under which the CRA will decide to remove an organisation from the register. Such decisions are usually made in response to a lack of compliance by such an organisation or by their refusal to co-operate with the CRA.

Pobal is currently assessing the relevance of its charitable status in relation to its role and function. It is presently compliant with all the requirements of the CRA. If there were to be a de-registration process, it would likely be in consultation with the CRA and Revenue.

In the interests of providing complete information to the Board, there are various options available to a charity in the event of a de-registration by the CRA:

- Right of Appeal from CRA decision to remove from the Register of Charities
- Application for re-registration after one year.

(b) Financial Implications of losing charitable status

As mentioned above, the CHY number issued by Revenue entitles Pobal to receive the charitable tax exemption.

VAT:

Pobal have been advised both by our legal advisors and by Revenue that the company's VAT status is very much linked to the nature of the activities undertaken by Pobal. There is no general VAT exemption for charities, so it is not directly linked to charitable status however many of the activities carried out by charities will either fall outside the scope of or be exempt from VAT.

If there were a situation where the activities of a charity were in competition with commercial traders, then a charity may be required to register and account for VAT on those activities. Revenue has previously advised Pobal that this was not applicable to it however assurances have been sought from Revenue to confirm would this remain the case if Pobal lost its charitable status, but maintained the same activities.

Revenue have previously noted the following:

"Pobal should not be liable to VAT on any charges it makes, will have no entitlement to claim any input credits and will just account for VAT on its received services and intra-community acquisitions of goods, subject to the usual rates"

This was noted by Revenue at a time when Pobal held charitable status. Revenue have confirmed via telephone that if the company's activities remained the same, there should be no change to its VAT status. The company is seeking confirmation in writing of this so that the Board may be fully aware of the correct position. Presently, the activities of Pobal are outside the scope of VAT.

It should be noted that this could be subject to change if the activities of Pobal were to change or if a different type of income was generated in the future, however at the time of writing, no such changes have occurred.

In terms of Pobal's administration fee charged by Pobal to its lead department and the other state departments that it works with, no charge for VAT is included due to its VAT status. The loss of charitable status, it appears, would not change this position as the VAT treatment is not directly linked to charitable status.

Stamp Duty:

The applicable piece of legislation relating to exemptions to stamp duty for charities is Section 82 of the Stamp Duties Consolidation Act 1999. This section

will apply to conveyances or transfers or leases of land, established solely for charitable purposes. Whilst Pobal does not own any property, it would be excluded from payment of stamp duty on leases, as leases fall within the definition of 'land' under the act. The key element of this section is that the lease of property must be used by Pobal in furtherance of its charitable functions. If that is maintained, stamp duty will not be payable.

Deposit Interest Retention Tax ("DIRT"):

DIRT is a tax applied on the interest paid on certain deposits in Ireland in financial institutions, however DIRT is not required to be deducted from interest where the interest is paid to a charity.

DIRT is applied at a rate of 39%.

Should Pobal lose its charitable status, any deposit interest earned (which would be minimal) would be charged at the above mentioned rate. In Pobal's 2017 Annual Financial Statements, there was a figure of €5000 earned in respect of deposit interest. This would result in a DIRT withholding of €1950, if Pobal were no longer a charity.

Capital Gains Tax and Capital Acquisitions Tax:

It appears as Pobal does not own property or receive property from other organisations/persons, the above mentioned taxes would have no immediate impact and very limited future application if Pobal were to lose its charitable exemption. Pobal is not a typical fundraising charity and does not receive charitable gifts.

Corporation Tax:

There is no trading or passive income earned by Pobal and any charges are operated on a cost basis (i.e. no profit generated). In that regard, as corporation tax is paid on net profits, there should be no corporation tax applied to Pobal, irrespective of whether it is registered as a charity or not.

It would appear therefore that if there were no changes to the activities and functions of Pobal, then there would be no immediate consequences (aside from DIRT and stamp duty) of losing its charitable status for tax purposes. In addition, Pobal would lose the exemption relating to payment of rates on each of its property. It would be necessary to inform the landlord of each of Pobal's premises and for a revaluation application to be processed by the Valuation Office.

Conclusion

Over the last two years, the CRA have actively been following up on concerns relating to compliance of charitable organisations but also assessing whether certain organisations should be deemed to be a charity in the first instance. Pobal has engaged with the CRA to discuss the role of Pobal as a funder (on behalf of government) and to detail the work with beneficiary organisations, many of which are charitable organisations. Pobal has advised the CRA that the company was undertaking a review of its charitable status.

If Pobal were no longer to hold charitable status, it would be removed from the Register of Charities and would lose its charitable tax exemption.

It appears from the review which has been undertaken that there are no major consequences for Pobal if it were no longer to be registered as a charity. The Board of Pobal should consider the information provided and decide whether it is appropriate to de-register as a charity or not.

If the Board considers it appropriate to de-register as a charity, there are a couple of matters which should be checked by the relevant authorities prior to any removal from the Register of Charities.

- If Pobal is in receipt of monies from the Government, which were provided to Pobal contingent on it fulfilling its charitable purpose, would the CRA require Pobal to apply such funds 'cy-pres' to another similar organisation?
- If Pobal were to lose its charitable status and therefore its charitable tax exemption, would Revenue seek to clawback relief previously availed of?

If Pobal were to no longer hold its charitable status or wish to consider removal of same, it would be necessary to have discussions with both Revenue and the CRA, however approval for same would need to be forthcoming from Pobal's lead department prior to taking any action. In that regard, should the Board wish to consider removal of Pobal's charitable status, the first step to be taken would be consultation with the Department for Rural and Community Development.