**Corporate Criminal Offence - implications for incorporated small charities**

Failure to prevent tax evasion is a serious criminal offence. Small charities may well believe they have no risk but this is not so if they are incorporated.

From 2017 a new Corporate Criminal Offence of " Failure to prevent the criminal facilitation of tax evasion" impacts on all incorporated charities of whatever size (this includes charities registered as companies and charitable incorporated organisations) .

**Incorporated small charities need to take action now**. Doing nothing is not an option.

**Background**

The new rules apply where a person acting on behalf of an incorporated charity e.g. an employee or volunteer knowingly facilitates someone else's tax evasion.

It is already illegal to evade tax (as opposed to “avoid” tax which is legal). Although it always been illegal to deliberately and knowingly facilitate tax evasion by someone else, historically it has been difficult to prosecute a company and its directors for assisting tax evasion . The new law counters this by introducing the new offence. The Corporate Criminal Offence imposes a new legal requirement of the Board of Trustees in the governance of the charity.

**Main elements**

In order for the incorporated charity to be guilty of the new offence-

a. criminal tax evasion (which might be UK or foreign tax) must take place by a taxpayer,

b. an associated person e.g. an employee, volunteer , agent or contractor of the charity must deliberately and dishonestly facilitate that evasion,

c. the charity must have failed to prevent the associated person from committing the facilitation.

Associated person is broadly defined to include any person providing services for or on behalf of the incorporated charity. It may include those involved in providing services to outside organisations or others which use the charity's facilities e.g. for wedding receptions, parties etc.

If an offence occurs the charity is criminally liable even if it is unaware of the offence unless it can be demonstrated there were "reasonable procedures" in place at the time of the offence to prevent the associated person committing the offence or it was unreasonable to have such procedures. Examples of where an offence might occur in an incorporated small charity are given in Appendix 1.

There is a self reporting procedure for incorporated charities to notify that they have facilitated tax evasion; if followed it can be taken into account in deciding whether to prosecute.

**Reasonable procedures**

Whilst the law is not specifically targeted at incorporated charities they will nevertheless be subject to it and need to consider whether they have reasonable procedures in place. There are no exemptions for small incorporated charities. What is reasonable will depend on the facts and circumstances of each charity; HMRC, who will police the new law, has issued detailed guidance "Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion". This contains 6 guiding principles which can be used to meet the "reasonable procedures" requirement-

* Risk assessment
* Proportionality
* Top level commitment
* Due diligence
* Communications and training
* Monitoring and review

In its guidance HMRC acknowledges that reasonable procedures will differ for each organisation and they should be proportionate to the assessed risk. In some limited circumstances it may be unreasonable to expect prevention procedures to be in place. This might apply where the charity has assessed all of the risks which are considered to be extremely low and where the costs of implementing any prevention procedures are disproportionate or cost prohibitive in relation to the negligible risks faced. HMRC states in its guidance that it will however rarely be reasonable not to have even conducted a risk assessment. Appendix 2 contains the possible contents of a risk assessment framework which evidences the procedures the charity has in place.

**What happens if a small charity is convicted ?**

Conviction could result in an unlimited financial penalty, director disqualification, trustee disqualification, and reputation damage which could have serious effects on its fundraising and its work in the community.

**Action required**

Trustees of small charities should familiarise themselves with the new legislation **NOW** and identify someone to manage the Criminal Corporate Offence requirements. As a minimum a risk assessment should be undertaken and documented with a view to establishing the reasonable procedures which have been, or need to be, put in place. It is possible that existing procedures will not capture all of the relevant risks and these will have to be addressed in a reasonable and proportionate way.

25th November 2019

This is a brief general outline of the new law which incorporated small charities may find useful in addressing the action to be taken. Trustees of small charities constituted as companies or Charitable Incorporated Organisations may need to take professional advice to ensure they and their charity are protected by implementing reasonable procedures.

## Appendix 1- Examples of possible offences

Whilst the precise risks which an incorporated charity faces depends on its individual circumstances the following examples illustrate where the trustees and the charity may be at risk.

**Cash payments to avoid Vat**

A plumber called to repair the charity's boiler suggested to the charity administrator that if he pays in cash his charges will be £200 rather than £240 since he will not be charging Vat. The administrator accepts the lower offer and pays cash without an invoice since the charity is not Vat registered and would not be able to recover the Vat. The plumber will avoid paying Vat and income tax by not declaring the charges for tax purposes. This is tax evasion which has been knowingly facilitated by the administrator, a charity employee.

**Cash payments to an employee**

The charity engages a cleaner who works regular hours during the week. The treasurer, who is a volunteer, does not run a payroll for the charity but pays the cleaner each week in cash as the cleaner has requested since "this will save the charity NIC and I will be better off because the cash will be tax free". This is tax evasion by the cleaner which has been knowingly facilitated by the charity treasurer, its volunteer.

**"Donations" to an incorporated small charity**

A company wishes to make a tax deductible donation to a small charity which has provided benefits in return and subject to conditions which would prevent corporation tax relief being available to the donor company. The donor asks the charity's accountant, its agent, to provide a receipt showing the payment as a donation but with no reference to the benefits and conditions which are recorded separately explaining that this is so that a tax deduction can be obtained. Here the donor is evading tax by claiming a Corporation Tax deduction which is not due and the accountant , an associated person of the charity would be facilitating the evasion by knowingly providing documentation that facilitates that evasion.

**Gift aid declarations**

The treasurer of a small charity is provided by the club's fundraiser (a volunteer) with donations from individuals and the relevant gift aid declarations. He processes the gift aid claims online. The treasurer and fund raiser know that some gift aid declarations are from supporters where the money has come from other people (e.g. collections at work) and other gift aid declarations are purported to be from donors who had never heard of the charity. Gift aid is not due in respect of these gift aid declarations and the treasurer has knowingly facilitated tax evasion by claiming gift aid where it is not due.

**Appendix 2 - Example of possible contents of a risk assessment and mitigation procedures**

**1. Initial risk assessment**

Charity-wide assessment of the areas of potential risk of involvement in the facilitation of tax evasion including consultation with the trustees, employees and volunteers connected with tax and financial matters. Conclusion as to the level of risk including the reasoning behind the conclusion.

**2. Steps taken to mitigate risk (as appropriate)**

Identify and list current procedures to mitigate risk in the areas of -

* trustees setting the tone for the charity,

* recruiting employees and volunteers,

*controls over payments and documentary evidence for services provided and received ,

*training,

*monitoring and controls.

This work should result in a clear policy statement by the Board in relation to the facilitation of tax evasion. It may also suggest additional actions which form a reasonable and proportionate response to any remaining risk not covered by these procedures under the headings below.

**3. Top level commitment**

Annual review of the initial risk assessment to include consideration of any changes in the charity's operations and procedures. The review could be conducted by the charity's treasurer but must be signed off by the Board which should exert its influence over adherence to any procedures which are put in place.

**4. Due diligence**

This should be tailored to the charity's circumstances but should include obtaining a fit and proper persons statement from trustees, employees and volunteers confirming their understanding and complying with the charity's policy of not facilitating criminal tax evasion.

**5. Communication**

The charity's policy should be widely communicated . Employees and volunteers should be advised of the Board's policy that the charity will be apply its disciplinary procedures in the case of employees or other procedures in the case of volunteers if they are guilty of an offence. Any charity rule book or staff manual should contain reference to this.

**6. Training**

Training for trustees, staff , leaders and volunteers where considered appropriate.

**7. Monitoring and review**

In -year reviews of risks where there are new activities or working processes to ensure procedures remain up to date and continue to reflect the charity's needs.

**The risk assessment ,mitigation procedures and any Board policy should be documented with Board minutes recording the consideration of these and the action which needs to be taken.**