

CLAS CIRCULAR 2019/20 (27 November 2019)

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It would be very helpful if members could let us know of anything that appears to indicate developments of policy or practice on the part of Government or other matters of general concern that should be pursued.

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THE NEW CORPORATE CRIMINAL OFFENCE: IMPLICATIONS FOR CHURCHES

For action

Members may not be aware that a new corporate criminal offence of failure to prevent the criminal facilitation of tax evasion was introduced by the Criminal Finances Act 2017.

Trevor James, Chair of the Association of Church Treasurers and Accountants, has written the following advice on how to comply with the legislation. We are grateful to him for permission to circulate it.

This is a brief general outline of the new law which churches may find useful in addressing the action to be taken. Trustees of churches may need to take professional advice to ensure that they and the church are protected by implementing 'reasonable procedures'.

Introduction

Failure to prevent tax evasion is a serious criminal offence. Churches may believe that this does not present a risk to them, *but it is not so.*

From 2017, a new Corporate Criminal Offence of 'Failure to prevent the criminal facilitation of tax evasion' was introduced which impacts on *all* incorporated churches of whatever size. Churches can be incorporated in a variety of ways including by statute, by Royal Charter, by registering as a company or by registering as a Charitable Incorporated Organisation: Parochial Church Councils are also incorporated bodies.

Incorporated churches 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 church e.g. an employee or volunteer, knowingly facilitates someone else's tax evasion.

Evading tax is already illegal (as opposed to *avoiding* tax by legitimate tax-planning – which is legal). Although it has always been illegal deliberately and knowingly to facilitate tax evasion by someone else, historically it has been difficult to prosecute a company or church and the company's directors or the church's trustees for assisting tax evasion. The new law counters this by introducing the new offence. The Corporate Criminal Offence imposes a new legal requirement on the church trustees (such as PCC members, deacons or elders) in the governance of the church.

Main elements

In order for the church to be guilty of the new offence:

- criminal tax evasion (which might be evasion of UK or foreign tax) must take place by a taxpayer,
- an associated person, eg an employee, volunteer, contractor or agent of the church, must deliberately and dishonestly facilitate that evasion; and
- the church must have failed to prevent the associated person from committing the facilitation.

An 'associated person' is broadly defined to include any person providing services for or on behalf of the church. It may include those involved in providing services to outside organisations or others which use the church's facilities, eg for weddings and christenings.

If an offence occurs, the church 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 from committing it, or that it was unreasonable to have such procedures. Examples of where an offence might occur in a church are given in Appendix 1.

There is a self-reporting procedure for churches to notify that they have facilitated tax evasion; if followed, it can be taken into account in deciding whether or not to prosecute.

Reasonable procedures

While the law is not specifically targeted at incorporated churches, they will nevertheless be subject to it and they need to consider whether they have 'reasonable procedures' in place. There are no exemptions for incorporated churches. What is 'reasonable' will depend on the facts and circumstances of each church. HMRC, which 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 six 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 church 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 church has in place.

What happens if a church is convicted of the offence?

Conviction could result in an unlimited financial penalty, director disqualification, trustee disqualification and reputational damage that could have serious effects on the congregation's confidence in the leaders of the church, on the church's reputation, on its fundraising and on its work in the community.

Appendix 1: Examples of possible offences

While the precise risks which a church faces depends on its individual circumstances the following examples illustrate where the trustees and the church may be at risk.

Cash payments to avoid VAT

A plumber called to repair the church's boiler suggested to the church 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 church 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 church employee.

Cash payments to an employee

The church engages a cleaner who works regular hours during the week. The treasurer, who is a volunteer, does not run a payroll for the church but pays the cleaner each week in cash as the cleaner has requested since "this will save the church 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 church treasurer, its volunteer.

"Donations" to a church

A company wishes to make a tax deductible donation to a church 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 church secretary, a volunteer, 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 church secretary, an associated person of the church, would be facilitating the evasion by knowingly providing documentation that facilitates that evasion.

Gift Aid declarations

The treasurer of a church is provided by the church's fundraiser (a volunteer) with donations from individuals and the relevant Gift Aid declarations. He processes the Gift Aid claims online. The treasurer and fundraiser know that some Gift Aid declarations are from supporters where the money has come from other people (eg, collections at work) and other declarations are purported to be from donors who have never heard of the church. Gift Aid is not due in respect of these 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

- Church-wide assessment of the areas of potential risk of involvement in the facilitation of tax evasion including consultation with the trustees of the church (such as PCC members, Deacons or Elders), and employees and volunteers connected with tax and financial matters.
- A 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 church,
- recruiting employees and volunteers,
- controls over payments and documentary evidence for services provided and received,
- training, and
- monitoring and controls.

This work should result in a clear policy statement by the trustees 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 church's operations and procedures. It could be conducted by the church treasurer but it must be signed off by the trustees, who should exert their influence over adherence to any procedures put in place.

4. Due diligence

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

5. Communication

The church's policy should be widely communicated. Employees and volunteers should be advised of the church's policy that the church will 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 rule-book or staff manual should contain reference to this.

6. Training

Training for trustees, leaders, staff 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 church's needs.

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