THE CUP TRUST INQUIRY REPORT OF 18 JANUARY 2019

A report by the Charity Commission for England and Wales about a charity trust involved in an abusive tax scheme.

Charity Commission for England and Wales

1. This report of the Charity Commission for England and Wales (the Commission) into the manner in which The Cup Trust (referred to in the report as the Charity) had operated, and the Commission's response to its operation, was the end result of a long line of controversy relating to The Cup Trust in the UK. The Cup Trust had been registered as a charity on 7 April 2009. However, by 2010 it became common knowledge that it was involved in a tax avoidance scheme (the scheme). There followed litigation, investigations and reports by the Commission in 2010 and 2013, substantial adverse publicity for the Commission, and for charities as a whole, and this Inquiry. The Cup Trust was finally removed from the Register of Charities on 26 May 2017.

2. The scheme was devised and promoted by entities related to Matthew Jenner who was a tax adviser and a director of Mountstar PTC Ltd (Mountstar) until his resignation on 10 April 2014, and subsequent bankruptcy in March 2015. Mountstar, a private trust company incorporated under the laws of the British Virgin Islands, but operating out of Jersey, was the sole corporate trustee of the Charity.

3. The scheme was complex with the following steps:

    a The Charity purchased UK Treasury gilt-edged securities (referred to as gilts) at full value from an entity known as The VL Settlement with the aid of a loan from a foreign-based lender;

    b It then sold these gilts to an intermediary at a nominal value (0.01% of the full value);

    c The intermediary on-sold the gilts to a high net worth UK-based taxpayer at nominal value;

    d The high net worth UK-based taxpayer then sold them at full value back to The VL Settlement and 'donated' the net proceeds of sale plus a small amount (0.02%) to the Charity;

    e The Charity then used these proceeds to repay the loan from the foreign-based lender, retaining the 0.02%;

f By this process, the beneficial ownership of the gilts was transferred from The VL Settlement to the Charity to the intermediary to the UK-based taxpayer and then back to The VL Settlement on the same day.

4. Provided that it was repaid within twenty-four hours, the loan to the Charity was interest free. All of the steps were executed on the same day, virtually simultaneously, and repeated numerous times during the course of the day. The process was facilitated by all steps being transacted by, and all parties utilising, the same bare trustee whose bank account was used, and which held legal title to all of the gilts. All documents were executed by the same attorney, HNW Tax Services.

5. The one-day circular process of financial instrument dealing occurred in ten 'rounds' between 30 January and 28 November 2010. There were 826 transactions involving around 300-400 UK taxpayers with over £176 million of gilts being purchased and sold by the Charity with money borrowed from the overseas lender. This was supposed to represent £176 million of 'donations' to the Charity. The only cash which the Charity retained from the scheme was £155,000 representing the nominal payments made by the intermediary and the taxpayer/donors.

6. Under the scheme, the taxpayers were then able to claim higher rate tax relief on their 'donations', with the Charity claiming gift aid and gift aid transitional relief from Her Majesty's Revenue and Customs (HMRC) on those 'donations'. If the scheme had been successful, the Charity would have received £46 million in gift aid from HMRC, whilst the donors' higher rate tax relief would have netted them £55 million. The gift aid claim was rejected by HMRC in December 2013. HMRC contended that the payments by the taxpayers did not amount to a qualifying donation for the purposes of gift aid because they failed to satisfy the requirements set out in section 416 of the Income *Tax Act 2007*. This contention was ultimately not appealed.

7. On information received from HMRC, the Charity Commission had previously investigated the operations of the Charity in 2010, within seven weeks of the first 'round' of transactions. The Commission identified various areas of regulatory concern: the administration, governance and management of the Charity; the protection of property (including reputation); application of funds; identification and management of risks; and Mountstar's compliance with its duties and responsibilities as charity trustee, particularly in relation to the management of conflicts of interest. However, that investigation was closed on 7 March 2012 because the Commission took the view that it could not deregister the Charity, which had been established for charitable purposes, because it was not for it to find fault with the scheme. That was for HMRC. The Commission merely issued guidance for Mountstar as to the management and recording of conflicts of interest.

8. Ona hearing of the matter, the First Tier Tribunal (Charity) (FTT(C)) was underwhelmed by the Commission's position, and made a highly critical decision in October 2013. Its decision was widely supported and commented upon in the media. The Times and other leading newspapers, prompted by various politicians, published a report criticising both HMRC and the Commission for their lack of action on the scheme. The report described the scheme as 'a massive tax avoidance scam'. The criticism thus moved into the public arena, and the Commission's opening of a statutory inquiry ensued in February 2013. Interim managers were appointed by orders of the Commission on 26 April 2014 and 18 February 2015. The interim managers received court approval to discontinue all appeals against Commission and FTT(C) decisions.

9. The Cup Trust issue received very wide publicity in the UK, raising questions in Parliament and the community about the effectiveness of the Charity Commission as a regulator. The Commission had originally looked at the Cup Trust and its trustee, Mountstar, and found that, although it was clearly a tax evasion vehicle, it had been established for charitable purposes (as defined). The fact that it served as a tax evasion vehicle for the very rich was not a matter within its remit. Moreover, as a bureaucracy, the Commission put its checklists into play, and concluded that conflicts of interest within the Charity had been managed because the Charity had responded to its questions (by its only remaining 'conflicted' director) and had a conflicts of interest policy. The FTT(C) criticised this approach severely.

10. In this report, the Commission explained that :

11. Under charity law, a charity is an institution which is established for charitable purposes only, and which is subject to the charity law jurisdiction of the High Court. The Commission must register any charity which applies for, and meets the legal requirements for, registration. It cannot turn down an organisation for registration if it meets the requirements for registration even though there may be concerns about its management or governance. The purposes of an organisation will in most cases be set out in the legal document which establishes it, which in the case of the Charity was a trust deed. The purposes of an organisation are not the same as the motives of those who establish it, or the activities which it carries out. In other words it is possible for someone to create a charity with the intention of using that charity to do particular things other than furthering the charity's purposes – that does not necessarily mean that it is not a charity…In the case of The Cup Trust, the purposes expressed by the governing document were unequivocal, so there was no scope for the court and consequently the Commission to take either the motive of those setting up the trust or its activities to determine its charitable status in law. If however, a charity carries out activities which are not permitted, that may be a breach of trust for which trustees may be accountable. However, that in itself could not be a reason to conclude that The Cup Trust was not and never was a charity in law. In consequence, it The Cup Trust was properly registerable as a charity at that time on the information known, notwithstanding its later activities in relation to the participation in the Scheme and the wider benefits which might flow to the individual taxpayers in relation to the Scheme. This position was confirmed by independent counsel instructed by the Commission. The Tribunal also subsequently accepted that it was a charity.

12. This position was the very one which was so much criticised in the Tribunal, the government, the media and the wider community. The Commission has subsequently changed its registration processes to ensure that there is now robust post-registration monitoring of charities where there are concerns, or where the Commission has required certain actions at or in connection with registration. Where there is sufficient evidence at registration that an organisation does not meet the legal test to be a charity and so is not eligible to be registered as a charity, applications are now rejected. Where appropriate, the organisation and/or individuals concerned are referred to HMRC and/or other regulators.

13. During 2010-2011, the Charity donated only £55,000 to charities, out of £176 million 'churned' by its activities. The Commission expressed its concerns to the Charity about governance and conflicts of interest, but declined to act further pending the determination of the HMRC on the gift aid question. In this report, the Commission maintained that it had acted appropriately:

14. The Commission's remit is in part to determine whether an organisation is a charity under the law and to ensure trustees comply with their legal obligations in managing charities. It has a statutory function to identify and investigate abuse and mismanagement in charities and, where appropriate, take protective or remedial action. It is for HMRC, not the Commission, to decide the legitimacy or otherwise of tax matters in relation to charities. The Commission's role as charity regulatory therefore focuses on ensuring that trustees discharge their legal duties as charity trustees in managing and administering the charity properly and responsibly. Where issues are raised about taxation matters or concerns about the operation of a charity being examined by other regulators, the Commission considers whether they indicate misconduct or mismanagement in the administration of the charity and whether it needs to protect charity property.

15. However, in light of the public interest in the Charity, the Commission has updated and published further information on charities' fiduciary duties as regards tax matters and its work with HMRC on these issues.

16. The UK government's response was to make new law concerning fundraising by charities. The changes were introduced by the fundraising sections of the *Charities (Protection and Social Investment) Act* 2016*.* These sections were directed at helping charities to demonstrate their commitment to protecting donors and the public, including vulnerable people, from poor fundraising practices. The new law also sought to ensure that fundraising standards form part of the agreements between charities and any commercial participators or professional fundraisers with whom they work. The actions of the professional fundraiser used in The Cup Trust case was an impetus in driving this legislation.

17. There are now two new requirements relating to fundraising:

    1. Where a charity, registered or unregistered, uses a professional fundraiser or commercial participator to raise funds, any compulsory written agreements between charities and these third parties must include extra information covering:

        - the scheme for regulating fundraising or recognised fundraising standards that will apply to the professional fundraiser or commercial participator in carrying out the agreement

        - how the professional fundraiser or commercial participator will protect the public, including vulnerable people, from unreasonably intrusive or persistent fundraising approaches and undue pressure to donate

        - how charities will monitor the professional fundraiser or commercial participator's compliance with these requirements

    2. Where registered charities must have their accounts audited, they must include extra information about fundraising in their trustees' annual report. The extra annual statements should include information about the charity's:

        - approach to fundraising

- work with, and oversight of, any commercial participators/professional fundraisers
- fundraising conforming to recognised standards
- monitoring of fundraising carried out on its behalf
- fundraising complaints
- protection of the public, including vulnerable people, from unreasonably intrusive or persistent fundraising approaches, and undue pressure to donate

18. On 3 May 2017, the Commission made an order under section 181A of the *Charities (Protection and Social Investment) Act* 2016 (*the Act*) to disqualify the company, Mountstar (PTC) Limited, from being a charity trustee for a period of 15 years. Later, on 18 July 2017, the Commission made orders under section 181A of the Act to disqualify Mr Jenner and another trustee of Mountstar, from acting as charity trustees for a period of 15 years. Those orders came into effect on 30 August 2017. A further disqualification order under section 181A of the Act against the third director of Mountstar was made on 24 August 2017 which came into effect on 5 October 2017. No orders for compensation were issued, since Mountstar has no assets, Mr Jenner is bankrupt and the other two directors did not benefit from the scheme.

19. The report concluded with commentary on the need for directors of charities to be aware of their duties and of the need to manage fundraising and taxation matters in an appropriate way.

VIEW THE CASE

The FTT(C) decision from 2013 may be viewed at:
http://www.charity.tribunals.gov.uk/documents/decisions/mountstar-decision-17Oct2013.pdf

This report may be viewed at:
https://www.gov.uk/government/publications/the-cup-trust-charity-commission-inquiry-results/the-cup-trust-inquiry-results-formerly-a-registered-charity

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