

BOOTLEGGING AND DUTY EVASION

Nearly the oldest profession - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

The phrase 'bootlegging' is centuries old. It emanates from returning sailors who would hide alcohol in their boots – away from the sight of the duty men at the ports. Smuggling can of course take on many forms from simple 'booze cruise' overloads through to drugs, guns, counterfeited products and even people smuggling. The real money lies not so much in the profit from smuggling in a prohibited commodity, but in the evasion of tax and duties on perfectly legal commodities. This is especially so in the thriving 'missing-trader' VAT frauds and duty diversion conspiracies. In this article we consider a few of the offences and give a brief over-view of what legal challenges to expect if you are charged.

SECTION 170

There are numerous offences which fall into the bootlegging or evasion categories. By far the most popular offence used by prosecutors is s170 of the Customs and Excise Management Act 1979 – or conspiracy to commit such an offence under (an offence under the Criminal Law Act 1977). In this short article we cannot do justice to the many intricacies that s170 throws up but if you are alleged to have committed an offence under this section you will know that the prosecution have the advantage of an offence which casts a very wide net. The section creates two offences; section 170(1) provides that it is an offence to knowingly acquire goods for which duty has not been paid or be knowingly concerned in dealing with such goods with intent to defraud Her Majesty of payable duties. Section 170(2) provides that it is an offence to be "knowingly concerned in any fraudulent evasion of any prohibition" on the import of goods. Basically s170(1) applies to legal goods that tax should be paid on, e.g. cigarettes and s170(2) applies to prohibited goods, e.g. cocaine. Section 170(2) does not make the cocaine prohibited – that is done by the Misuse of Drugs Act 1971; the importing of goods prohibited by the 1971, or any other Act, is unlawful under s170(2).

IMPORTATION

In importation cases the battleground is likely to be the state of knowledge or involvement of the Defendant – i.e. was he 'knowingly concerned', or acting with the required intent under s170(1)? The Crown have to prove this element and in most disputed cases this will involve inferences from facts. For example a covert surveillance operation showing the Defendant meeting persons who

are involved in the importation and/or a series of phone calls at critical times – the defence have the job of working to rebut these inferences.

In *Neill v H.M. Advocate*, 1986 SCCR 288 it was held that to be 'concerned' in the importation of goods, a person has to be involved in the enterprise in some way and must have accepted a role to be performed if circumstances so required. It is here that prosecutors can sometimes over egg the pudding and ascribe a role to a Defendant that does not match his true role. Of course the jury could still find the Defendant guilty but any party to litigation that pins their colours firmly to the mast risks their case being severely weakened if their theory of the case can be demonstrated to be false. All of course is dependent on the facts of the case; a person may have some knowledge of what is going on without having a true role – on the other hand the facts may lead to an irresistible inference of knowledge. Assessing properly how much to reveal at the interview or Defence Statement stage is often the key in advancing the defence case.

A common theme in importation cases is the situation where someone accepts involvement in an illegal importation but claims not have known that the goods were really drugs – 'I thought it was cigarettes!'. This is a defence to a s170(2) case as that subsection applies to prohibited goods and cigarettes are not prohibited. But if the suspect admits that he knew he was involved in a drugs importation, but thought it was cannabis (Class C) and not cocaine (Class A) then he will still be guilty under s170(2) – because although the two drugs carry different sentences the actual offence is the evasion of the prohibition rules. There is a certain amount of confusion over this because the situation is different if the charge is conspiracy to contravene s170(2). In that situation the prosecution must prove that the agreed course of conduct was to import cocaine, because the essence of the offence is in the agreement – not the actual import; the prosecution cannot prove agreement to import heroin by proving an agreement to import cannabis; see *R v Taylor* [2002] Crim L.R. 205.

MTIC

Missing Trader Intra Community (MTIC) VAT frauds (or carousel frauds) have been the topic of much discussion recently. The basic idea is that goods, usually high value technical goods such as mobile phones, CPUs or other

computer chips are imported VAT free from E.U. countries. The goods are then sold on at VAT inclusive prices and the original dealer would then disappear without paying the VAT to the authorities. This basic operation would usually occur through a series of companies all liable to pay VAT. Sometimes the goods are re-exported back to the E.U. at which point the exporter reclaims the VAT from HMRC.

In large operations the trick is to understand completely how the prosecution link the various lines, or chains of companies. Conspirators may be accused of being party to a sham company or to allowing their company to 'go to the wall' – i.e. the companies VAT number will be used until the, up to then, legitimate company then disappears. These frauds are taken very seriously as they are costing the Government billions in lost revenue. Establishing patterns of trading is what both the prosecution and defence will probably have to concentrate on as well as possibly a consideration of lifestyle issues.

Traders may find themselves under suspicion purely because they have started to import CPUs, or mobile phones – the first a suspect may know that he is in trouble is being told that his bank account has been frozen by way of a Crown Court Restraint Order under the Proceeds of Crime Act 2002 and also possibly being served with orders for disclosure of documents. There will then be immediate problems as to living expenses and possible variation applications as the suspect – who may not have even been questioned by police at this stage, struggles to keep his life and business afloat.

The biggest problem the Crown has had is dealing with the purchasers who all claim to be innocent. They are entitled to claim back the VAT that has been paid out by them. The Government's approach was simply not to re-pay these sums – the justification being that the deals were non-commercial for VAT purposes and therefore no rebates were necessary. Customs were challenged and they lost. In a High Court reference to the European Court of Justice the Court held that in the UK's approach to tackling carousel frauds it was wrong to refuse to grant VAT rebates to innocent third party companies caught up in the scam; *Optigen Ltd & Fulcrum & Ors v Commissioner of Customs and Excise* (OJ C251 of 18.10.03).

The reaction to this judgement has been the recent introduction in Parliament (House of Commons 5th July 2006) of a proposed 'reverse charge'; i.e. it is proposed that it will no longer be the seller's responsibility to account for and pay VAT to HMRC but that of the customer in the case of the sale of certain hi-tech goods.

DEFENCE INVESTIGATION AND PREPARATION

As long as there are taxes there will be bootleggers and tax evaders and, of course, 'duty men' to pursue them.

Given the broad variety of prosecutions there can be no general advice to those faced with a 'cheating the revenue' type prosecution. But it is always worth remembering that despite the resources that State puts behind prosecuting these cases the authorities, can and do get it wrong just as much as they can and do get it wrong in any other type of criminal case. There are pitfalls for the Crown; their case may sometimes be just too complex for a jury to be sure; they might confuse knowledge with participation in an importation case or the defence, through sheer hard work, may be able to show that a 'rogue trader' is in fact a legitimate business man just trying to do his best. There might, in some cases, have to be a great deal of investigative or accountancy work to be undertaken by the defence team – or it simply may all come down to inferences from some phone traffic. Whatever the case, as usual, early preparation and keeping the maximum pressure on the prosecution, is the only key to a successful outcome.

AUTHORS

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