

FRAUD: TAX EVASION & MONEY LAUNDERING

The new favourites - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

In this short article we highlight the increasing importance of tax fraud type offences and money laundering cases.

THE FRAUD ACT 2006

It is impossible to write an article on fraud and not mention this statute. However, for these purposes the Act is almost irrelevant. The Act abolished all the deception offences in the Theft Acts of 1968 and 1978 and created, by s1(1), one new offence of 'fraud' which could be committed in three different ways. However, the Act did not repeal any of the offences which can be described as offences against the revenue; e.g. s72 of the Value Added Tax Act 1974 on VAT frauds.

TAX FRAUD

The common law offence of cheating the public revenue is perhaps the easiest route for the Crown to take as all the prosecution have to prove is that the Defendant made a false statement with intent to defraud the revenue; *R v Hudson* [1956] 2 QB 252. In fact in *R v Mavji*, 84 Cr. App. R 34 the Court of Appeal held that an actual act of deception is not necessary - the offender in that case did not complete a VAT return or pay his VAT bill - that was enough as he was found to have (not) done so with the necessary dishonest intent.

Alternatively, in respect to specifically Income Tax, Her Majesty's Revenue & Customs (HMRC) have the option of the statutory offence under s144 of the Finance Act 2000 for those 'knowingly concerned' in the 'fraudulent evasion' of income tax.

In the end whether the offence you are charged with is s144 of the Finance Act 2000 or the common law offence of cheating the revenue, the ultimate question will be whether there was an intent to defraud - i.e. was the Defendant acting honestly or not?

Typically, in any fraud case, there will be the highlights; that is key 'facts' that the Crown concentrate on, i.e. particular invoices, particular dates and your answers to the interrogators in interview. Obviously the defence team has to identify the prosecution 'highlights' and know them well at an early stage but often though the answer will be in drawing the jury's attention to other aspects of the case and laying the groundwork for that well - aspects

like the Defendant's character or business practices or the more technical aspects such as patterns in the invoices that tend to show a leaning towards late payment rather than non-payment, or material which shows that you have declared monies that might have been missed or not claimed against valid receipts etc etc.

Careful drafting of the Defence Statement is often critical in tax fraud cases. The fruits of your defence may lie in showing documents to the jury which tend to support your case - documents which perhaps you don't even know exist. In *R v Oliver* [2007] EWCA, Crim 2220 the Court were concerned with a large scale VAT carousel fraud. The case was stayed as an abuse of process because of non-disclosure by HMRC. This included the fact that the schedules of unused evidence did not list substantial quantities of material that had been gathered from third parties. This assisted in one of the Defendant's cases as it showed certain trading associations which was important in the context of his defence.

MONEY LAUNDERING

There are three main offences created by POCA which carry penalties of up to 14 years imprisonment. They are s327 - concealing, disguising, converting or transferring criminal property, or removing it from the jurisdiction. Section 328; is entering into, or becoming concerned in an arrangement to facilitate the acquisition, retention, use or control by, or on behalf of another person, of criminal property knowing or suspecting that the property is criminal property. Section 329 is the offence of acquiring, using or having possession of criminal property.

'CRIMINAL PROPERTY'

The lynchpin of the 3 offences is the notion of 'criminal property'. The prosecution have to prove that the property, whether it is cash, a house, a car or whatever it is is 'criminal property'. This is defined at s340(3) as property which represents a benefit from criminal conduct, either directly or indirectly, in whole or in part, so long as the launderer 'knows or suspects' that the property represents such a benefit. The Crown has to show that the alleged launderer committed the relevant act (i.e. transfer, concealing etc) knowing or suspecting that the property derived from criminal conduct.

The prosecution will normally attempt to prove that

a Defendant 'knew' or 'suspected' either by prosecuting the principal offence - drug trafficking etc on the same indictment or rely on circumstantial evidence to try and prove that the money was criminal property. In R v Da Silva [2006] EWCA Crim 1654, 11/7/06 the Court of Appeal considered that 'suspicion' meant that "there is a possibility, which is more than fanciful that the relevant facts exist. A vague feeling of unease would not suffice."

Of course the circumstantial evidence which the prosecution may bring to Court can be quite damning at first sight, e.g. large sums of cash, contaminated notes, lies in interview and a lack of commercial sense in some transactions - linked possibly with connections to anyone accused or convicted of a principal offence. So rebutting inferences can be a very significant part of the job of defending. It may lead to the instruction of an expert, for example an auditor with knowledge of the particular business area in question. The expert may be able to help rebuttal by comparing the business with other like businesses in the area and/or show the existence of a reasonable audit trail to try and make the Crown's case look like no more than mere speculation. A Judge may then be persuaded that your case is suitable for the 'circumstantial evidence' direction to the jury whereby he or she will remind them that before they can convict on circumstantial evidence alone they have to consider whether that evidence reveals any other explanations 'which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case' - so if there is another plausible explanation that direction will strongly point towards an acquittal.

A recently decided case called R v NW, SW, RC & CC [2008] EWCA Crim 2, 23/1/08 is important for Defendants in money laundering cases. In that case the Court of Appeal confirmed that the Crown could not simply point to un-explained wealth and assert that there was no legitimate explanation and therefore it must be from the proceeds of crime - i.e. be criminal property. The Court felt that the Crown had to identify the criminal conduct or at least the category of criminal conduct alleged to have generated the money.

TAX EVASION AS MONEY LAUNDERING

In R v IK [2007] EWCA Crim 491, 8/3/07 the question for the Court was whether the proceeds of cheating the revenue could be 'criminal property'. In a nutshell a legitimate trader had earned legitimate money undertaking a legitimate business (a shop). However, the allegation was that not all the income was declared - thus cheating the revenue. The Crown prosecuted a money laundering offence but the trial Judge ruled that there was no 'criminal property' - the money did not come from an actual crime. Following a prosecution appeal the Court of Appeal found that the undeclared income could in part 'represent' the proceeds of crime, as that undeclared amount would be representative of the 'benefit' of tax evasion.

In conclusion, there can be no doubt that the State will always maintain as many possible offences as possible when it comes to offences against the revenue, the plans to scrap jury trials in certain fraud cases must be fought tooth and nail as the bottom line is always the question of the honesty and integrity of the Defendant and who better placed to decide that question than a properly directed jury?

AUTHORS

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