

BOOTLEGGING AND DUTY EVASION

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

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. We attempt here to look at a few frontier type offences – both old and new.

SECTION 170 - CIGARETTES, ALCOHOL & DRUGS

The prosecution of the standard booze cruise excise duty evasion is now much less common as there is no presumption that a certain amount/literage cannot be for personal use. There are however still numerous offences which fall into the boot-legging 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 that offence (conspiracy being 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 which are prohibited by the 1971, or any other Act, is unlawful under s170(2).

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 *Mac 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.

CAROUSELS

Missing Trader Intra Community (MTIC) VAT frauds (or carousel frauds) are highly lucrative scams that attack the VAT system. 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. The goods may then come back to the original importer and the circuit (carousel) starts again.

Innocent traders may be used by those intent on defrauding the Revenue. 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 disappears.

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 repay 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 introduction of a 'reverse charge'. From 1st June 2007 this applied to high value electronic goods such as mobile phones and CPUs as they were the very goods that the MTIC fraudsters were trading in. The reverse charge works by levying the VAT on purchase rather than sale, thus the purchaser shells out directly to HMRC rather than to the company that sold him the goods. This has been having an impact already and MTIC frauds appear to have declined. However, the reverse charge will not solve the problem as the fraudulent traders will inevitably move to trading in VATable goods other than high value electronic goods.

FUEL

The evasion of excise duty on fuel has been around for years e.g. by the use of non-road diesel (red diesel) diverted for road use. Another fraud is the use of rebated oil i.e. oil that has a much lower level of excise duty than Diesel Engine Road Vehicle fuel (DERV) and the mixing of that product with DERV to 'extend' or 'blend' the fuel. Sometimes this rebated fuel will be purchased on the continent and though no duty evasion occurs at the frontier the purpose is to make a much higher mark up on

the sale of road fuel. Such fuels can damage engines and, as you might imagine, HMRC takes their investigation of these matters very seriously.

As traders in oil now largely have to be Registered Dealers in Controlled Oils (RDCOs) and therefore complete paperwork for sales the issues will often be similar to an alcohol diversion fraud where invoices etc are said to be fraudulent however in the case of oil frauds there is usually also a government chemist testing the product and confirming that rebated fuel (e.g. kerosene) has been mixed with DERV.

CONCLUSION

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. 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

Jonathan Lennon is a Barrister specialising in serious and complex criminal defence case at 23 Essex Street Chambers in London. He is a contributing author to *Covert Human Intelligence Sources*, (2008 Waterside Press) and has extensive experience in all aspects of the Proceeds of Crime Act 2002.

Aziz Rahman is a Solicitor- Advocate and Partner at the leading Criminal Defence firm Rahman Ravelli Solicitors, specialising in Human Rights, Financial Crime and Large Scale Conspiracies/Serious crime. Rahman Ravelli are members of the Specialist Fraud Panel.

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CONTACT US

Rahman Ravelli Solicitors

Saracen House, 10 Pellon Lane, Halifax, HX1 5SP
DX 16001 Hx1
Tel: 01422 346666 (24HR)
Fax: 01422 430526

enquiries@rahmanravelli.co.uk

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