

TAX AND THE PROCEEDS OF CRIME

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The phenomenon of money laundering has arisen because of the combination of two factors: offshore tax havens and electronic banking transactions. In respect of the first of these factors, the problem is magnified by the fact that such a large proportion of the world's money is held in offshore centres. Whilst initially the offshore centres acted as means of reducing tax liabilities, they are now also regarded, to an extent, as black holes hiding criminals from investigation by offering relaxed nominee company rules, banking confidentiality and less regulation (although, it has to be said, the offshore centres themselves object strongly to this view of their activities). In respect of the second of these factors, the ever-advancing possibilities of modern technology means that cash paid into a bank account can be easily transferred around the world with very few questions asked and in such a way as to destroy any audit trail. Responses to the problem of money laundering have come in a variety of forms – the Vienna Convention, the Council of Europe Convention and national legislation.

The UK government's most recent response is in the form of the Proceeds of Crime Act 2002 ("PCA"). The PCA provides the courts with a new set of powers to inquire into and restrain a person's assets and income where it is suspected that they are the "proceeds of crime". The legislation is drafted extremely widely indeed. In addition to creating offences, its main objective is to facilitate the recovery of both laundered

and un laundered illegally obtained property. It effectively provides a mechanism for the State to obtain restitution from criminals on a broad basis.

A central distinction of the legislation is the divide between confiscation and money laundering investigations (which fall exclusively within the jurisdiction of the Crown Court) and the new civil recovery investigations (where jurisdiction is reserved to the High Court).

In a tax setting, the PCA gives rise to two implications. First, tax crimes will act as a trigger to liability. Secondly, the wide ranging armoury of remedies includes “revenue powers”. I deal with each of these implications in my analysis of the criminal and civil regimes under the PCA. But before I do, it is worth mentioning that the PCA also establishes an administrative body (the Assets Recovery Agency) to conduct confiscation and civil recovery investigations. It effectively establishes a body of financial private investigators. At the head of this agency is the Director, who is responsible for fulfilling the functions of the legislation.

Criminal regime

There are two types of offences which will trigger liability under the criminal regime within the PCA. The first type of offence is obtaining a benefit from criminal conduct. The second type of offence is money laundering.

Obtaining a benefit by Criminal Conduct:

Where an individual has been convicted of an offence in the Crown Court from which he has received a benefit from his criminal conduct, the Director may request that the Crown Court makes a confiscation order equal to the amount of the benefit. The standard of proof in establishing the obtaining of such a benefit is the civil standard (the balance of probabilities)¹. The individual will then be required by the confiscation order to pay the amount of the benefit to the Director. A person benefits from criminal conduct where he obtains property or a pecuniary advantage² as a result of or in connection with the criminal conduct. In a tax context, where an individual has been found guilty of carrying out a fraud on the Inland Revenue which causes an evasion of tax, the amount of the unpaid tax will be treated as a pecuniary advantage³.

This, of course, then invites the question: “what is the actual value of such a pecuniary advantage?”. On the basis that the tax which has been evaded will be a debt owed by the individual to the Revenue, is the value of the pecuniary advantage to be assessed by reference to the value of the unpaid tax debt or the amount of the tax evaded⁴? One might argue that as a matter of logic it ought to be the value of the unpaid debt. However, in my view, the authority of *R v. Dimsey and Allen*⁵ and indeed the legislation itself, indicates that the value of the pecuniary advantage will be the amount of the tax evaded. It is also worth noting that under this heading, offences of attempting, conspiring or inciting, aiding and

abetting, counselling or procuring an offence will result in the same consequences under the PCA as apply to the substantive offence. Thus, an adviser who is guilty of, say, procuring the evasion of tax by a client will be liable under the PCA and any benefits received in the course of that procurement (e.g. fees) will be subject to the powers of the Act.

Money Laundering

Central to the money laundering offences created by the PCA⁶ is the concept of “criminal property”. The term “criminal property” carries with it the mental element of the offences. However, the question of who carried out the underlying criminal offence or who primarily benefited from it are irrelevant to the determination of whether or not property is “criminal property”⁷. These provisions essentially make it an offence to conceal, disguise, convert, transfer or remove criminal property from England and Wales. Furthermore, the use or possession of criminal property is also an offence. In the context of tax evasion, this is unlikely to materialise in practice, for the simple reason that it is extremely difficult to launder a tax liability. If the “criminal property” in such a case is the amount of tax evaded, unless there is a clear allocation of funds to meet that liability which have not in fact been so used, it is extremely difficult to see how it might be established that any particular fund of money constitutes the tax liability.

The maximum term for money laundering offences is 14 years.

Civil Regime

The advantage of proceeding under the civil regime is that no criminal conviction is required in the first instance in order to trigger the liability. The standard of proof with regard to all matters is thus always the balance of probabilities. Under the civil regime, the Director may bring an action for an order to recover property obtained through unlawful conduct⁸. “Unlawful conduct” is defined by reference to criminal law⁹. Whilst determining the criminal law of England and Wales will be relatively straightforward, determining the criminal law of a foreign jurisdiction will be more difficult – it is a question of fact for the court¹⁰ to be determined by evidence from experts within that foreign jurisdiction.

These powers are exerciseable whether or not criminal proceedings are brought in respect of the criminal activity and regardless of the outcome of any such criminal proceedings as might be brought¹¹. However, if a confiscation order has already been made under the criminal regime in respect of the property, the Director cannot achieve double recovery

Property recoverable under this regime includes all forms of property (such as things in action and other intangible property). As far as tax evasion is concerned, it is submitted that the unpaid tax will again amount to “property” for these purposes, with the value of the property being determined by reference to the amount of tax evaded. It is briefly worth noting that the civil regime provides a legislative mechanism whereby the Director can trace property into the hands of another person or

into new property as if he had a proprietary interest in the property¹². All the Director must show is that the property was obtained by the unlawful conduct of one person. The recipient may be entirely ignorant of such conduct and yet the property may still be traced into his hands. It should also be noted that the usual shortcomings of tracing property under the common law (namely, the inability to trace into a mixed fund) and in equity (namely, the requirement for the wrongdoer to be in breach of a fiduciary duty) are sidestepped by the PCA. These statutory rules enable property to be traced into a mixed fund and a proportion of that fund recovered¹³. The statutory rules do, however, still preserve a defence against the tracing of property for equity's darling, the bona fide purchaser¹⁴. However, as noted above with regard to the money laundering offences, it will only be in exceptional cases that this remedy is relevant in a case of tax evasion, as ordinarily it will not be possible to show the movement of a tax liability.

Revenue Powers

The general purpose of the PCA is to provide as many powers for the recovery of the proceeds of criminal conduct as possible. Clearly confiscation, forfeiture and civil recovery are the most direct methods of achieving that purpose. However, one of the most innovative remedial powers is the creation of "revenue powers". This novel remedy is perhaps an acknowledgement that there may be situations where the evidential thresholds required for exercising the

alternative remedial powers¹⁵ may be unachievable, but the investigation has uncovered substantial income which an individual has not declared for tax purposes.

Part 6 of the PCA permits the Director to take over the functions normally exercised by the Commissioners of Inland Revenue in respect of a person's tax affairs over a specified period. Indeed, the Revenue have a statutory duty to co-operate with the Director in the exercise of his functions¹⁶. The qualifying conditions for the Director to acquire revenue powers are that the criminal conduct has given rise to income, chargeable gains or profits¹⁷. There are also provisions which provide for inheritance tax where the value transferred is attributable to criminal property or where criminal property is settled¹⁸. When the qualifying conditions are met, the Director may serve a notice on the Revenue, which automatically vests in the Director all the Revenue's functions, save as to the PAYE and NICs requirements of a company, for the specified period¹⁹. In exercising his Revenue powers, the Director must interpret the law in accordance with any published concession or treatment of the Revenue²⁰. However, to assist him in recovering tax due from income or gains obtained from criminal activity, the Director is not required to prove the source of any income, unlike the Revenue²¹. As long as he can show that income was received by the individual he may raise an assessment in respect of it.

The underlying rationale for this provision is that if the source of the profits can be ascertained the Director

is likely to simply use the ordinary civil recovery remedies. It is precisely the situation where the Director can prove that profits have been received but their source is unknown that he is likely to want to use his revenue powers. Appeals from the Director's exercise of revenue powers lies to the Special Commissioners²². One interesting feature of these appeals will be the interaction of the Human Rights Act within such appeals. The Director will presumably be required to show the criminal conduct underlying the assessment and it remains to be seen whether such an allegation will be construed as a criminal charge within the meaning of the Convention.

Conclusion

The PCA introduces powerful machinery for the State to collect the ill-gotten gains of criminals. In particular, the remedial powers contained therein are ground-breaking and create a mechanism whereby the State can recoup lost tax on the proceeds of crime arising within the black economy which might otherwise never be subjected to tax.

It will be interesting to see how often the Director invokes his revenue powers in practice and indeed the attitude of the Revenue towards the usurpation of their jurisdiction.

¹ See s.6(4)(c) of the PCA..

² See s.76(4) of the PCA..

³ See *R. v. Dimsey and Allen* [2001] Cr. App. R (S) 497.

⁴ The quantum of the benefit is dealt with in sections 78 to 81 of the PCA..

⁵ [2001] Cr.App.R (S) 497.

⁶ See sections 327 to 330 of the PCA..

⁷ See s.340(4) of the PCA..

⁸ See s.240 of the PCA.

⁹ See s.241 of the PCA..

¹⁰ See s.15 of the AJA 1920.

¹¹ See s.240(2) of the PCA..

¹² See s.304(2) and (3) of the PCA..

¹³ See s.306 of the PCA..

¹⁴ Query the applicability of other restitutionary defences, such as change of position.

¹⁵ For example, where the criminal property has been dissipated and it is not possible to trace it into the hands of another or into any replacement property.

¹⁶ See s.4 of the PCA. Other organisations responsible for the investigation or prosecution of offences have the same duty e.g. the Police, the Crown Prosecution Service and Customs & Excise.

¹⁷ See s.317(1) of the PCA..

¹⁸ See ss.321 and 322 of the PCA.

¹⁹ See s.317(3) of the PCA.

²⁰ See s.324 of the PCA.

²¹ See s.319(1) of the PCA.

²² See s.320 of the PCA.