
The Personal Tax Planning Review

CRIMINAL LIABILITY IN RELATION TO TAX

Michael Jump¹

Introduction

Certain recent convictions upheld in the Court of Appeal have demonstrated the exposure of professional tax advisers to the general criminal law. The purpose of this article is to highlight the relevant areas and offer observations.

OFFENCES UNDER THE GENERAL LAW²

CONSPIRACY

A conspiracy may be either statutory or common law.

Statutory conspiracy

A person agreeing with any other to pursue a course of conduct which if carried out in accordance with their intentions, either:

- (1) will necessarily amount to, or involve the commission of, any offence³ or offences by any one or more of the parties⁴ to the agreement; or
- (2) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible;

¹ Michael Jump, Head of Tax Chmbers at 24 Old Buildings, Lincoln's inn, London WC2A 3UJ. Tel: (0171) 2744 Fax: (0171) 831 8095.

² Other than under the Taxes Act.

³ Offence here meaning an offence triable in England and Wales.

⁴ See below as to parties.

is guilty of conspiracy to commit that offence or offences in question.⁵

Incitement to commit the offence of statutory conspiracy is not of itself an offence.⁶ A 'tax' offence would normally be a conspiracy to deceive the Revenue either by false⁷ answers to questions or the submission of false accounts or comparability.⁸

Common law conspiracy

At common law, a person who enters into an agreement with another to defraud any other person (that other person would of course include the Revenue) is guilty of an offence at common law. Apart from conspiracy to defraud or (not here relevant) conspiracies to corrupt public morals or to outrage public decency, the offence of conspiracy at common law has been abolished.⁹

Conspiracy to defraud

A person who agrees with one or more others by dishonesty^{10 11}:

⁵ Criminal Law Act 1977 s.1(1) (substituted by the Criminal Attempts Act 1981 s.5(1)(i)).

⁶ Ibid s.5(7) amended by the Criminal Attempts Act 1981.

⁷ As to misleading, see *Accurate but potentially misleading answers* below

⁸ To knowingly misdescribe undoubtedly non-allowable business entertainment business expenses as deductible "conference fees" in the hope that the Revenue will allow them without further analysis.

⁹ Ibid s.5(1). The incitement to commit a common law conspiracy is not an offence.

Ibid s.5(7) amended Criminal Attempts Act 1981, s.10, schedule part 1.

¹⁰ In determining whether a person acted dishonestly the test is (a) that his actions were dishonest according to the ordinary standards of reasonable and honest people; and (b) if so, whether he himself realises his actions were, according to those standards, dishonest. *R v Ghosh* [1982] QB 1053, 75 Criminal Appeal Reports 154 CA.

¹¹ But it is unnecessary to give a direction as to the meaning of 'dishonesty' unless there is a defence that the actions were not, according to ordinary standards, dishonest: *R v. Roberts* (1987) 84 Criminal Appeal Report CA.

It is irrelevant if, say, the fraud does not affect the tax liability of a particular person in respect of an accounting period but rather causes some other tax advantage to arise, e.g., a more flexible trading loss is obtained instead of say, a capital loss.

- (a) to deprive a person of something which is his or to which he would or might be entitled; or
- (b) to injure some proprietary right of a person,

is guilty of conspiracy to defraud at common law.

In relation to defrauding a person performing public duties (as distinct from a private individual) it is sufficient if the purpose is to cause him to act contrary to his public duty and the intended means of achieving this purpose are dishonest. The purpose need not involve causing economic loss to anyone¹². In the case of Revenue frauds the conspiracy is of course to cause the Commissioners of Inland Revenue to agree a liability otherwise than in accordance with their duty.

The essence of both statutory or common law conspiracy is the fact of combination by agreement, which **agreement** may be wholly or partly or a combination of express or implied. The conspiracy arises (and the offence is committed) as soon as the **agreement** is made and continues so long as the combination exists, meaning until the conspiratorial agreement is ended by completion of its performance or the abandonment or frustration of its purpose. The '*actus reus*'¹³ in a conspiracy is the agreement to execute the unlawful conduct not its execution. It is not enough, however, that two or more persons have pursued the same unlawful conduct at the same time, unless they did so as a result of a meeting of minds.

The mental element: mens rea

The Criminal Law Act 1977 defines the '*mens rea*'¹⁴ in all statutory conspiracies¹⁵. It is thought that for a Revenue crime the essential elements are intention (which would include knowledge), or recklessness, as in civil fraud¹⁶. It is no defence to say that the intended course of conduct could not in fact have been pursued, since the offence is the agreement to pursue it. The essential

¹² *Scott v Metropolitan Police Commissioner* [1975] AC 819 at 841; also *Welham v DPP* [1961] AC 103.

¹³ The criminal act.

¹⁴ The guilty mind.

¹⁵ s.1(1).

¹⁶ *Derry v Peek* (1889) 14 AC 337 (HL); civic fraud: reckless and careless whether the statement be true or false.

ingredient of a Revenue common law conspiracy consists in the intention of carrying out any unlawful elements in the conduct contemplated by the agreement with knowledge of other facts which would render the conduct unlawful. Mistake of law will not be a defence but belief in a state of facts which, if true, would render the unlawful conduct lawful may be an answer.

Parties to the agreement

A person is not guilty of conspiracy to commit a Revenue offence if the only other person with whom he agrees to commit it is his spouse or a person under the age of criminal responsibility, but spouses may be guilty as co-conspirators if others (e.g., advisors) are concerned.

Where a statute exempts a particular person or class of persons from liability for an offence it does not necessarily follow that that person, or a person belonging to that class, cannot be convicted of conspiring with another to commit the offence. The question must be determined by considering the purpose of the relevant provision. Where one person is immune from liability, whether in respect of the crime itself or the conspiracy to commit the crime, another who agrees with him to commit that crime may be convicted notwithstanding the immunity of the former.

Conspiracy in relation to tax

The normal offence will be the submission of false returns or accounts or the supplying of false information. Persons will normally know whether or not the information which is to be supplied is false, and the attitude of the court in a recent trial emphasised the need to be particularly careful in answering Revenue enquiries; particularly if those enquiries are from Enquiry Branch or of an investigative nature. This applies even more forcefully if the questions are raised under specific statutory powers given to the Revenue in order to enable them to obtain information.

Accurate but potentially misleading answers

There has been the view that provided the statements made are factually correct the taxpayer is not at fault if the answer is not the whole story which, if sufficiently probed by the Revenue, would (say) set them off on a course of further enquiry. An instance is where the Revenue are seeking to probe into the beneficial ownership of a non-resident company. The word 'beneficial' is capable of a number of meanings. It is thought that it is unwise to treat even a carefully drafted enquiry from the revenue as if it had been drafted by a technician and, for instance, answer 'No' simply because there is some arrangement as a result of which a certain person is not technically a beneficial owner. Such an answer might be said to be misleading. The better course of conduct for those managing non-resident companies may be to say that whilst the company will give every co-

operation required in relation to the determination of its own tax liability those concerned are not prepared to provide further information. This may well be reasonable not only because such persons may be under contractual liabilities in the country where situated but also because they may be risking giving an incorrect answer and imperilling themselves.

FORGERY

It would hardly seem necessary to remind that forgery is an offence, but what may be overlooked is that ante- or post-dating documents is forgery. If a person makes¹⁷ a false instrument with the intention that it be used to induce somebody to accept it as genuine, and by reason of so accepting it to do or not do some act to his own or any other person's prejudice¹⁸, he is guilty of forgery. Backdating of a document is forgery.

If a person makes a copy of an instrument which is, and which he knows or believes to be, a false instrument with the intention that it be used to induce somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice, he is also guilty of an offence.

Use of an instrument which is and which is known or believed to be false with the intention of inducing somebody to accept it as genuine and by reason of so accepting to do or not to do some act or omission to his or any other person's prejudice is an offence; the submission of a copy of a back-dated document, if the back-dating were known, would be an offence.

PERJURY

The offence

Broadly, an offence committed by witnesses in proceedings: if any person lawfully sworn¹⁹ as a witness or as an interpreter in a judicial proceeding²⁰ wilfully

¹⁷ A person is to be treated for these purposes as making a false instrument if he alters an instrument so as to make it false in any respect whether or not it is false in some other respect apart from the alteration: Forgery and Counterfeiting Act 1981 s.9(2).

¹⁸ An intention that the instrument should be accepted as genuine is not sufficient; there must also be an intention to induce the recipient to act or omit to act to his own or another person's prejudice: *R v Tobierre* [1986] 1 AER 346, 82 Criminal Appeal Reports 212 CA.

¹⁹ As to lawfully sworn, see next paragraph.

makes a statement, material in that proceeding, which he knows to be false or does not believe to be true²¹, he is guilty of perjury²².

Sworn

To be lawfully sworn the formalities are immaterial if the court or person for whom the oath is taken²³ has power on oath for the purpose of verifying the statement in question and if administered in a form which the witness accepts, without objection, to be binding.

Judicial proceedings

A statement is made in judicial proceedings if made in proceedings before any court, tribunal or person having by law power to hear, receive, and examine evidence on oath: this would include Commissioners. It is not necessary that the statement should be before the tribunal if made, for instance, in an affidavit to be put before the tribunal, and the offence is committed by a person lawfully sworn in England for the purposes of a judicial proceeding in another part of Her Majesty's dominions or in a British tribunal lawfully constituted in any place outside those dominions or in a tribunal in a foreign state.

Material

Whether or not the statement is material is a matter of law to be determined by the trial court but the test is whether the statement might have affected the outcome of the proceedings, not that it would have done so.²⁴ The statement may be material if it induces the court to believe a substantial part of the witness's evidence or a material part, or if it induces the court to admit other material evidence. A statement as to a witness's credit can be material.

Offences akin to perjury

If any person being required or authorised by law to make any statement on oath for any purpose and being lawfully sworn otherwise than in a judicial proceeding

²⁰ As to judicial proceedings, see below.

²¹ Swearing to a fact without then knowing whether it was true or false is perjury and it seems that it may well be sufficient if the person does not believe the statement to be true even if, in fact, true.

²² Perjury Act 1911 s.1(1); Criminal Justice Act 1940 s.1(1),(2).

²³ Or affirmation made.

²⁴ *R v Millward* [1985] QB 510, 80 Criminal Appeal Reports 280 CA.

wilfully makes a statement which is material and which he knows to be false or does not believe to be true, he is guilty of an offence²⁵.

Other false statements

If anyone knowingly and wilfully makes, otherwise than on oath, a statement false in any material particular and the statement is made:

- (a) in a statutory declaration; or
- (b) in an abstract, account, balance sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return or other document which he is authorised or required to make, attest or verify by any statute for the time being in force; or
- (c) in any oral declaration or oral answer which he is required to make by, under or in pursuance of any statute for the time being in force,

he is guilty of an offence²⁶.

The importance of this in relation to the Revenue is that taxpayers are required to make returns and chartered accountants and others certify accounts, with the result that here is a further offence which can be committed.

False written statements tendered in evidence in criminal proceedings

If any person in a written statement²⁷ tendered in evidence in criminal proceedings wilfully makes a statement material in those proceedings²⁸ which he knows to be false or does not believe to be true, he is guilty of an offence²⁹; and likewise as to written statements in committal proceedings.

²⁵ Perjury Act 1911 s.2; Criminal Justice Act 1948 s.1(1),(2).

²⁶ Perjury Act 1911 s.5; Criminal Justice Act 1948 s.1(2); Criminal Law Act 1967 s.1.

²⁷ And this applies to written statements made in Scotland or Northern Ireland as well as to those made in England: Criminal Justice Act 1972 s.48(1).

²⁸ As to materiality, see *Material* above.

²⁹ Criminal Justice Act 1967 s.89(1).

Aiding, abetting and inciting

Every person who aids, abets, counsels, procures or suborns another person to commit an offence against the Perjury Act is liable to be proceeded against, tried and punished as a principal offender.³⁰ And every person who incites another to commit an offence against the Perjury Act is guilty of an offence³¹.

Punishments for the above offences

Sentences for the above offences may be either imprisonment or fine or both and, in some cases, imprisonment for periods up to seven years.

CHEATING THE PUBLIC REVENUE*The offence*

It is an indictable offence at common law for a person to practise a fraud on the public revenue³². Offences relating to the public revenue were expressly saved when the common law offence of cheating was abolished. A fraud on the public revenue is indictable even though the particular fraud might not have been indictable had it been on another individual. The offence may be committed by the submission of incorrect accounts, or a certificate of declaration of disclosure known to be false. The offence does not require any positive act of deception either by words or conduct but may include any form of fraudulent conduct which results in diverting money from the Revenue³³. If it be thought that conspiracy, forgery or perjury are not in point - and this is hard to imagine - or that the penalties thereby provided are insufficient, there remains to the Revenue this final and all embracing common law offence of cheating the public revenue, punishable by fine and imprisonment at the discretion of the court with the result that if it be felt that the relevant statutory penalties are insufficient a person found guilty of cheating the public revenue can be imprisoned for such period and fined such amount, without limit, as the court may think fit.

³⁰ Perjury Act 1911 s.7(1).

³¹ Perjury Act 1911 s.7(2).

³² *R v Hudson* [1956] 2 QB 252, 40 Criminal Appeal Reports 55 CCA.

³³ *R v Mavji* [1987] 2 AER 758, 84 Criminal Appeal Reports 334 CA.

UNDER THE TAX ACTS AND REVENUE PROCEDURE

Voluntary disclosure

Voluntary disclosure by a taxpayer, whilst not guaranteeing immunity, will go a long way towards mitigation of penalty. From a practical point of view the Revenue consider that immunity from penalties only arises if:

- (a) the failure to disclose was a genuine error not arising from lack of sufficient care; and
- (b) discovery and subsequent disclosure be made without any prompting by the Revenue.

This article is concerned with cases where this does not apply.

The professional adviser

If a professional adviser acquires information which leads him to believe there is an error, he should advise his client to make disclosure and explain the potential penalties. If the client declines to disclose, the professional adviser should consider his position in relation to the rules of his own professional body, but it is considered that there is normally no obligation upon him to make a disclosure which may be a breach of professional confidence, with the result that the only course of action left to the adviser may be to decline further to act. If, after consideration, he decides that he will act he must be exceptionally careful to see that he is in no way personally responsible for conveying or endorsing the inaccuracy.

Hansard

In a case where serious fraud is suspected, the first statement, known as the "Hansard extract", is handed to the taxpayer and adviser in leaflet form by the inspector at the opening interview³⁴. The Hansard extract is as follows:

"The practice of the Board of Inland Revenue in cases of tax fraud is as follows:

- (a) The Board may accept a money settlement instead of instituting criminal proceedings in respect of fraud alleged to have been committed by a taxpayer.

³⁴ That is, if the client and adviser go to an interview.

- (b) They can give no undertaking that they will accept a money settlement and refrain from instituting criminal proceedings even if the case is one to which the taxpayer has made full confession and has given full facilities for investigating the facts. They reserve themselves full discretion in all cases as to the course they pursue.
- (c) In considering whether to accept a money settlement or to institute criminal proceedings, it is their practice to be influenced by the fact that the taxpayer has made a full confession and has given full facilities for investigation into his affairs and for examination of such books, papers, documents or information that the Board may consider necessary."

The Revenue Statement of Practice regarding proceedings against taxpayers who have made fraudulent claims for personal allowances expenses deductions:

"Criminal proceedings are normally instituted against a person who has evaded tax by making a fraudulent claim to income tax personal allowances or to an expenses deduction. The Commissioners of Inland Revenue have power under the Income Tax Acts, however, to make a monetary settlement with such a person and in such a case criminal proceedings are not taken against him.

In all cases, including cases of voluntary disclosure, the Commissioners reserve themselves complete discretion as to the course of action; they can give no undertaking that criminal proceedings will not be taken. Nevertheless, if a person who has made a false claim comes forward voluntarily, without having been challenged with his offence, and makes a full and complete confession, these facts have great influence on the decision as to whether or not he should be prosecuted.

Any person who has made a false claim should therefore consider whether it is in his or her interest immediately to make a disclosure to the Inland Revenue ..."

As appears from what was earlier said, where criminal proceedings are initiated, proceedings are usually available under the appropriate section of the Perjury Act 1911 although such proceedings may also be taken in respect of any conspiracy or forgery involved in the alleged fraud and, also, there is the common law offence of cheating the Revenue.

Interview

If the inspector is asking for an interview, a prudent professional adviser will establish whether or not the Hansard statement is to be given before the interview

commences, because when given there is substantially less risk of prosecution provided, that is, that the taxpayer then makes full disclosure. If, however, an enquiry branch investigator is non-committal or confirms that the statement will not be given, the adviser may conclude that either a prosecution is being considered or that the enquiry branch have decided to prosecute and are seeking more evidence. In such circumstances it is for the taxpayer and adviser to determine whether to attend.

Seeking penalties is not the same as a criminal prosecution but on any intimation that the Revenue may be seeking a penalty under section 99³⁵ the possibility of a criminal prosecution should be taken exceptionally seriously.

Inspectors normally seek an opening face-to-face interview for which, incidentally, they are trained. It may be thought that the inspector would have spent considerable time preparing for the interview with the result that a perfectly honest taxpayer may be at a substantial disadvantage if he is to be asked questions on matters which occurred a long time ago, with the result that, in such cases, prudent professional advisers will frequently politely decline to take the taxpayer to such an interview but invite written questions upon which they can obtain, and take steps to ensure the accuracy of, answers which they can then send to the Revenue. Scrupulous care to ensure that the answers are correct and not misleading is essential. In a case where the inspector has asked the wrong question but the taxpayer or his adviser knows the question which should have been asked, it should be remembered that an accurate answer to the wrong question may be considered misleading and may carry substantial weight in any subsequent proceedings.

Inducements

If criminal proceedings are to be taken it is often fatal to a prosecution if it can be shown that inducements have been offered in order to obtain a confession, but it is expressly provided that a statement made by a person will not be inadmissible in criminal proceedings for fraudulent conduct relating to tax solely because the person has been informed that the Board may accept pecuniary settlements rather than taking criminal proceedings.³⁶

The use of the Hansard statement puts the professional adviser into a difficulty because he has to advise the client, but the use of the statement is well known and it is thought that the Revenue would not wish it to be thought that they would renege on accepted practice.

³⁵ Taxes Management Act 1970: assisting in preparation of incorrect returns etc; penalty £3,000.

³⁶ Taxes Management Act 1970 s.105.

After the Hansard statement has been presented the inspector will normally ask the taxpayer to answer certain questions, typical examples of which are:

- (i) have any transactions been incorrectly recorded (or omitted from) the books of any business with which the taxpayer has been connected?
- (ii) Are the accounts of the business with which the taxpayer has been connected correct and completed to the best of his knowledge and belief?
- (iii) Are the tax returns of the taxpayer (or of any business with which he has been connected) correct and complete to the best of his knowledge and belief?
- (iv) Is the taxpayer prepared to allow an examination of the records of the business in which he has been involved, together with personal financial records, in order that the Revenue may be satisfied that the answers to the first three questions are correct?

Extreme care should be taken in answering these questions. Any form of fraud in relation thereto may well invite prosecution, as also may an accurate but in reality misleading answer if the taxpayer (or his adviser) realises that such answer could be misleading.

Revenue practices

Revenue policy as to selective investigation procedures has been expressed in various public statements³⁷.

³⁷ The main informal statements as to examination of business accounts are set out as follows: Inland Revenue Press Release 16.x.76; TR 212; TR 246, IRPR i.viii.77; TR 309; TR 358.