THE INDIRECT ENFORCEMENT OF REVENUE LAWS THROUGH THE ANTI-MONEY LAUNDERING LAWS OF THE UK, JERSEY AND GUERNSEY

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Introduction

The development of what is now called "money laundering law" is a relatively recent phenomenon, but one which can have an impact on any financial transaction. It has spawned a multitude of new rules to be observed, rules as to how the new rules are to be observed and bodies responsible for drafting, supervising and enforcing the new rules. It has spawned a host of new activities and opportunities, for employment (of compliance staff, regulators, investigators and inspectors), for training, for lawyers, for publishers and for university essays.

The extent to which it has been successful in the fight against crime will only be known in the fullness of time. Its proclaimed objective, a weapon in the fight against organised crime and particularly drug trafficking, is a worthy one but it is in danger of becoming a self-justifying avenue of intrusion into the ordinary activities of honest people.

The UK has, in many ways, moved well ahead of its peers in Europe in the scope and enforcement of its anti-money laundering legislation, particularly in the extension of the original concept from applying only to the proceeds of drug trafficking, to "all crimes", without limit, which leads to its possible application in any circumstances where evading tax of any sort is also a crime. The first all crimes legislation in the UK was radically overhauled after less than 10 years.

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Anti-money laundering legislation has an extraordinarily intrusive effect in the ordinary business lives of many people, particularly those concerned with the financial affairs of other people. It cuts across many hallowed notions, including rules which have limited the cross-border enforcement of tax obligations, rules which have limited the exchange of tax related information between countries and rules of professional privilege. It is not universally loved, except perhaps by those who have an interest in its enforcement. It is not universally believed to be successful[2]. It is, however, recognised as here to stay.

The legislation has an apparently simple basis but, in relation to tax, many hidden complexities, reflecting the inherent complexity of tax law and particularly tax law as a trans-national concept. This essay reviews some of those complexities, as they arise from the laws now in force in the UK, Jersey and Guernsey. Although many of the same arguments arise in relation to domestic taxes, the emphasis in this essay is on the collection of taxes levied under the laws of a foreign state in each case, i.e. the impact of anti-money laundering law on the trans-national enforcement of tax obligations.

1 Background, money laundering and tax evasion

1.1 Background

The growth of organised criminal activities and, in particular, the growth of the narcotics trade worldwide during the 1970's and the 1980's, provoked increasing concern. The drugs trade proved hard to combat and the potential profits to be derived from it were of such a size that they made the risk of detection worth taking. While there are traditionally several crimes which penalise indirect involvement in criminal offences, such as being an accessory, an accomplice or assisting an offender, these were felt to be inadequate in dealing with organised and other serious crime. Governments concluded that not only should drug traffickers and other serious criminals themselves be targeted and punished, but the potential rewards should be eliminated by searching out the proceeds of their crimes, confiscating them and punishing any people who were assisting them by holding and disguising those proceeds on their behalf.

Initially, the intention of the authorities concerned with these matters was simply to deprive criminals of the proceeds of their crimes and thereby make crime not worth the risks it involves - i.e. to make sure that "crime does not pay". Although confiscation of the proceeds of crime had been a feature of criminal law

2 See below note 4

in the UK for many years,[3] several high profile cases[4] revealed the limitations of the provisions which had been enacted. Such early legislation, aimed at the drugs trade, focused only on the confiscation of the proceeds thereof, with no attention to the prosecution of those assisting the traders by holding and dealing with the proceeds.

The inadequacy of that approach led to the development of a second line of attack, namely the creation of the offence of money laundering to facilitate the prosecution of those who assist criminals to retain those proceeds. This required the creation of a new type of crime which might be thought to cover the same ground as some existing offences, such as assisting an offender, being an accomplice, conspiracy etc., some of which could have been used to prosecute money launderers in some cases but all of which gave rise to difficulties of proof of the necessary *mens rea* and other crucial elements to the required standard. Substantive money laundering offences as crimes in their own right now exist side-by-side with the confiscation regimes.

The final stage in the development of the current legislation has been the expansion of the basis of anti-money laundering law to cover not only drug-related crime, but "all crimes". The extent to which those crimes include tax crimes has been a matter of much discussion.

The success of the anti-money laundering initiatives taken so far is debatable[5] and the legislation and its implementation is continually under review. Legislation being introduced now has the benefit of about 20 years of experience and the international nature of the crimes and official responses to it are such that the authorities of any country are able to benefit from experience elsewhere and modify legislation and practice accordingly.

3 For example Drug Trafficking Offences Act, 1986 (UK)

4 Such as *R v Cuthbertson* [1981] AC 470, dealing with Section 27 of the Misuse of Drugs Act, 1971

5 On the perceived failure of anti-money laundering initiatives see Alldridge, P *"Money Laundering Law"* (Oxford, Hart Publishing, 2003) (hereinafter referred to as "MLL") , Chapter 4; Cabinet Office Performance and Innovation Unit Report *"Recovering the Proceeds of Crime"*, London, Cabinet Office, 2000 and "The Limits of the Law: An Analysis of the Interrelationship of the Criminal and Civil Law in the Control of Money Laundering" (1999) *Journal of Money Laundering Control (*hereinafter *"JMLC") Vol 2 No 3* 209 at p219. The International Bar Association web-site recently posed the question "Do you believe that anti-money laundering law is successful", to which 65% of responders replied "No".

1.2 What is money laundering?

Money-laundering has been described as -

> *"the process of transforming the proceeds of illegal activities into legitimate capital"* [6]

and as

> "*rendering the proceeds of crime unrecognizable as such"*[7]

The traditionally accepted stages of money laundering are "placement" (when the proceeds of crime are first invested), "layering" (when the proceeds are disguised) and "integration" (when they are integrated into the legitimate economy). There are an infinite number of ways in which money can be laundered and in principle any financial transaction could play a part.

For obvious reasons, accurate estimates of the amount of criminal money both onshore and offshore cannot be based on hard evidence. The FATF believes that a figure of US$500 billion of laundered money per year is plausible[8]. Fisher[9] estimates US$937 billion of laundered money every year (although this degree of precision has been described as "spurious"[10]). It was recently estimated[11] that in the UK alone, the annual proceeds of crime are somewhere between £19billion and £48billion.

Significant growth in the holding of assets in offshore financial centres was a major economic phenomenon of the 1970s and 1980s. In the Edwards Report[12] it was estimated that assets of approximately £300 to £350 billion were held in

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6 MLL at p2

7 Gleeson, S, Chapter 5 of Birks P, *"Laundering and Tracing"* (Oxford, Clarendon Press, 1995) at p115

8 IMF working paper 96/55, referred to in MLL p4, note 18

9 Fisher, J and Bewsey, J "Laundering the Proceeds of Fiscal Crime" (2000) *Journal of International Banking Law* 11

10 MLL, p4 note 14

11 Financial Times, Monday 1 March 2004, p11

12 Review of Financial Regulation in the Crown Dependencies (London, Home Office, 24 October 1998) ("the Edwards Report")

Guernsey, Jersey and the Isle of Man alone[13] and that, of the estimated US$17.5 trillion wealth of the world's high net worth individuals, approximately one third of it was held "offshore"[14]. Anecdotally, it is claimed that a large proportion of the funds "hidden" in offshore financial centres is of criminal origin in one way or another[15]. It is difficult to make any accurate estimate of what proportion of property, whether or not otherwise regarded as of criminal origin, has been obtained or retained as a result of tax evasion.

Vehicles established and administered in offshore centres have obvious uses in those processes although there are many legitimate reasons for the use of offshore financial centres. The Edwards Report gives several examples[16]. Whatever the reasons, there can be little doubt that reduction of tax, legally or illegally, has always been in the forefront.

1.3 What is tax evasion?

Although the difference between the consequences of unsuccessful tax evasion (which is criminal) and unsuccessful tax avoidance (which is not) is well-known, defining the difference is not so easy[17]. It has traditionally been the case that everyone is entitled to order their affairs so as to lawfully pay the lowest amount of tax[18], although the courts have now limited this principle[19]. As tax avoidance techniques and resulting anti-avoidance legislation have developed in sophistication, the dividing line has become more difficult to discern[20]. This is particularly so for tax laymen, such as those who would make up a jury in a criminal trial and, in many cases, those responsible for dealing with client assets

13 Edwards Report Part 1 p ix

14 Edwards Report Chapter 2

15 Jeffrey Robinson "The Sink" (2003) Constable, London p5

16 Chapter 2, Edwards Report

17 See e.g. Bridges and others " R v Charlton, Cunningham, Kitchen and Wheeler" (1999) *JMLC Vol 2 No 3* 197 and Rider, B A K and Nakajima, C V (eds) *"Anti-Money Laundering Guide"* (Bicester, CCH Editions Limited, 1999) paragraphs 52-150

18 *IRC v Duke of Westminster* [1936] AC 1

19 *WT Ramsay v IRC* [1981] 1 All ER 865, *Furniss v Dawson* [1984] 1 All ER 530

20 Lord Scarman in *Furniss v Dawson* ibid at p 531 describes any attempt to define the difference as "ambitious". In the judgement in *R v Allen* [2000] 2 AER 142 (CA), the court does not use the expression "tax evasion", but uses "tax avoidance" throughout - see Ormerod, J "Summary Evasion of Income Tax" (2002) *Criminal Law Review* 3 at p22

such as trustees and investment managers[21]. As will be seen, suspicion of criminal conduct plays an important part in anti-money laundering law. For a person with limited or no specialist tax knowledge, lack of understanding might be confused with suspicion which can lead to serious consequences for entirely innocent people[22].

Mere artificiality, complexity or lack of commerciality is not itself the test[23]. The evasion/avoidance distinction is perhaps best summed up as the distinction between transactions or arrangements in which there is a genuine belief in their honesty and those where there is an element of dishonesty[24]. Thus, a scheme which relies on non-disclosure or misleading disclosure where it is known that accurate disclosure is required by law, would be criminal and within the terms "tax evasion" and "fiscal evasion" used in this essay.

1.4 Connections between tax evasion and money laundering

Money laundering and tax evasion might be connected in either of two ways. Firstly, and given the circumstances in which they are earned, the proceeds of crime are likely to be untaxed. Keeping them out of sight of the authorities, including tax authorities, will be an important objective. Secondly, in many countries the evasion of tax due on legitimate income or gains is itself a crime and, if that crime is within the scope of anti-money laundering laws, dealing with the untaxed property could be money laundering.

The property concerned in the first category is clearly the proceeds of crime which is not tax-related, although they might also be connected to tax offences due to their non-declaration. This essay is concerned only with the second category.

The law against money laundering rests on two requirements - there must have been "criminal conduct" and there must be "proceeds" thereof. The necessary criminal conduct is called the "predicate offence", which is the underlying criminal offence which generates the proceeds which the perpetrator will then wish to "launder" into legitimate capital. If those two elements are both present,

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21 See also Bridges, P "Tax Evasion - A Crime In Itself: The Relationship With Money Laundering" (1996) *Journal of Financial Crime Vol 4 No 2* 161 at p166

22 For an example see Sheptycki, J W E *"Issues In Transnational Policing"* (New York, Routledge, 2000) at p169, note 6

23 See Tiley, J "Revenue Law" (4th Edition, Oxford, Oxford, 2000) pp92-110

24 See Bridges and others op cit (note 16) p208 and Ormerod op cit p22

anti-money laundering law produces two consequences - the proceeds will be liable to confiscation and any person (be he the perpetrator of the predicate offence or a third party) who has dealt with the proceeds knowingly or suspectingly, will independently be guilty of the substantive crime of money laundering.

The question of whether or not fiscal offences can be regarded as predicate offences for the purposes of UK (and Guernsey and Jersey) anti-money laundering law has been much debated ever since the legislation was first introduced[25]. In relation to tax offences generally, the arguments against treating them as predicate offences attack both of the above requirements, arguing that tax evasion is not (or, due to the Revenue Rule, will not be treated as) "criminal conduct" for this purpose and also that there are no identifiable, "launderable" proceeds of that conduct for the purposes of criminalisation. In relation to evasion of foreign tax, reliance is placed on the long-standing and well entrenched, that the courts of one state will not enforce the revenue and penal laws of any other state ("the "Revenue Rule").

Certain writers have also raised the possibility of Human Rights challenges to some aspects of the legislation[26]. A detailed consideration of those is outside the scope of this essay.

2 International and European anti-money laundering initiatives

2.1 Introduction

International measures have provided a framework for national laws. The international measures initially took the form of conventions to which states could voluntarily subscribe, but developed into a legal framework established by agencies representing the major economies and which they were determined to enforce world-wide.

Appendix A contains a chronological sequence of the major international, European, UK and Channel Island legislation, which are considered in this Chapter/section on a jurisdictional basis, rather than chronologically. Only the most significant are considered below.

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25 According to Brandon, B "Tax Crimes Money Laundering and the Professional Adviser" (2000) *JMLC Vol 4 No 1* 37 at p38, the suggestion that foreign tax evasion could be a predicate offence was 'met with incredulity'

26 For example Alldridge P "Are Tax Evasion Offences Predicate Offences for Money-Laundering Offences " (2001) *JMLC Vol 4 No 4* p350 (hereinafter referred to as "Alldridge JMLC"), at p 357

2.2 International initiatives

2.2.1 The Vienna Convention (1988)[27]

This is a United Nations Convention and provides the model upon which much of the current anti-money laundering legislation is based. As its name implies it is not an "all crimes" convention, but is directed solely at the drugs trade, and the laundering of the proceeds of drug dealing. However the Convention is important as a basis for future developments in confiscation regimes, international co-operation and mutual legal assistance and, in particular, money laundering as a substantive crime in its own right[28].

2.2.2 The Financial Action Task Force ("FATF")

FATF is an ad hoc grouping of governments which now also includes representatives of the governments of the world's major financial centres and of the European Commission[29]. It was established in 1989 by the Paris summit of the G7 countries. It is dedicated solely to the fight against money laundering. FATF has no powers of enforcement of its own but makes recommendations regarding the combating of money-laundering. Its Recommendations are only that, and have no binding effect. Nevertheless, its influence is substantial. Its interpretation of its own recommendations is generally echoed by regulatory and other authorities internationally, the practical effect of which is to change the way the law is interpreted, a phenomenon which has been referred to as "legislation by stealth"[30].

In 1990 FATF published its first set of 40 Recommendations. These were revised in 1996 and again in 2003. The 1996 Recommendations have been endorsed by 130 countries and have been described by FATF as the international anti-money laundering standard[31]. No doubt the 2003

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27 The Vienna Convention Against Illicit Trafficking in Narcotic Drugs and Psychotrophic Substances, (United Nations, 1988). Article 3(10) recognises the special place tax offences hold in international law enforcement

28 Article 1(b) and (c) under the heading "Offences and sanctions"

29 FATF website www.oecd.org/fatf

30 Alldridge JMLC pp351 and 358

31 Introduction to the 2003 edition of the FATF 40 Recommendations

edition will have the same standing. The FATF Recommendations are intended to be a minimum standard and countries are left free, if not encouraged, to add their own definitions casting the net wider than those contained in the Recommendations. In 1991, the FATF members agreed to a process of mutual assessment to ensure that the 40 Recommendations were being put into practice.

One of FATF's most important achievements has been to develop an approach to the combating of money laundering which is universally understood and which makes for a measure of consistency internationally. It has also been influential in encouraging, through the 40 Recommendations[32] international co-operation regarding mutual legal assistance, exchange of information and extradition for money laundering offences.

Despite the lack of enforcement powers, FATF has become a de facto lawgiver in the money laundering field. It backs the 40 Recommendations with blacklists, "naming and shaming" non-conforming countries and with the threat of possible sanctions against them.

There was and there remains no mention in the Recommendations of fiscal offences as predicate offences. In the first edition in 1990, FATF referred to illegal arms sales, smuggling, drug trafficking, prostitution rings, embezzlement, insider trading, bribery and computer fraud schemes. The 1996 edition used the expression "serious crimes", to be defined by reference to the maximum and minimum sentences which could apply. Otherwise, the definition of "serious crimes" was left to each Member State. It was not until the release of an interpretation note in 1999 that tax offences received a specific mention. Even then, this only took the form of an enjoinder by FATF that the mere fact that a transaction is described as "also" involving tax matters should not exclude it from consideration as a matter warranting a Suspicious Transaction Report ("STR")[33]. The use of the word "also" suggests that tax matters were not the concern of FATF unless coupled with some other suspicious transaction - the interpretation note is not intended to imply that tax offences are to be covered in their own right, but is simply a warning that otherwise suspicious transactions might well be disguised

32 Recommendations 30 to 40

33 Interpretation note issued by FATF on 2nd July 1999 - FATF web-site http://www1.oecd.org/fatf/Interpnotes-1996_en.htm#[2]

as tax-related, in order to deflect further enquiry[34].

The 2003 edition of the 40 Recommendations again refers to "serious offences" and Recommendation 1 certain designated categories of offences, which are defined in the glossary to the Recommendations. There is no mention of fiscal matters in that list. Recommendation 40(a) contains the only reference that there is in the Recommendations themselves to "fiscal matters", the Recommendation being that a country should not refuse a request for information or other co-operation

> *"... on the sole ground that the request is also considered to involve fiscal matters".*

Again, the word "also" implies that a request for information or other co-operation in respect of a transaction which relates only to fiscal matters does not fall within Recommendation 40 (a) and the purpose appears more to be directed at overcoming any local rules which restrict assistance or disclosure where the facts arise in connection with fiscal matters.

2.2.3 Information exchange and mutual legal assistance

As a matter of general law, and in the absence of an enabling treaty, states do not assist one another in the collection of taxes[35] and information concerning fiscal offences has not generally been exchanged. Generally, treaties also limit the way in which information could be used, once exchanged[36]

However, there is a trend away from that approach and an important feature of anti-money laundering initiatives has been the emphasis on international co-operation in the investigation and prosecution of crime, particularly by the exchange of information[37], which is now evidenced by the enactment of national legislation and the conclusion of international

34 It is possible that the release of the Interpretation Note was connected with a communication released on 8th May 1998, after the meeting of the G8 Finance Ministers which called for "international action to enhance the capacity of anti-money laundering systems to deal effectively with tax-related crimes"

35 See below, page 30/section 4 "The Revenue Rule"

36 See for example *"Model Convention on Income and Capital"*, (2003, Organisation for Economic Co-operation and Development ("OECD")), Article 26(1)

37 For example as set out in Article 7 of the Vienna Convention entitled "Legal Assistance"

treaties and conventions facilitating the exchange of information between countries irrespective of its connection to fiscal matters. The Harmful Tax Practices Committee of the OECD has been active in promoting the exchange of information amongst countries, coupled with the threat of "defensive measures" against so-called territories which do not co-operate in creating a means for wide international exchange of fiscally relevant information. The OECD's efforts resulted in the release by it in 2002 of a "Model Convention on Exchange of Information on Tax Matters". The European Community has enacted two Directives on the matter[38].

The UK, Guernsey and Jersey each have a variety of laws enabling exchange of information in criminal matters, including laws which permit the exchange of information in respect of tax offences. Their authorities are known to take advantage of those powers. In a guide on Mutual Assistance published by Law Officers of Guernsey, it is made clear that in Guernsey fiscal offences are treated in the same way as any other offences and that -

> *"The Bailiwick authorities are willing and often have provided assistance to other jurisdictions which are conducting enquiries into the fraudulent evasion of tax."*[39]

A detailed review of these instruments is beyond the scope of this essay (and, it could be said, not directly part of the law relating to "money laundering" at all). They are mentioned because they have come at a time when "money laundering" has become synonymous with "terrorism", "drug dealing" and "organized crime" and any objection to any measures said to be directed at money laundering is seen as assisting evil criminals. This has provided an easy peg upon which to hang arguments in favour of wide information exchange and mutual assistance rules which include tax offences amongst their subjects[40].

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38 Council Directive 76/308/EEC of 15 March 1976 and Council Directive 77/799/EEC of 19 December 1977

39 "Mutual Assistance in Criminal Matters and the Bailiwick of Guernsey" (1999, Guernsey LawOfficers, Guernsey Government website www.gov.gg/law/mutualassistance.htm#14). See also e.g. Investigation of Fraud (Jersey) Law, 1991

40 See also Mitchell, D J, "US Government Agencies Confirm That Low Tax Jurisdictions are not Money Laundering Havens" *Journal of Financial Crime Vol 11 No 2* 127

2.3 European Initiatives

2.3.1 The First Directive - 1991

The most important document published by the European Community in respect of the current anti-money laundering law of its members is the so-called "First Directive"[41] published in June 1991. It had been preceded in November 1990 by a Council of Europe Convention[42] ("the 1990 Convention") which, in terms similar to those of the Vienna Convention, dealt with money laundering offences as substantive criminal offences in their own right. As opposed to the 1990 Convention (to which member states could voluntarily adhere), Council Directives are legally binding on Member States which were obliged by the First Directive to apply the provisions thereof in their domestic law by not later than 1 January 1993.

"Criminal conduct" was only loosely defined in the First Directive and the preamble to the Second Directive[43] published in 2001 expressly stated that the First Directive obliged Member States only to combat the laundering of the proceeds of drug offences[44]. It is clear that it was not intended to deal with fiscal evasion.

2.3.2 The Joint Action - 1998

The First Directive was followed by the Joint Action of December 1998[45] the most important aspect of which for present purposes was an amended definition of the predicate offences to which European anti-money laundering law should apply. These were to be "serious offences", defined by reference to the level of punishment which the crime could

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41 Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering

42 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, made at Strasbourg on 8 November 1990

43 Council directive 2001/97/EC of 4 December 2001 amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering

44 Paragraph 7 of the preamble to the Second Directive. Member States were free however, to widen the scope of their national legislation and many, including the UK, did so.

45 Joint Action 98/699/jha of 3 & 4 December 1998 on "Money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime"

attract. The only reference to tax or fiscal matters in the Joint Action is confirmation that Member States may make reservations to the scope of the 1990 Convention with regard to confiscation of proceeds of offences under legislation on taxation[46].

The implications of this are several. Firstly, the Second Directive requires that Member States and the EC bring their definitions of serious crime into line with that set out in the Joint Action, so the definition itself is important. Secondly, reservations relating to fiscal offences would only be necessary if fiscal offences were covered by the definition in the first place - i.e. the ability to “opt-out” in relation to confiscation implies a belief that fiscal offences would otherwise have been covered. Thirdly, although this would permit members to exclude the proceeds of tax offences from the confiscation regime, the position in relation to the substantive money laundering offences is left open. This might imply that fiscal offences are intended to be predicate offences for money laundering but might equally imply that they are understood not to be covered anyway. This is the more likely as it is unlikely to have been the intention to allow Member States to opt out of confiscation but remain able to prosecute, where the predicate offence was tax evasion. It is also more consistent with the position that certain of the Member States do not regard tax evasion as a domestic criminal matter but merely an administrative matter not carrying criminal sanctions.

2.3.3 The Second Directive - 2001

The First Directive was substantially amended in 2001 by a Second Directive dealing with money laundering matters[47]. The Second Directive widened the scope of the institutions, the activities and the nature of offences to which the anti-money laundering law of Member States should apply, although it did not go as far as the Joint Action had suggested. It envisaged that, by 15th December 2004, the definition of “serious crimes” would be further amended to come into line with that

46 Article 1

47 Directive 2001/97/ec of the European Parliament and of the Council of 4 December 2001

contained in the Joint Action[48] and on what is seen as an interim basis, the scope of the predicate offences to which the Directives apply was increased from drugs offences to "all serious offences"[49]. Those "serious crimes" include -

> *"fraud… as defined in article 1(1) and article 2 of the Convention of the Protection of the European Communities' Financial Interests"*

and

> *"an offence which may generate substantial proceeds and which is punishable by a severe sentence of imprisonment in accordance with the penal law of the Member State".*

The former clearly includes tax fraud where it is directed against the financial interests of the European Community, but not, it is submitted, tax fraud against the interests of any individual Member State of the Community.

In the absence of any indication to the contrary, it is at least arguable that the phraseology of the latter is sufficient to ensure that, in some cases at least, tax evasion is covered.

The EC initiatives led to each Member State introducing its own legislation on the topic. The legislation enacted in the UK and the Channel Islands is outlined in the next chapter/section.

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48 Article 1E of the First Directive as amended by Article 1 of the second Directive. A proposal for a Third Directive, which includes a definition of "serious crimes" was issued in June 2004 (see http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0448en01.pdf) but has not yet been adopted. Certain crimes (e.g. fraud on the EC's financial interests) are specifically defined as "serious". Other crimes will be "serious" if, at least, a custodial sentence of more than one year (or in some cases, six months) can be imposed. The proposal will probably be of little relevance to the UK where all crimes are within the legislation and in Jersey where the statutory offence of tax evasion is not punishable by imprisonment. The maximum sentence for statutory tax evasion in Guernsey is 12 months (see note 71), so if Guernsey Law was brought into line with this definition, statutory tax evasion, at least, would also not be "serious" for this purpose

49 Paragraph 9 of the preamble and the definition of "criminal activity" in article 1E of the Second Directive.

3 The Current legislation in the UK, Guernsey and Jersey

3.1 Introduction - The scheme of the legislation

The anti-money laundering legislation of the UK, Guernsey and Jersey adopts a common overall approach, outlining in broadly similar terms what is meant by "criminal conduct" and the "proceeds" thereof, which are discussed in Chapters/sections 4 and 5 respectively. Such proceeds are liable to confiscation and dealings with them are criminalised, subject to a defence which is available to a person who reports his suspicion of dealings with the proceeds of criminal conduct to the appropriate authorities. Such a report (called a Suspicious Transaction Report or "STR" in this essay) also attracts protection against liability for breach of any obligation of confidentiality but makes the information available to the authorities to be dealt with by them as they see fit. Those reports are dealt with in Chapter/section 6.

3.2 The United Kingdom

3.2.1 Overview

The current relevant legislation in the United Kingdom is the Proceeds of Crime Act, 2002 ("POCA 2002"). It repealed and replaced the relevant provisions of the Criminal Justice Act 1998 ("CJA 1988"). From the outset, CJA 1988 contained a confiscation regime. The criminal anti-money laundering provisions of CJA 1998 including definitions of "criminal conduct" and of the proceeds thereof were inserted by the Criminal Justice Act 1993 ("CJA 1993")[50].

POCA 2002 establishes four separate regimes, namely -

- confiscation (which can only be enforced after a conviction and which is substantially the same as that contained in CJA 1988.);
- Civil Recovery (which is new and where no conviction is required);
- Revenue functions (conferring the power to levy tax and which are also new. No conviction is required);
- substantive money laundering offences. The substantive money laundering offences are of two types. There are the "primary"

50 Sections 93A(7) and 102(1) of CJA 1988, inserted by Sections 29(1) and (2) of CJA 1993

> money laundering offences of being involved in the process of money laundering itself and "secondary" offences which are committed if a person carrying on business within the "regulated sector", although not himself involved in the money laundering, nevertheless knows, suspects or has reasonable grounds for knowing or suspecting that someone else is involved in money laundering and fails to report that knowledge or suspicion. The "regulated sector" is defined in conformity with the Second Directive and consists in the main of persons who are engaged in handling money or financial affairs of others[51], including solicitors and accountants.

POCA 2002 creates a new agency called The Asset Recovery Agency ("ARA"), which has no power to bring a prosecution but which is to exercise the confiscation, Civil Recovery and revenue powers.

3.2.2 POCA 2002 - Civil Recovery and tax offences

Civil Recovery proceedings are said[52] to be civil proceedings and any proceedings are to be determined on a balance of probabilities[53] rather than the criminal scale of proof beyond a reasonable doubt. This formulation was obviously intended to remove the risk of a successful challenge under the Human Rights Act and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), notwithstanding that Civil Recovery invokes the full might of the State against the citizen and cannot be applied unless there has been criminal conduct. Despite this, it has been argued that there is indeed scope for argument that proceedings for Civil Recovery are, indeed, criminal proceedings and subject to the provisions of Articles 6 (fair trial) and 7 (retrospectivity) and the First Protocol (right to property) of ECHR[54]. However, this argument was recently dismissed by the Northern Ireland Court of Appeal[55].

It is submitted that there must be doubt whether or not Civil Recovery can apply at all in cases of tax evasion and in particular to the evasion of

51 Money Laundering Regulations 2003, Statutory Instrument 2003 No. 3075

52 Section 240(1)(a)

53 Section 241(3)

54 MLL pp 240-246

55 *Cecil Walsh v.Director of the Assets Recovery Agency* 2005 NICA 6. Whilst there remains the possibility of a higher court overruling this decision, together with Smith's case (see below note 141) it is a valuable illustration of the strict and purposive approach that is being used by the courts in the interpretation of anti-money laundering legislation.

foreign taxes. It proceeds on the basis that the State is entitled to "recover" all property derived from unlawful conduct, as if it belonged to the State – i.e. the claim for Civil Recovery is an action *in rem* as if the State were recovering its own property. According to Lord Falconer (now the Lord Chancellor) in the House of Lords debates[56], the claim is based on ownership and, according to this argument, the proceeds of crime do not belong to the criminal, but belong to the State. This rationale has been criticised.[57]

Where the offence alleged is tax evasion, committed against the authorities of the United Kingdom, one can appreciate that the Crown might wish to make a claim to the proceeds, but the Revenue functions within POCA 2002 or the Revenue's normal taxing powers surely suffice in this regard. Although that is not of itself a basis for precluding the availability of Civil Recovery, there are several arguments why it is not available for the recovery of evaded taxes and the ready availability of other remedies supports that approach.

In the case of domestic or foreign tax evasion without other criminal conduct, the transactions upon which tax has been evaded will frequently have been lawful (such as profits from trading transactions, inheritances upon which Inheritance Tax is not paid etc), so the property itself (as opposed to the benefit of not having paid tax) will not have arisen from unlawful conduct. A State claim of a proprietary interest in such property due to its unlawful origin would seem to have no merit.

Secondly, Civil Recovery is an action *in rem*, based upon a fiction of ownership or some other powerful right of the State in the assets themselves. This requires that there be identifiable assets to which the proprietary rights attach. In many instances of tax evasion, it is not possible to label any particular assets as the actual proceeds of the evasion, hence the need for deeming provisions such as Section 340(6)[58], which has no equivalent in Part 5 of POCA 2002[59].

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56 HL debates 25 June 2002 column 1234 (Lord Falconer)

57 MLL p57.

58 See below Chapter/section 5 "The Proceeds of Crime"

59 i.e. the Civil Recovery part of POCA 2002

In the absence of such a right in an identifiable asset, a claim *in rem* could not be brought[60]. In *R v Allen*[61] the confiscation provisions of CJA 1988 were applied against all of Allen's assets[62] but that depended on the equivalent in CJA 1988 of Section 340(6) of POCA 2002[63].

In relation to foreign taxes, the position is stronger still. Even if it can be argued that the Crown has the necessary interest in the proceeds of the evasion of UK taxes, no such interest would exist in the case of the evasion of taxes due to some other State.

In civil proceedings, the Revenue Rule should prevent a claim to directly or indirectly enforce a foreign tax liability[64] unless Part 5 of POCA 2002 overrides it. It is not expressly stated that it does and it is submitted that it should not. As against that, Civil Recovery proceedings are not for the enforcement of a foreign tax liability as such. They are for a proprietary claim and would not be brought by nor (*prima facie* at least) directly or indirectly under the control of, a foreign revenue authority[65], but by the ARA. POCA 2002 does not require the ARA to hand the recovered property over to the victim (i.e. the foreign revenue authority). The claim being enforced is not for the benefit of a foreign sovereign (and the tax would remain due) and so the question arises whether it falls within the protection of the Revenue Rule at all. Although the courts have given the legislation a wide meaning, the debt is only due because of a foreign tax liability, so it is submitted it should not be subject to Civil Recovery. If it were, that would amount to a radical change in the legal position.

The Civil Recovery regime operates on the basis of a dual criminality test - i.e. the conduct must have been unlawful under the criminal law of the UK and of the law of the place where the conduct took place. If it applies to the proceeds of tax offences, the requirement of dual criminality will exclude from its operation any claim based upon tax evasion in a country where that is not a crime (for example in

60 MLL p234

61 [2000] 2 AER 142 (CA)

62 See below page 45/section 5.6

63 Section 71(5) CJA 1988

64 *Government of India v Taylor* 1955 AC 491. For a more detailed discussion of the Revenue Rule, see Chapter/section 4

65 cf *QRS1 APS and others v Frandsen* [1999] STC 616

Switzerland). Strangely, under those circumstances, a person in the United Kingdom who assists the foreign tax "evader" could (if the evasion of foreign taxes is a predicate offence for money laundering purposes) nevertheless be convicted of money laundering, because the money laundering offences themselves apply only a single criminality test[66].

3.3 Jersey and Guernsey

3.3.1 Overview

The constitutional position of Guernsey and Jersey is that they are both self-governing dependencies of the Crown, with responsibility for their own domestic legislation. They have their own parliaments (known in each case as the "States of Deliberation"). By constitutional convention, the UK does not interfere in their internal government unless that is required because good government has broken down there. The native law of the Islands is Norman Law, not English Law. The ultimate court of appeal for both islands is the Privy Council. Decisions of the United Kingdom courts do not have authoritative force but are strong persuasive authority[67].

The anti-money laundering laws of Jersey and Guernsey are so similar that they can be dealt with together.

In Jersey, the main anti-money laundering legislation is contained in the Proceeds of Crime (Jersey) Law, 1999 ("Jersey POCA"), and in Guernsey it is contained in the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 ("Guernsey CJA")[68]. Both the Jersey and Guernsey laws are substantially based on the amended CJA 1988 and much of what has been written concerning CJA 1988 (and, where comparable, POCA 2002) applies equally to the Guernsey and Jersey laws. For convenience Jersey POCA, Guernsey CJA and CJA 1988 will be collectively referred to in this essay as "the CJA Model". Whether the Channel Island laws will be amended to accord more closely with POCA 2002 is uncertain, but, at present at least, appears to be unlikely.

In many corresponding provisions the language is identical between the two islands and to that used in CJA 1988. Due to the similarity of the

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66 See below page 28/section 3.4

67 Dawes, G "The Laws of Guernsey", *"The Laws of Guernsey"* (Hart Publishing, Oxford, 2002) pp 19-23

68 Other anti-money laundering provisions are found in the Drug Trafficking Offences (Jersey) Law 1988 and the Drug Trafficking Offences (Bailiwick of Guernsey) Law, 1988, as amended, which are not considered in this essay

legislation, decisions of the United Kingdom courts on CJA 1988 would be of very strong persuasive force in a Jersey or Guernsey court. However, the local laws are each different and the Island courts are free to reach their own conclusions[69].

The Jersey and Guernsey legislation, in common with CJA 1988, contain a confiscation regime and criminalise money laundering, but do not include the Civil Recovery and Revenue Powers of POCA 2002.

3.3.2 "Criminal conduct" – domestic differences between Guernsey and Jersey

The offences to which Jersey POCA applies are those for which a person is liable on conviction to imprisonment for a term of one or more years[70] but the penalty for fraudulently or negligently making incorrect statements in connection with a tax return is a fine[71], rather than imprisonment, so this offence falls outside the scope of Jersey POCA.

In Guernsey "criminal conduct" is any

> *"conduct …… which constitutes a criminal offence under the laws of the Bailiwick of Guernsey which may be tried on indictment or which would constitute such an offence if it were to take place in the Bailiwick".*

and[72] it is an offence triable on indictment to knowingly make a false statement or representation in any tax return. As a consequence, knowingly making a false statement in a tax return in some other country, would be "criminal conduct" in Guernsey. In addition, the Theft (Guernsey) Law[73] makes false accounting, amongst other things, a statutory offence triable on indictment.

69 See Dawes op cit p13

70 First Schedule Jersey POCA

71 Income Tax (Jersey) Law 1961 article 137

72 Section 201, Income Tax (Guernsey) Law, 1975. It is punishable by, inter alia, a prison sentence not exceeding 12 months, just below the threshold set in the proposed Third Directive - see note .48 above

73 Theft (Bailiwick of Guernsey) Law 1983 Section 19

There is no Jersey equivalent of the Theft (Guernsey) Law so if tax evasion amounts to criminal conduct under Jersey POCA it will only be because there has been a common law offence with imprisonment for a year or more as a possible penalty.

When the draft of Guernsey CJA was first submitted to the States of Deliberation in 1997, HM Procurer[74] advised that -

> *"Tax related offences whether committed locally or overseas, would undoubtedly be caught by the definition of criminal conduct if, for example, the conduct amount to offences under the provisions of the Theft (Bailiwick of Guernsey) Law 1983 and particularly the provisions relating to false accounting".*

By the time the final legislation was considered in 1999, it had become clear that these provisions might place Guernsey at a competitive disadvantage to Jersey, if only because of the perceptions which these differences might raise in the minds of potential clients and customers of the finance industry in the two islands. It was acknowledged that the continuation of section 201 would result in the Guernsey legislation being "out of line with that in other comparable jurisdictions"[75] so the Guernsey States of Deliberation resolved at the same time to amend section 201 so that charges under that section would henceforth be heard in the Magistrates' Court and not on indictment. Royal Assent was granted to Guernsey CJA but not to the amendment of section 201. It was said at the time[76] that the Privy Council had not rejected the amendment, but had advised against it proceeding and as a result it had been withdrawn. Precisely what transpired is of little consequence except perhaps to illustrate the extent to which the Channel Islands remain susceptible to outside influences in matters of this sort and, perhaps, that conformity with worldwide trends in matters such as money laundering might be felt by the UK to fall within the "good government" ground upon which the UK can interfere in Channel Island affairs. "Criminal conduct" under Guernsey CJA quite clearly includes conduct which would offend against Guernsey's statutory tax evasion offence but not the equivalent in Jersey.

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74 Guernsey's senior law officer, approximately equivalent to the Attorney General in the UK.

75 Guernsey Billet d'État, Wednesday 31 March 1999, page 190

76 States of Guernsey Board of Administration President, quoted in Guernsey Press Thursday 28 October 1999

Professional opinion in Guernsey supports this view[77]. The position in Jersey has been summed up as follows -

> *"Tax evasion per se does not constitute criminal conduct for the purposes of the 1999 law and one has to resort to trying to identify in the scenario of suspected crime the component elements of some other offence such as forgery, false accounting or common law fraud, which does fall within the definition of criminal conduct, as a basis for applying the 1999 Law to the scenario in hand"*[78]

The UK now has a statutory offence of tax evasion[79] but historically tax evasion has been charged as the common law offence of cheating the Revenue[80]. It has been argued[81] that that offence does not exist in Jersey. There is no report of it ever been charged there. Tax evasion will, even in the absence of a statutory provision, usually involve some other form of criminal activity such as fraud, which is known in Jersey but appears to require a positive act not an omission[82] and requires evidence of consequences not usually required for a statutory tax offence and so can be more difficult to prove than a simpler statutory offence[83].

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77 e.g. Howitt, S "Trust Administration Under the New Money Laundering Law Environment", (2000), *Babbe le Pelley Tostevin (Guernsey advocates), Guernsey, (web-site www.bltguernsey.com)* and Robilliard St J "Tax Avoidance; Tax Evasion and the Guernsey Money Laundering Legislation", (2000), *Ozannes (Guernsey Advocates), Guernsey (web-site www.ozannes.co.uk)*. Robilliard suggests that Guernsey CJA requires that the predicate offence must be one which is an offence in the whole of the Bailiwick whereas the Income Tax (Guernsey) Law, 1975 only applies on the Island of Guernsey itself and not to the rest of the Bailiwick.

78 Howard, S "Money Laundering and Tax Evasion - The Prosecutor's Tactic" (2001) *Jersey Law Review* 173

79 Section 144, Finance Act 2000

80 For example *R v Allen* [2001] 4 All ER 768 (HL); *R v Charlton* [1996] STC 1418

81 Binnington, A "Money Laundering and Tax Evasion - The Bankers Dilemma" (2001) *Jersey Law Review* 7

82 As opposed to cheating the Revenue - *R v Mavji* [1987] 2 AER 758 where an omission was held to be sufficient

83 Binnington op cit p10. Hence the need for "Cheating the Revenue" and statutory offences.

Even if there is little practical difference between the two, there is a difference in perception[84] of the likely risk of being reported, guilty or not, for an offence which is clearer in one jurisdiction than another. In financial services perception can be all-important.

The scope of the offence is vital not only in relation to the risk of prosecution but also in determining the protection, if any, which will be given to a person making an STR to the authorities. If the conduct reported is based on a suspicion of something which is not covered by the law, the protection will not be available[85].

3.4 Defining "criminal conduct" in POCA 2002 and the CJA Model

The definitions of criminal conduct in POCA 2002 and the Channel Islands laws appear in Appendix B. In the CJA Model, there is a single definition of "criminal conduct" for the whole of the statute but each of the four regimes of POCA 2002 now has its own definition. That said, the definitions in POCA 2002 for the criminal money laundering[86] and the taxation regimes[87] are identical to one another and that for the confiscation regime[88] is very similar to those.

The Civil Recovery regime of POCA 2002 does not use the expression "criminal conduct", using "unlawful conduct" instead[89]. It does not require a conviction before it can apply and it might be thought that it might be thought that the difference is for that reason. As the taxation regime also does not require a conviction but still uses the expression "criminal conduct", this would appear not to be the reason for the difference.

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84 See above page 25 note 74/section 3.3.2 note 75

85 See below, page 52 note 168/section 6.5 note 169

86 Section 340(2)

87 Section 326(1)

88 Section 76(1)

89 Section 241

The notion of "criminal conduct" has certain features in common in all of the legislation -

- **not limited by time**[90] - they each apply to all proceeds of crime, whether the conduct giving rise to the proceeds occurred before or after the coming into force of the relevant law, so although the money laundering offence must have been committed after the law took effect, it can relate to proceeds derived before that and dealings with which would not have been criminal before the law took effect. This has placed professionals in an unenviable position - conduct which was perfectly lawful might have become unlawful, leaving them with no alternative but to terminate relationships (which itself has implications) and/or file suspicious transaction reports.

  Criminal property never ceases to be criminal property irrespective of its investment and re-investment. While understandable, this can have extra-ordinary results - what of the property of companies which profited from the use of slave labour during World War II or even the fortunes made in Guernsey during Napoleonic times in transhipping French wine and brandy for sale to the UK - conduct which would have been illegal if performed in England at the time?

- **single criminality**[91] - except for the Civil Recovery regime in POCA 2002, they each apply a single criminality test - i.e. conduct is criminal conduct if it is a crime under the law of the relevant place or, if it occurred outside that place, would have been a crime in that place if it had occurred there - i.e. the conduct need not be unlawful in the place where it occurs but only in the "home" jurisdiction.

  It has been suggested that the single criminality test has the benefit of simplicity and is more likely to result in the conviction of offenders because there will be no need to prove the foreign law and awareness of illegality under it. In theory, this means that there is no need for a person who handles the assets of others to be an expert, or even to have any knowledge at all, of the tax laws applicable to the owner. Whether this been achieved is debateable;

- **extraterritoriality** - as noted above, they each apply to all proceeds of criminal conduct, wherever the conduct took place;

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90 Section 340(4)(c) POCA 2002; Section 4(1)(a) Guernsey CJA and Article 1(1) Jersey POCA

91 Section 340(2) POCA 2002, Section 1 Guernsey CJA and Article 1(1) Jersey POCA

- ***mens rea* comprises either knowledge or suspicion**. Suspicion is generally actual, subjective suspicion as opposed to suspicion which would be held by a reasonable person in the same position (which is the *mens rea* in relation to only some of the offences in each of the laws (the non-reporting offences in POCA 2002 and transferring assets out of the jurisdiction in the CJA Model)). In the CJA Model there appear also to be *mens rea* requirements in relation to certain of the offences which are an offence if done "for the purpose of .." achieving a result. This has been eliminated in POCA 2002.

4 Criminal conduct, the Revenue Rule and fiscal offences

4.1 The Revenue Rule

The "Revenue Rule" is the widely accepted principle that that the courts of the UK will not directly or indirectly enforce the penal or revenue laws of another country[92]. The leading UK authority on this principle is the House of Lords case of *Government of India v Taylor*[93]. The rule has been set out in numerous other cases both before and after that decision. It applies in Guernsey[94] and Jersey[95].

The basis of the rule is not completely clear, but it is generally stated to rest on considerations of sovereignty: that the imposition of tax is an exercise of a sovereign power and that that power stops at national borders[96].

It has been argued that the Revenue Rule will prevent the application of anti-money laundering laws in circumstances where the predicate offence is tax evasion, as the contrary would be to indirectly enforce of foreign revenue laws[97]. And, as the tax evader will not himself be subject to prosecution in the UK (or Guernsey/Jersey) for evading the foreign tax and might also not be at risk of extradition to the "victim" state, it would be unfair if a third party launderer

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92 Dicey & Morris *"The conflict of Laws"* (12th edition, London, Sweet and Maxwell, 1993), 100-101 (hereinafter "Dicey & Morris")

93 1955 AC 491

94 *Re Tucker* (1989) 7 GLJ 4

95 *Re Charlton* 1993 JLR 360

96 See Lord Keith, *Govt. of India v Taylor* supra, at p511

97 Brindle, M ""Trust Design, Tax Planning and Money Laundering" (1997) *Private Client Business* 252 at p257 and ""Corrupt Leaders and Their Bankers" (1999) *JMLC Vol 3 No 1* 17 at p 21

could be convicted[98]. This argument ignores the fact that the evader, if he is in the jurisdiction, could himself be convicted of money laundering, if the Revenue Rule does not protect him. If that rule protects the evader, it should equally protect the launderer. If it does not, there is an anomaly that there could be a criminal conviction for not paying a debt which cannot be recovered by civil means[99].

The *Frandsen* case[100] was an attempt at indirect enforcement of Danish tax laws. The liquidator of a group of Danish companies sued for payment of an amount which would in turn be used to satisfy tax debts in Denmark. The Court of Appeal held that the liquidator was really the nominee of the Danish revenue and that the Revenue Rule precluded the enforcement of the claim in the UK courts. The court had to deal with the question of whether or not the UK's accession to the Treaty of Rome and the UK's implementation of the Brussels Convention on Jurisdiction and the Enforcement of Judgments overturned the rule. It was held that it did not, but even if it did, the Revenue Rule would still preclude the enforcement of the claim. Although the Convention conferred jurisdiction on the English court, the court held that the question was not whether or not jurisdiction existed but whether or not the English courts would exercise it[101], and in that case, it would not.

Parliament can undoubtedly make laws which derogate from the rule, despite the absence of express derogation from *Government of India v Taylor* the courts have interpreted statutes and conventions as requiring them to grant requests for assistance in gathering information which would be used elsewhere (in Norway) in the collection of foreign taxes[102] and in the extradition of a convicted offender to Norway although some of the offences of which he had been convicted were fraud, theft and false accounting related to his Norwegian tax returns[103]. The exercise of the court's jurisdiction to assist a foreign authority in gathering information for criminal proceedings, including tax evasion proceedings, was not

98 Graham, T "Money Laundering and Foreign Tax Evasion - Is 'Government of India v Taylor' really dead?" (2000) *JMLC Vol 3 No 4* 377, esp. at p379 and p381

99 Baker P, "The transnational enforcement of tax liabilities" (2002, *"Tolley's International Tax Planning"*) at para 34.79

100 *QRS1 APS and others v Frandsen* 1999 STC 616

101 Simon Brown LJ, referring to Lord Goff in *Re State of Norway's Application* [1990] 1 AC 723 at p 808C

102 *Re State of Norway's Applications* [1990] 1 AC 723

103 *R v Chief Metropolitan Stipendiary Magistrate, Ex Parte Secretary of State for the Home Department* [1988] 1 WLR 1204 (the "Nuland" case)

precluded by the Revenue Rule if it fell within the terms of an applicable statute. A similar approach has been followed by the courts of Jersey and Guernsey[104]. Each of those cases has been an exercise in legislative interpretation. The question is, what would be the likely result of a similar exercise by the courts in relation to POCA 2002 and the CJA model?

In abrogating a common law rule, Parliament is expected to say so unequivocally, particularly so where a breach of the new statute would give rise to serious criminal consequences. The argument was described as follows in the *Nuland* Case[105] -

> *"1. As a matter of construction it requires clear and express language in a statute to derogate from the common law or to take away common law rights. 2. That it is a rule of international custom and practice that states will not directly or indirectly enforce revenue or penal laws of another state. 3. That the rule of international custom and practice has become part of the common law. 4. That the Act of 1870 does not specifically take away this limitation."*

Neither POCA 2002 nor the CJA Model expressly overrides or preserves the Revenue Rule and some commentators doubt that the courts would hold that it has been overridden[106]. However, the judgement in the *Nuland* Case makes it clear that the courts should look only to the actual wording of the statute and ascertain whether or not the conduct in question falls within its terms. It is submitted that, in the case of Guernsey and of the UK, there can be little doubt that it does, both in respect of their statutory offences and also (in common with Jersey) in respect of any applicable common law offences[107].

There are other arguments on this as well. The Revenue Rule is directed at the enforcement in one jurisdiction of the revenue laws of another, by or for the benefit of the foreign state. It is debatable as to whether or not the use of anti-money laundering laws meets these criteria. Much of the money laundering legislation is to do with the collection of information, which it is known will be shared between law enforcement agencies internationally. Collection of

104 See *Re Charlton* 1993 JLR 360 (Jersey) and *Re Tucker* (1989) 7 GLJ 4 (Guernsey) - both concerned requests for assistance in obtaining information in tax matters - *Charlton* was a criminal matter and *Tucker* the enforcement of UK taxes due by a bankrupt

105 supra, p1212A

106 e.g. Brindle M "Money Laundering, Tax Evasion and Professional Liability" (2002) *International Personal Tax Planning* 10-1 at 10-14 to 10-17; Graham op cit p 381

107 See also MLL pp 125-127 esp. at p 127 where the author reaches the same conclusion.

information has been one of the areas where the courts have been prepared to assist foreign revenue authorities, even where that might amount to assistance in the enforcement of foreign revenue or penal laws[108]. Neither POCA 2002 nor the CJA model makes any provision for a foreign revenue authority to directly or indirectly come to the domestic courts and collect tax, so the provisions of those laws are distinguishable from *Government of India v Taylor* and *Frandsen*.

Secondly, the Revenue Rule is only a part of a wider rule which refers also to the non-enforcement of foreign criminal laws. If anything, the arguments for non-enforcement of criminal laws are stronger than those for not enforcing a civil (ie tax) debt, yet no-one argues that, for some reason, foreign criminal laws are not within the scope of the legislation. Clearly, they are, and expressly so, and no exception is made where the criminal conduct is tax-related. It is submitted that, if the non-enforcement rule is abrogated, it is the whole of the rule and not only that portion which relates to non-tax crimes.

It is interesting to speculate on another twist in the *Frandsen* tale. If the purchase by the Danish companies of the shares in their capitals would have been unlawful under the UK Companies Act if done there, would that have been "criminal conduct" for money laundering purposes, and might that have affected the outcome in some way?

4.2 "Criminal conduct" and tax evasion generally.

In view of the scope of the definitions of criminal conduct, it is perhaps surprising that there has been a debate at all about whether or not tax evasion can be a predicate offence. While the real strength of the arguments to the contrary lies, it is submitted, in the questions which relate to "proceeds" rather than those which relate to "criminal conduct", when considered in detail the concept of "criminal conduct" does reveal difficulties and problems of application which are still worthy of debate, especially in the context of the evasion of foreign taxes.

Nevertheless, it seems to be clear that tax evasion, and still less the evasion of foreign taxes, was not particularly intended to be included within the "criminal conduct" to which CJA 1988 and CJA 1993 applied[109]. The introduction of both of those Acts should be seen in the context of the first edition of the 40 Recommendations and of the First Directive which provided a basic framework for them (and particularly for CJA 1993), neither of which appears to have contemplated the possibility of tax evasion being a predicate offence. It must be

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108 e.g. *Re State of Norway's Application, supra*

109 Brindle PCB p253

acknowledged that tax evasion was also not intentionally excluded from the ambit of CJA 1988 and its terms are certainly wide enough to include it.

The two leading cases which deal with CJA 1988 in the context of fiscal offences are *R v Allen*[110] and *R v Smith*[111]. Both of these cases were confiscation cases and the arguments were based on questions surrounding the "proceeds of crime" rather than whether the conduct itself, once proven, was "criminal" within the scope of the Act.. Both dealt with the evasion of domestic (ie UK) rather than foreign taxes (*Allen* with Corporation Tax and Income Tax and *Smith* with excise duties) and both dealt with the perpetrator of the predicate offence rather than an alleged third party money launderer. However, in neither was the argument raised that the provisions of CJA 1988 did not apply to fiscal offences.

Given that the CJA Model has only one definition of "criminal conduct" for the whole statute, it is difficult to argue that it should be given a different meaning for the criminal provisions as opposed to the confiscation provisions. Alldridge suggests that this debate remains at least worthwhile[112] but concedes that the arguments in favour of different interpretations for confiscation and criminal money laundering purposes are not "entirely compelling"[113]. Given that there are now separate definitions for the different regimes of POCA 2002, this argument might be easier to make in the UK than in the Channel Islands. Nevertheless, it would seem that the courts are likely to adopt a purposive approach and to apply a consistent meaning to the expression throughout each of the statutes which would include fiscal evasion as a predicate offence. It should be considered whether or not this construction would survive a challenge under the ECHR on one of several bases, including *inter alia* retrospectivity and the obligation to breach confidentiality.

4.3 Transposing foreign conduct - what assumptions may be made?

Tax law is of a technical nature and liability for tax usually depends on numerous factors being present, particularly factors which connect a taxpayer to a jurisdiction, such as residence, source of earnings or citizenship. In applying the single criminality test, it is difficult to know what factors are to be taken into account in assessing the conduct. After all, it is only the conduct itself which is to be judged "as if it occurred in" the asset jurisdiction and not any other facts or information.

110 *R v Allen* [2000] 2 AER 142 (CA)

111 *R v Smith (David Cadman)* [2002] 1 All ER 366 (HL)

112 Alldridge JMLC op cit p353 and MLL pp 184 - 188

113 Alldridge JMLC op cit p 355

In the absence of some assumptions, it could be impossible to apply this test at all in many cases, particularly in relation to the evasion of taxes payable in another jurisdiction. Assume that a resident of Germany holds an interest-bearing bank account in the UK and that he should declare and pay tax on the interest to the German authorities but he leaves it out of the income which he declares in his tax return. His criminal conduct is his failure to declare the income to the German tax authorities when he has an obligation to do so. How is this to be treated for UK money laundering purposes? Either it has to be assumed that he completed and submitted his tax return to the German authorities whilst physically in the UK, with nothing more, in which case there will have been no criminal conduct for UK money laundering purposes (the submission by a German resident of an incorrect tax return to the German authorities not being an offence under UK law), or numerous other assumptions will have to be made - in effect, to also transpose the place of and the reasons for his obligation to declare and pay tax from Germany to the UK. What assumptions is it permissible to make to do this? That the taxpayer is a resident of the UK and not Germany? If so, does the bank account remain in the UK, or is it then to be outside the UK (such as in Germany); and, if it is outside the UK, is he domiciled in the UK and does he remit the income to the UK in a way which causes a tax liability or does he not remit it to the UK? More importantly, is it permissible to transpose the identity of the victim of the conduct (ie the foreign revenue authority), to the local revenue authority?[114]

These doubts raise again the question of whether, in every case at least, it can be said that foreign tax evasion is criminal conduct and also the possibility of a Human Rights challenge, on the basis that the crime is not sufficiently certain.

4.4 Local taxes but no foreign crime/taxes

What is the position of conduct which is known to be lawful in the jurisdiction where it is carried out but not in the jurisdiction where the property is held (referred to as the "asset jurisdiction")?

The first, simple answer is that it is criminal conduct in the asset jurisdiction - all one must do is look to the conduct and assess it against local law. If there is any crime (subject to any applicable limits in terms of penalty etc.) in local law which could have been committed as a result of the conduct, then it will be criminal conduct. However, examples can be given of absurd consequences which can arise from the literal application of this approach (for example, the earnings of a Spanish bullfighter). An example in the tax field which is perhaps not so absurd is that of a person resident in the UK but not domiciled there and who has income

114 Brindle op cit at p257-258, where doubt is cast on the permissibility of such a transposition

producing assets, say, in Guernsey. If he were resident in Guernsey, he would be required to declare his world-wide income in his tax return, but not in the UK, as he is only taxable there on foreign source income if it is remitted to the UK. His failure to include it in his UK tax return is, *prima facie*, a crime in Guernsey, but only if fraudulent. If the conduct to be assessed is purely the mechanical act (i.e. the *actus reus* but not the *mens rea*) of completing a tax return omitting the foreign income, then he will fail the test. However, it would be surprising if his failure should be reported to the authorities in Guernsey. The answer is surely that his conduct is not fraudulent, because he has no obligation to declare the income in the UK and is therefore not reportable in Guernsey. This obvious answer requires knowledge of his *mens rea* (i.e. was there the requisite intention to defraud). To ascertain that, it is necessary to have some reference to his obligations under UK law, without which it could not be known what his state of mind was - i.e. one can only know if he had an intention to deceive if one knows something of what his obligations were. Thus, it is impossible to completely divorce the actions from the foreign obligations.

4.5 No similar crime/tax in the local jurisdiction

The first question arises from, for example, offences in foreign jurisdictions against fiscal or similar laws, such as exchange controls, which have no equivalent in the asset jurisdiction.

In the absence of any exchange controls in the UK (and the Channel Islands), the mere breach of the exchange control rules of another country would not be criminal conduct for the purposes of POCA 2002 or the CJA Model. However, if the foreign exchange control authorities have been deceived in some way so that the conduct also amounts to a common law fraud on the foreign exchange control authority, could the fraud be regarded as "criminal conduct" in the UK, Jersey or Guernsey? It has been suggested that it cannot[115] and support for this proposition is also found in certain of the cases referred to in the *Nuland* Case[116]. However, those cases were not decided in connection with the current legislation and it is submitted that this is no longer certain.

A similar question arises in relation to taxes of a sort not found in the asset jurisdiction, such as wealth taxes (applied in Holland), Secondary Tax on Dividends (South African) or UK Inheritance Tax (which has no equivalent in the Channel Islands). As a result of the OECD harmful tax competition programme, some jurisdictions including Guernsey are to eliminate taxes on corporate income. Would such a move result in the evasion of foreign corporate taxes no longer

115 See Chapter 5 "Money Laundering Guide" Barry K Rider (ed) (1999) CCH Editions Ltd

116 See *Nuland* at p 1217 (*Ex Parte Khubchandani* 71 Cr. Ap. R 241)

being criminal in those jurisdictions? This will depend on how this change is effected under local law. The answer to the wider question might depend on whether the foreign tax is analogous to a local tax or whether the conduct amounted to a common law offence such as fraud or false accounting[117]. This creates uncertainty and, again, requires some knowledge of the foreign law.

5 The Proceeds of Crime

5.1 Introduction

Money laundering crimes are based on dealings, whether by the criminal or others, with the criminal's proceeds of crime. Some of the arguments against any tax evasion, whether domestic or foreign, being covered by those laws, arises from the problems of identifying the "proceeds" of the evasion and particularly "proceeds" that are being laundered by a third party on behalf of the tax evader. There is considerable debate as to whether the CJA Model achieved this[118]. The debate continues in relation to POCA 2002[119].

Some of the political rhetoric surrounding the debate has been complicated by the confusion of two situations. A 'real' criminal (eg a thief or drug dealer) will often not have paid tax on the proceeds of his crime (although passing them back into the system by declaring them as profits from commercial activities such as Laundromats and pizza parlours and ensuring that they were taxed was an early money laundering technique[120]). If he does not, he is committing two offences - the criminal offence and the tax evasion. The latter is often a result of the former as the declaration of the proceeds of crime for tax purposes might lead to its exposure for other purposes. Property which has arisen in this way is the proceeds of crime without having to consider the tax evasion.

The second situation is where the assets are derived from lawful activities, but tax is not paid. This is the case that this essay is concerned with; legitimate profits, which should be taxed but are not. What *prima facie* sets these aside from the first case is just that - the property itself is derived from some transaction which is not criminal, so it is not, initially at least, the proceeds of a crime at all.

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117 Fisher and Bewsey op cit p16

118 For example, Alldridge JMLC p353, Howitt op cit para 1.70.3 p334, and Binnington op cit p11

119 For example MLL p183 to p191

120 Robinson "The Laundrymen" (London, Simon & Schuster Ltd, 1995), p14

Subject to any future challenge under the ECHR in a later case, the decisions of the Court of Appeal in *R v Allen*[121] and the House of Lords in *R v Smith*[122] leave no room for doubt that the confiscation provisions of CJA 1988 applied to benefits derived from fiscal offences. However, the conclusions reached in those case are worthy of debate, particularly given that those decisions do not bind the Channel Islands courts and were not in respect of the money laundering crimes themselves.

Some of the issues which arise are -

- The laws apply to "proceeds" not "profits"
- How are "proceeds" defined and determined?
- Proceeds must be "obtained", not "retained" by the criminal conduct.
- Does a tax evader obtain a benefit by his evasion?
- If so, what is the extent of the benefit derived?
- What is the property which represents that benefit and can it be laundered?

5.2 "Proceeds" not "profits"

The legislation deals with the proceeds of crime, rather than the profits of crime - i.e. expenses incurred in generating the proceeds are not allowable deductions in assessing the amount derived from the crime. The confiscation provisions thus go further than the rhetoric of not letting criminals benefit from their crimes, and operate punitively.

In relation to tax evasion, the courts have treated the proceeds of the evasion as being the tax saved i.e. only a share of the profits[123] but something more than just the advantage of the delay in payment of the tax[124] which is arguably the only benefit actually realised by the conduct.

121 *R v Allen* [2000] 2 AER 142 (CA)

122 *R v Smith (David Cadman)* [2002] 1 AER 366 (HL)

123 *Allen* and *Smith*

124 See below page 44/section 5.6 "Does a tax evader obtain a benefit …"

5.3 Defining "proceeds"

In each case, the legislation has an extended definition of proceeds and the relevant sections are set out in full in Appendix B[125].

In the CJA Model "proceeds of criminal conduct" is defined as meaning, in relation to any person who had benefited from criminal conduct, that benefit[126] and -

> *".... a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of the property so obtained".*[127]

Under POCA 2002, property is criminal property if it constitutes a person's benefit from criminal conduct[128] and -

> *"A person benefits from criminal conduct if he obtains property as a result of or in connection with the conduct."*[129]

The laws are thus similar, each requiring that the property be "obtained" from or in connection with criminal conduct, rather than "retained" as a result of the conduct. Thus an argument runs to the effect that in the typical tax evasion case, property will have been "obtained" as a result of legitimate trading and a portion of it merely "retained" as a result of the non-payment of tax[130]. On this argument, the benefit of tax evasion is not "property" referred to in the definition and, amongst other things, cannot be laundered. This argument has been described as "specious"[131], perhaps correctly so given the provisions dealing with pecuniary advantage[132] derived from crime, but linguistically it has appeal

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125 Article 1 Jersey POCA, Section 4 Guernsey CJA and Section 340(3) to (10), POCA 2002

126 Section 102(1) CJA 1988, added by Section 529 (2) CJA 1993

127 Section 71(4) CJA 1988; Article 1(2)(b) Jersey POCA and Section 2(3) Guernsey CJA

128 Section 340(3) POCA 2002

129 Section 340(5) POCA 2002

130 Brindle PCB pp 254 - 255

131 Bridges and Green "Tax Evasion and Money Laundering - An Open and Shut Case?" (1999) *JMLC Vol 3 No 1* 51

132 e.g. section 340(6) POCA 2002 - see below page 44/section 5.6 "Does a tax evader obtain a benefit …"

particularly given the difficulties in knowing when property becomes "proceeds".[133]

5.4 "Suspicion" and "proceeds"

Under POCA 2002, property is "criminal property" for money laundering purposes only if it is a person's benefit from criminal conduct and the alleged money launderer "knows or suspects" that it constitutes or represents such a benefit[134]. Thus, the proceeds must be connected to the suspected criminal conduct.

The CJA Model is different. There, the offence consists in dealing with the proceeds of criminal conduct (whether or not the defendant knows or suspects that they are such proceeds), if the defendant knows or suspects that the person entitled to the property "has been engaged in criminal conduct or has benefited from criminal conduct"[135]. In the CJA Model, there need be no connection between the property and the criminal conduct which gave rise to the suspicion. As long as the property is the proceeds of criminal conduct and there is a suspicion that the owner has benefited in some way from criminal conduct, the offence can be committed. Thus, if the person holding the criminal property suspects the owner of having been engaged in some criminal activity and genuinely but wrongly believes that the property which he is holding is not the proceeds of a crime, he can be guilty of money laundering if he is wrong in that belief - he need not suspect that the funds are the proceeds of a crime[136].

It is clear both under the CJA Model and POCA 2002 that the person benefiting from the conduct did not himself have to have been the criminal, but only to have benefited from criminal conduct, which would include, for example, benefiting by inheritance.

5.5 Determining the "proceeds"

In the case of the person who steals £100,000 and deposits it into a bank account or under his mattress, the proceeds are clearly identifiable - it is the money which he stole and also any other property into which it is converted. In a tax case, the evader gets an advantage but does not obtain property by his evasion. For

133 See below page 44/section 5.6 "Does a tax evader obtain a benefit …"

134 Section 340(3) POCA 2002

135 Article 32(1) Jersey POCA; Section 39(1) Guernsey CJA

136 But a suspicious transaction report is to do with suspicion concerning the property - see below page 52/section 6.5

example, a person earns £100,000 of income from a legitimate trading transaction on which, say, tax should be paid at a rate of 40%. Say he earns that income on the first day of a tax year and his obligation to file a tax return which reflects that income does not have to be filed until three months after the end of that year. He does not intend to declare it but might change his mind. If he eventually fails to, he will in due course (at the time at which the tax would otherwise have been payable) become better off to the tune of £40,000. The whole £100,000 is kept in the Channel Islands or the UK, separate from all of his other property, but in his home jurisdiction he has sufficient resources out of which he could pay the tax if he chose to.

A number of questions arise. Unless the £100,000 was obtained in the course of a criminal conspiracy (such as, perhaps, in *Allen*), it was clearly not the proceeds of a crime when it was obtained (his intention not to pay tax of itself not being enough to amount to criminal conduct). At what point, if ever, does it become the proceeds of his crime - when they are earned, when he makes up his mind and decides not to include them in a tax return, when a misleading tax return is filed, when the deadline for filing a tax return is missed or when the due date for payment is passed? And is the whole £100,000 tainted in some way, is it just £40,000 of that £100,000 or is it some lesser amount equal to the time value or interest that he gains by the delay in paying only when he has been found out?

These questions are important in relation to criminal money laundering because they affect any person who might at any time be holding the property. He might know that they have been legitimately earned but not know whether or not they are or will be taxed. He might have his suspicions, but a suspicion concerning future conduct is not sufficient to bring the property within the scope of the statutes[137]. His position is uncertain as the nature of the money is affected by the intention and future conduct of the owner.

5.6 Does a tax evader obtain a benefit and, if so, what is the extent of that benefit?

Each of the laws extends the concept of property which is derived from crime by deeming provisions to the effect that -

> *"where a person derives a pecuniary advantage as a result of or in connection with commission of an offence, he is to be treated for the*

137 Guidance Notes issued in terms of Proceeds of Crime Jersey Law, (as amended) (1999, Jersey Financial Services Commission website www.jerseyfsc.org). Bridges and Green op cit pp55-56 suggest that if the only *actus reus* is the failure to file or to declare the item in, a tax return, it is highly unlikely that a conviction for laundering could be secured in the UK.

> *purposes of this Part of the Act as if he had obtained as a result of or in connection with the commission of an offence a sum of money equal to the value of the pecuniary advantage".*[138]

Thus, someone who is guilty of obtaining a benefit by deception cannot be heard to say that there are no proceeds of that benefit, as he is deemed to have received it in cash, which he can be made to give up. All that is needed is that a value be placed on the pecuniary advantage which he obtained.

In *R v Allen*[139] , the amount of the tax evaded was £4 million. It was unsuccessfully argued in the Court of Appeal that Allen had derived no pecuniary advantage from his criminal conduct in cheating the Revenue, because, although unpaid, the tax remained due. Therefore, although he had not intended to pay the tax, he still owed it and could be made to pay it, so he was no better off. The court held that the ordinary meaning of the expression "pecuniary advantage" included the evasion or deferment of a debt. In this case, the attempt at evasion was ultimately unsuccessful and the most which had occurred was that payment of the tax was delayed. It was not disputed that the confiscation order did not discharge the tax liability but the Revenue undertook not to seek to recover it. Allen's realisable assets were less than £4 million and were held to all be liable to confiscation.

The logic of Allen's argument is superficially attractive - he was genuinely no better off, particularly once the Revenue became aware of the fraud. However, it can equally be said that a thief is liable to return the proceeds of his theft to his victim and would remain so liable despite a confiscation order against him. The CJA Model envisages[140] the possibility of both a confiscation order and compensation of the victim and only envisages setting compensation off against confiscation if the defendant's means are insufficient to meet both.

It can be argued that the benefit to Allen was only the time value of money over the period during which the tax was evaded. This is a variation of the argument which was advanced in *Allen* - the tax remains due, so the pecuniary advantage gained by the defendant is only the value of that postponement. This question does not appear to have been argued in *Allen's* case. While the courts might take exception to a defendant arguing that, although he had intended to benefit himself to the tune of £4,000,000, he should only pay compensation at the rate of 5% per

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138 Section 71(5) CJA 1988; and cf Section 340(6) POCA 2002, Article 1(2)(b) Jersey POCA and Section 2(3) Guernsey CJA

139 *R v Allen* [2000] 2 AER 142 (CCA)

140 Section 72(7)

annum of £4,000,000, it has some merit. The purpose of confiscation orders is not punishment or debt collection, but depriving criminals of the benefit they have derived from their crimes. The effect of *Allen* (and *Smith*, below) is that the criminal courts have become a secondary means of tax collection. The Crown remains able, through its own already extra-ordinary powers, to collect the tax and it is submitted should be required to do so[141].

Allen was luckier than the defendant in *Smith*[142]. He smuggled cigarettes into England, failing to declare them and to pay the excise duty which arose at the moment of entry. He was discovered shortly thereafter and the cigarettes were seized by Customs. He was prosecuted for evasion of Excise Duty and pleaded guilty. He was sentenced to a term of imprisonment and a confiscation order was made against him. The Court of Appeal[143] distinguished *Allen* and held that Smith had not realised any pecuniary advantage from his smuggling - he had lost the cigarettes and, with them, the possibility of realising proceeds by selling them. The Crown appealed successfully to the House of Lords. Liability to the duty had been incurred and had been evaded. It remained due. The evasion of the duty (even though detected almost immediately) was a benefit to the accused[144] to be valued at the time it was obtained. In the result, Smith lost the goods, was liable for the duty and also for a confiscation order in an amount equal to the duty[145]. This decision has (with respect, correctly) been described as giving rise to an absurdity[146] and both *Smith* and *Allen* are harsh decisions[147] clearly illustrating the unsuitability this legislation for application to tax offences. The possibility must exist of a different court (such as a court in the Channel Islands or the European Court of Human Rights) taking a different view[148].

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141 This would open up the intriguing possibility of the Revenue, having secured a conviction before a lay jury, losing the tax case before a specialist tribunal - something the Revenue would no doubt rather not risk

142 *R v Smith (David Cadman)* [2002] 1 AER 366 (HL)

143 *R v Smith (David Cadman)* [2001] 1 CAR (S) 61

144 *R v Smith (David Cadman)* [2002] 1 AER 366 (HL)at p371 para 195

145 In the event, a lesser amount was ordered, to the limit of his realisable assets.

146 MLL at p134

147 In the House of Lords opinion in *R v Smith* at p322 (paragraph 23) Lord Rodger said "If in some circumstances it can operate in a penal or even a draconian manner, then that may not be out of place in a scheme for stripping criminals of the benefits of their crimes."

148 cf the Court of Appeal decision in *R v Smith* [2001] CrAppR(S) 61 and see MLL at p139.

5.7 What is the property that represents that benefit and can it be laundered?

Both *Allen* and *Smith* were concerned only with confiscation. Confiscation can be levied against all of the assets of the defendant, without the need to identify specific property. For money laundering to occur, there must be certain activities undertaken in relation to the proceeds of another offence. There must be actual ascertainable property which is concealed, retained, disguised and so on. Frequently, it will be clear which property is the property actually derived in connection with the tax evasion but that is by no means always the case. In a tax evasion scenario, the proceeds of the taxable transactions become criminal proceeds at some point; at that point the evader obtains a pecuniary advantage and at that point he is deemed to have derived a sum of money equal to the advantage. The property is not actual ascertained property but is only deemed to have been derived. Can "deemed property" be laundered? If it is not possible to say that a particular sum of money was obtained from the crime, then how can it be said that the sum of money has been laundered?

In *Allen* and *Smith* the whole of the estate of each defendant was treated as available for confiscation. Those decisions have been treated by some as holding that, in the case of tax evasion, all property of the defendant is criminal property and that therefore any dealings with any of his property might be laundering[149]. Certainly, a tax debt does not attach to a specific part of the evader's property and any of his assets can be used in settlement of his tax liabilities and so the whole estate of the evader is better off. Each of the laws contains provisions which make it clear that confiscation can be ordered against the defendant's estate generally[150] and that for confiscation, it is not necessary to identify specific property, which it is for laundering. Thus, notwithstanding *Allen* and *Smith*, there must be doubt, in some cases at least, as to whether or not property can be satisfactorily identified for laundering[151] in relation to tax evasion. The alternative, wider approach is a less acceptable result given that it makes tax evaders (and people who deal with them) worse off than "ordinary" criminals (and people who deal with them) and gives a wide and uncertain interpretation to a criminal statute[152].

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149 Brandon JMLC (2000) Vol 4 No 1 at p41 - it is noteworthy that this article does not refer to *Allen* which was presumably published after the article was finalised. *Smith* was decided later

150 Jersey POCA Article 2, Guernsey CJA Article 4 and POCA 2002 Section 9

151 See also MLL at p189 and Brindle op cit p255

152 Not only offending important principles of interpretation but also potentially opening up a challenge under Article 7 ECHR on grounds of uncertainty.

This argument cannot be pressed too far, however. In many cases it will be clear from the facts which property represents the proceeds of the transactions upon which tax should have been paid, and a court is likely to hold that that property is, or contains, the property which represents the benefit of that non-payment.

5.8 Conclusion

Whatever criticisms might be levelled at them, the decisions of the House of Lords in *Smith* and the Court of Appeal in *Allen* represent the current state of the law in England with regard to confiscation and in respect of which there is no substantial difference between the CJA Model and POCA 2002, so unless these cases are later overruled or set aside under ECHR, they are very likely to represent the effect of POCA 2002 as well.

In relation to money laundering as opposed to the confiscation orders, the issue is a very important one for both Guernsey and Jersey. Both islands are more likely to produce people holding the proceeds of other people's crimes, rather than the tax evaders themselves[153]. Guernsey and Jersey courts tend to be strongly influenced by decisions of the English courts, particularly the House of Lords, given that the final court of appeal in both islands is the Privy Council. An appeal from a decision of one of the Island courts would represent an opportunity for this issue to be more fully debated, however unlikely a different decision might be.

6 Suspicion and suspicious transaction reports

6.1 Introduction

The third of the three major elements of anti-money laundering law, after "criminal conduct" and "proceeds", is "suspicion". This chapter/section will deal with the relevance of suspicion, what is meant by suspicion, with Suspicious Transaction Reports ("STR") as a defence to a criminal charges and civil liability and briefly with the way in which the information in such reports is handled by the authorities.

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153 i.e. the accused in *R v Dimsey* [2000] 2 AER 142 (CA) rather than the accused in *R v Allen*

6.2 The relevance of suspicion

Certain sections of the legislation impose a positive obligation to report suspicions concerning property[154].

Secondly, POCA 2002 relies on the concept of "suspicion" in order to define "criminal property"[155] and the CJA Model relies on suspicion in the creation of the money laundering offences[156].

Thirdly, under each of the laws, the substantive money laundering offences will generally not be committed if the person who deals with the criminal property reports his suspicions concerning the property to the relevant authorities[157].

6.3 What is meant by "suspicion"?

A person who has a suspicion but does not deal with it appropriately faces the risk of prosecution and regulatory action such as cancellation of his licence to carry on business. If he makes a report which is not based on suspicion within the meaning of the legislation, he is at risk of civil consequences for breaching obligations of confidentiality, amongst other things. Certainty is thus very important.

Despite its importance, "suspicion" is difficult to define. Dictionary definitions include "a belief or opinion that is based on very little evidence"[158] and even "a faint notion" and "an inkling"[159]. It has been said that -

> *"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises*

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154 eg section 330 of POCA 2002, which applies only to the "regulated sector" and the anti-drug money laundering legislation in the Channel Islands which is beyond the scope of the discussion in this essay.

155 Section 340 (3)(b) POCA 2002

156 Sections 38 and 39 Guernsey CJA and articles 31 and 32 Jersey CJA. See above, page 39/section 5 -- "Proceeds of Crime"

157 But note Section 38, Guernsey CJA and Article 31 Jersey POCA, where there is no provision for such a report or defence.

158 Chambers 21st dictionary, Edinburgh 1999

159 Oxford English Dictionary

at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."[160]

It clearly falls well short of prima facie proof.

6.4 Objective or subjective?

In the main, suspicion is used in the legislation in a purely subjective sense[161]. If the defendant was not suspicious, there is no offence, no matter how unreasonable or ignorant he might have been. Reasonableness might go to the credibility of his professed lack of suspicion but beyond that, is not relevant to the subjective test. However, though there is no obligation to be expert in foreign tax law or to investigate a client's tax affairs[162] "studied ignorance", purposely achieved by, for example, not reading any correspondence about a client's tax affairs will not protect a defendant and could even indicate suspicion in some cases.

Other than the use of "reasonable suspicion" in some provisions, the laws do not create degrees of suspicion. Thus, unless the courts decide otherwise, anything ranging from a faint notion or inkling that something might be amiss to a knowledgeable assessment by an experienced tax adviser as to specific tax issues would be sufficient. What is unclear is whether the suspicion for this purpose requires suspicion concerning every element of the possible crime[163] or whether it is enough to be suspicious in a very general sense without any real reference to the detailed elements of the predicate offence. As noted,[164] many tax avoidance schemes are complex and artificial and will only be understood by experts. Where the dividing line between such schemes and evasion lies, is not clear. Complexity might give rise to unjustified suspicion, particularly in the light of warnings[165] that criminal schemes are often disguised as complex tax avoidance

160 per Lord Devlin in *Shaaban Bin Hussein and Others v Chong Fook Kam and Another* [1969] 3 AER 1626 (PC) at p1629

161 Exceptions can be found in Sections 330 of POCA 2002 ("Failure to disclose: regulated sector"), Article 34(2) Jersey POCA ("Concealing or transferring proceeds of criminal conduct") and Section 38(2) Guernsey CJA ("Concealing or transferring proceeds of criminal conduct"), each of which uses an objective standard of reasonableness

162 e.g. Guidance Notes issued in terms of Proceeds of Crime Jersey Law, (as amended) (1999, Jersey Financial Services Commission website www.jerseyfsc.org). para 2.05-2.06

163 See the discussion of *mens rea* and foreign tax, above pages 36-37/section 4.4

164 See above page 8/section 1.3

165 e.g. the FATF Interpretation note referred to above at page 13 note 32

schemes. On the other hand, the involvement of professionals might wrongly eliminate suspicion[166] and, if it does, will be a defence. Much will depend on the facts of each case. Most financial institutions now include in their terms of business a provision to the effect that the client is responsible to obtain his own tax advice and obliged to meet his tax obligations, if any. Are such provisions enough to allay any suspicions the institution might otherwise have had? It is submitted that they are not, and if suspicion arises, the existence of such a provision is no protection.

Where "reasonable suspicion" is in issue, there are also uncertainties. Against what standard will the conduct be judged? Would it be reasonable to expect that a bank clerk or trust officer in an offshore trust company has some knowledge of the tax regime to which his client is subject? Can the reasonable trustee perform his function without at least an outline knowledge thereof? Would the standard of reasonableness be judged against a person of the same skill and expertise as the bank clerk or trust officer or is it that which a person in that position should have had. This might be particularly relevant in offshore jurisdictions which are known to have limited pools of labour and expertise available and might there be a lower objective standard in those places than in others, for that reason?

6.5 Suspicious transaction reports - defence to money laundering charges and risks

It is a defence under each of the laws that a report has been filed recording a suspicion that property is the proceeds of criminal conduct[167]. Making such a report is not a breach of any secrecy obligation or restriction on the disclosure of information owed to any person[168] and, under the Guernsey and Jersey laws "… shall not involve the person making it in any liability of any kind to any person …".

One risk of making a report is that the suspicion on which it is based is not appropriate to justify the report and that, in consequence, the protections do not apply. In an unreported decision[169] concerning property which had been frozen after a STR had been filed, the Royal Court of Jersey held that Article 32(3) did

166 Such as might have been the case in *R v Charlton* [1996] STC 1418- see p 1425c-h

167 Article 32(3) Jersey POCA, Section 39(3) Guernsey and Section 327(2) POCA 2002

168 Section 39 (3) (b) Guernsey CJA, article 32(3) Jersey POCA and section 337(1) POCA 2002.

169 *In the Representation of DP*, Royal Court 6 August 2002 - unrep. [2002] 6 Jersey Law Review p331

not protect a company director who had filed a report about property of company A (about which he had no suspicions) because he had concerns about unconnected activities of company B in which one of company A's shareholders also had an interest. The director was criticised and ordered to pay the costs of the application. The brief summary of the judgement in the Jersey Law Journal gives no details of the court's reasoning, but this case illustrates the point.

The position in this respect is clearer under POCA 2002 where the suspicion must be that the property is the proceeds of crime (i.e. there has been criminal conduct as defined and that these are its proceeds).

Once a report has been made, it becomes illegal to disclose that fact to any other person[170] and it also becomes illegal to deal with the property without the consent of the authorities. The authorities can authorise the "reporter" to proceed with any transaction relating to the property. This can give rise to another dilemma, if the suspicion is that a third party has an interest in the property and he has become the constructive trustee for that third party. He should advise his client and the third party and await the outcome of any claims. By declining to proceed with a transaction requested by his client, he runs the risk of revealing his suspicion and the report, but by proceeding with the transaction he runs the risk of a civil claim by the beneficiary of the constructive trust. If the authorities do not consent to the release of the property, he cannot release it to the beneficiary of the constructive trust but can equally not disclose to the beneficiary the reason for not doing so. This might be of limited application in cases of tax evasion unless the circumstances are such that the tax authority could be regarded as the beneficiary of the constructive trust[171].

It is likely that the protection provided will be a very strong incentive to make a report on the least suspicion and face the consequences of a civil claim, rather than face prosecution and other consequences for failing to do so. For this reason, it is likely that reports of legal tax avoidance schemes will also find their way to the authorities.

6.6 Use of the information

Once a report has been filed, the use to which the information is put is entirely up to the authorities. There is no prohibition upon its transmission to any other

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170 "Tipping off" Section 333 POCA 2002; Section 41 Guernsey CJA and Article 35 Jersey POCA

171 If the Civil Recovery provisions of POCA 2002, do apply to tax evasion, it is possible that the Asset Recovery Agency could be such a beneficiary but is unlikely to be prejudiced by these provisions.

authority, whether domestic or foreign and no limit to the use to which the information may be put by any foreign authority. Thus, the exchange of information under anti-money laundering laws is very different to the exchange of information under Double Tax Treaties. The authorities might seek to limit the use to which the information can be put (so that, for example, information can be used for investigation and prosecution of tax evasion but not exchange control evasion), but have no remedy other than the use of diplomatic channels if those limits are not adhered to. The financial investigation units of Jersey and Guernsey advise[172] that discretion is used in providing information to foreign authorities, with a view to ensuring that persons are not placed in danger or at risk of unfair treatment of some sort. It is also their policy that information contained in reports should not be used as evidence but that other channels should be used to obtain evidence for legal proceedings.

7 Conclusion

As has been seen, the origins of the anti-money-laundering legislation in the UK and the Channel Islands make it clear that tax evasion was not envisaged as one of the crimes to which it would apply. The fit with tax evasion is an uncomfortable one, even in relation to POCA 2002 and there are many unanswered questions as to how precisely these laws will apply in given circumstances. However, and despite the arguments, it is clear that the authorities regard fiscal evasion (both foreign and domestic) as within the scope of the legislation. Whether and in what circumstances the courts will do so remains an open question, but one which seems heavily weighted in favour of the views of the authorities.

Not least because of the many uncertainties which it creates, the legislation poses significant risks and problems for all those involved with the financial affairs of others, whether as professional advisers, investment managers, trustees or bankers. Whereas previously offshore jurisdictions were somehow regarded as fairly safe from detailed inquiry, particularly into tax matters, that is clearly no longer the case. Those jurisdictions are, it would appear, subject to significant pressure from elsewhere to enact and enforce laws which are the equivalent of those in the major economies and, given their profiles as "tax havens" with all of the pejorative connotations which that brings, regard themselves as in the spotlight in relation to enforcement.

172 Correspondence with the writer

It is clear that laws against money-laundering are now here to stay. A major effort has been undertaken in drafting and implementing the legislation and a considerable political commitment has been made to its enforcement. The inconvenience and cost which it causes in business life will have to be accepted as part of a campaign which governments believe is sufficiently important to warrant the cost. Originally conceived as a weapon in a campaign against drug dealing and sophisticated organised international criminals, anti-money-laundering law is now clearly seen by governments as an important weapon against tax evasion whether or not that is linked in some way to drug dealing and organised crime.

The legislation cuts across many previously hallowed principles, in particular concerning confidentiality, professional obligations and the enforcement of the revenue and criminal laws of other jurisdictions. It raises a great many arguments and uncertainties and might well operate unfairly, if only because of the difficulties in knowing whether or not a crime might have been committed. It tips the balance strongly in favour of the State and against the individual in many ways. It will lead to greatly increased flows of financial information concerning people who are innocent of any crime or wrongdoing of any sort and whose affairs might never otherwise have come to the attention of the authorities. It must be asked whether this is necessary or desirable. The courts have shown, in the decisions in the *Allen*, *Smith* and *Walsh* cases that they are likely to adopt a very robust approach in ensuring that the purpose for which this legislation has been enacted is pursued. It is to be hoped that the courts do not lose sight of their role in maintaining the balance between citizen and state.