

Tax Evasion –A crime in itself : The Relationship with Money Laundering

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Tax Evasion

- ▶ *“Tax evasion* means escaping or reducing tax by illegal means. This can range from wrongfully concealing income or assets and failing to declare them through to forging documents. Evasion usually involves dishonesty.” (Davies; Principles of Tax Law)
- ▶ Tax evasion is an illegal practice where there is an intentional avoidance to pay the true tax liability. The perpetrators who are caught evading taxes are generally subject to criminal charges and substantial penalties. (Stiglingh, 2013)



S147(1), Income Tax Act 1995

“Any person who willfully and with intent to evade income tax:

- a) Submits a false return of income;
- b) Gives any false information;
- c) Prepares or maintains or authorizes the preparation or maintenance of any false books, records or documents or falsifies or authorizes the falsification of any books, records or documents;
- d) Produces for examination false books, records or documents;
- e) ...
- f) ...
- g) Misleads or attempts to mislead the Director-General, in relation to any matter or thing affecting his own or any other person’s liability to income tax.

shall commit an offence and shall, on conviction, be liable to a fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding 2 years.”

Tax Avoidance

- ▶ Tax avoidance can be divided into two categories:
 1. Permissible Tax Avoidance Schemes
 2. Forbidden Tax Avoidance Schemes



Tax Evasion v/s Tax Avoidance (1)

- ▶ ***The difference between tax avoidance and tax evasion is the thickness of a prison wall***” Denis Healey.



Tax Evasion v/s Tax Avoidance (2)

Inland Revenue Commissioners v. Duke of Westminster [1936] A.C. 1

- ▶ *“Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax-payers may be of his ingenuity, he cannot be compelled to pay an increased tax”*

Tax Evasion v/s Tax Avoidance (3)

WT Ramsay Ltd v IRC [1982] AC 300

"Given that a document or transaction is genuine, the Court cannot go behind it to some supposed underlying substance. This is well known principle of IRC v Duke of Westminster. This is a cardinal principle, but it must not be overstated or overextended. While obliging the Court to accept documents or transactions, found to be genuine, as such, it does not compel the Court to look at a document or a transaction in linkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it from being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task for the Court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that it emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded. For this there is authority in the law relating to income tax and capital gains tax."

Specific Anti Avoidance Rules: Income Tax Act 1995

- ▶ Section 84 of the ITA 1995: Interest on debenture to shareholder reclassified as dividend.
- ▶ Sections 85, 86 and 87 of the ITA 1995 : Excessive payment or remuneration made to directors, employees or other persons is beyond reasonable amount disallowed.
- ▶ Power the MRA to reclassify expenditure.

General Anti-Avoidance Rule [GAAR] – Income Tax Act 1995, Section 90

"(1) Where any transaction has been entered into or effected and that transaction has, or would have had but for this section, the effect of conferring a tax benefit on a person...relevant person, and having regard to –

- (a) the manner in which the transaction was entered into or carried out;
- (b) the form and substance of the transaction;
- (c) ... (d) any change in the financial position of the relevant person that has resulted, will result, or may reasonably be expected to result, from the transaction;
- (e)... (f) whether the transaction has created rights or obligations which would not normally be created between persons dealing with each other at arm's length under a transaction of the kind in question; and (g)...

the Director-General may conclude that the person, or one of the persons, who entered into or carried out the transaction, did so for the sole or dominant purpose of enabling the relevant person, either alone or in conjunction with other persons, to obtain a tax benefit."

General Anti-Avoidance Rule [GAAR] – Income Tax Act 1995, Section 90

- ▶ (2) where subsection (1) applies the Director-General shall assess the liability to tax of the relevant person-
 - (a) as if the transaction or any part thereof had not been entered into or carried out; or
 - (b) in such other manner as the Director-General considers appropriate to counteract the tax benefit which would otherwise be obtained.

- ▶ (3) For the purposes of this section -
 - "tax benefit" means the avoidance or postponement of the liability to pay income tax or the reduction in the amount thereof;
 - "transaction" includes a transaction, operation or scheme whether or not such transaction, operation or scheme is enforceable, or intended to be enforceable, by legal proceedings

Court's Interpretation of S90 ITA 1995

- ▶ **Sir Gaetan Duval v Commissioner of Income tax (1983 MR 67)**
 - ▶ Adopted test laid down in **Newton v. Commissioner of Taxation of the Commonwealth of Australia (1958) A.C. 450** : *"In order to bring the arrangement within the section you must be able to predicate - by looking at the overt acts by which it was implemented-that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section."*

- ▶ **Mauritius Revenue Authority (Director General) v EA L Man Hin & Sons Ltd (2015 SCJ 144)**
 - ▶ Approved test laid down in the Australian case law **FCT v Spotless Services Ltd (1996) 186 CLR 404** where the following was held: *"A particular course of action may be both "tax driven" and bear the character of a rational commercial decision.... Much turns upon the identification, among various purposes, of that which is "dominant". In its ordinary meaning, dominant indicates that purpose which was the ruling, prevailing or most influential purpose...."*

The International Dimension of Tax Crimes

Government of India v Taylor (1955) AC 491

Lord Somervell :

"No country ever takes notice of the revenue laws of another. After considerable research no case of any country could be found in which taxes due to State A had been enforced in the courts of State B."

However, this rule is widely circumvented by international treaties:

- ▶ The Multinational Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI)
- ▶ The Mutual Assistance in Criminal and Related Matters Act 2003 (MACRMA)
- ▶ Double Taxation Agreements (DTA)
- ▶ Financial Action Task Force (FATF)

Money Laundering

► The Financial Action Task Force (“FATF”) defines money laundering as the processing of criminal proceeds to disguise their illegal origin in order to legitimize the ill-gotten gains of crime.



The Financial Intelligence and Anti-Money Laundering Act [FIAMLA] 2002

S3(1) Money Laundering:

Any person who:

- (a) Engages in a transaction that involves property which is, or in whole or in part directly or indirectly represents, the proceeds of any crime; or
- (b) receives, is in possession of, conceals, disguises, transfers, converts, disposes of, removes from or brings into Mauritius any property which is, or in whole or in part directly or indirectly represents, the **proceeds of any crime**;

Where he suspects or has reasonable grounds for suspecting that the property is derived or realized, in whole or in part, directly or indirectly from **any crime**, shall commit an offence.

The Financial Intelligence and Anti-Money Laundering Act 2002

“crime”

“(a) Means an offence punishable by –

- (i) Penal servitude;
- (ii) Imprisonment for a term exceeding 10 days;
- (iii) A fine exceeding 5,000 rupees;

(b) Includes an activity carried on outside Mauritius and which, had it taken place in Mauritius, would have constituted a crime; and

(c) Includes an act or omission which occurred outside Mauritius but which, had it taken place in Mauritius, would have constituted a crime;”

CRIMINAL CODE ACT 1838

11. Penal servitude

- (1) The punishment of penal servitude is imposed for life or for a minimum term of 3 years.
- (2) Where in any enactment the punishment of penal servitude is imposed without a term being specified, the maximum term for which the punishment may be imposed is 40 years.

Use of services of banks, financial institutions, cash dealers to commit an offence

S3(2), FIAMLA:

- (2) A bank, financial institution, cash dealer or member of a relevant profession or occupation that fails to take such measures as are reasonably necessary to ensure that neither it nor any service offered by it, is capable of being used by a person to commit or to facilitate the commission of a money laundering offence or the financing of terrorism shall commit an offence.
- **ICAC v Mauritius Commercial Bank Ltd [2017 INT 369]**: The Bank was fined two million rupees for failing to take measures that are reasonable to ensure its services are not used to facilitate crime.
- All suspicious transactions of money laundering are required to be reported directly to the Financial Intelligence Unit [FIU].

Court's Approach to Money Laundering

▶ **The Director of Public Prosecutions v A.A. Bholah ([2011] UKPC 44)**

The Judicial Committee of the Privy Council overruled the decision of the Supreme Court and held :

"Proof of a specific offence was not required to establish guilt. It is sufficient to show that the property possessed, concealed, disguised, or transferred etc. represented the proceeds of any crime – in other words any criminal activity – and that it is not required of the prosecution to establish that it was the result of a particular crime or crimes."

Relationship between Tax Evasion and Money Laundering

- ▶ Transfer of property which directly or indirectly represents proceeds of any crime



ICAC v Z.A Moraby & N.Moraby 2014 INT 70 (1)

Facts :

- ▶ Accused 1, a pharmacist transferred funds to bank account of brother, sister and mother.
- ▶ Accused conceded that he did not pay tax on funds in bank account.
- ▶ Prosecution alleged that the mere fact that Accused conspired to evade paying taxes by concealing his taxable income in various bank accounts was sufficient to transform funds into "proceeds of crime".
- ▶ Prosecution argued that Accused had obtained a pecuniary advantage in the form of tax avoidance.

ICAC v Z.A Moraby & N.Moraby 2014 INT 70 (2)

- ▶ "Mr Goburdhun's Argument based on "pecuniary advantage in the form of tax avoidance" – see R v K(I) [supra], is deceptively attractive.
- ▶ " ... where a person cheats the revenue by under declaring the takings of a legitimate trade, he obtains a pecuniary advantage in the form of tax avoided and is said to have obtained ... a sum of money equal to the value of the pecuniary advantage and that he further "benefitted" from his conduct and the value of his benefit was the value of the sum of money he was treated as having obtained... It would have been open to the jury to infer that the cash represented the underdeclared takings ... so it would then be "criminal property""

ICAC v Z.A Moraby & N.Moraby 2014 INT 70 (3)

Held:

- Property transferred had to be criminal property at the time it was so transferred.
- Transferred legitimate funds cannot be considered as “proceeds of crime” at the time it was transferred albeit in pursuant of a “conspiracy”.
- Accused parties must have knowledge or suspicion that those funds were proceeds of crime.

Conclusion

- ▶ Compliance check and proper due diligence
- ▶ Transparency
- ▶ International Pressure



THANK YOU

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