

A brief guide to Cheating the Revenue with a focus on the PAYE scheme.

Matt Elkins – BSB Solicitors, Jan 2007

1. The common law offence of cheating was generally abolished by the Theft Act 1968 s 32(1), but has been specifically preserved for offences relating to the public revenue. The offence of cheating the Revenue may encompass any form of fraudulent conduct which results in the Revenue being deprived of money to which it is lawfully entitled. As such it is considered by many to be an offence which is too widely drawn and is in need of reform.¹
2. The types of behaviour caught include: failing to account for VAT, withholding PAYE and National Insurance, failing to register for VAT, or simply failing to disclose income. Cheating at common law is a "conduct" offence and the actual result of a loss does not have to be proved;² also sentencing for common law cheating is limitless. There is an indictable common law offence of conspiracy to cheat, the punishment for which is a fine or imprisonment.
3. It has been held that the offence does not require a positive act of deceit such as a false representation; an act of omission, such as the failure to make a return to the appropriate public authority, may be sufficient where the purpose of the omission is to avoid the payment of money which is due.³ Failure to register for PAYE and NI and also omission to account for PAYE and NI, for example, would fall within the offence's scope. There is no need to actually prove a loss to the revenue.
4. It is not necessary to prove conduct resulted in any gain to the individual to establish cheating.⁴

¹ D. Ormerod, Cheating the Revenue, Crim LR (1998); HMRC's Powers and cheating the revenue, Tax Adviser, April 2006

² *R v Hunt* [1994] STC 819, CA.

³ *R v Mavji* [1986] STC 508; also see *R v Dimsey*; *R v Allen* House of Lords

⁴ *R. v. Hunt* [1994] S.T.C. 819; [1994] Crim.L.R. 747.

5. Essentially in order to amount to cheating it need only be established that there is fraudulent conduct that deprived the Revenue of money due.⁵ One of the clearest explanations of the offence is by the trial judge in *R. v. Less*:

The common law offence of cheating the Public Revenue does not necessarily require a false representation either by words or conduct. Cheating can include **any form of fraudulent conduct which results in diverting money from the Revenue** [emphasis added] and in depriving the Revenue of the money to which it is entitled. It has, of course, to be fraudulent conduct. That is to say, deliberate conduct by the defendant to prejudice, or to take the risk of prejudicing, the Revenue's right to the tax in question, knowing that he has no right to do so."

Further in *R v Mavji* the Court of Appeal stated that there was no need of an operative deception (although there may be an element of fraud)⁶:

In our judgment, "cheating the revenue" can take place without any positive act of deceit or, to adopt and respectfully endorse the words of Drake J. when ruling on this matter in the appellant's first trial: 'the common law offence of cheating does not necessarily require a false representation, either by words or conduct. Cheating can include any form of fraudulent conduct which results in diverting money from the revenue and in depriving the revenue of money to which it is entitled.

In *R. v. Hudson* Lord Goddard held that the offence required proof that the documents or statements made by the accused were "false and fraudulent to the appellant's knowledge."

6. In order to succeed in a successful prosecution of cheating often the critical element will be to establish if the defendant has been fraudulent or dishonest. The relevant *mens rea* is therefore the *Ghosh* test:

⁵ Ibid

⁶ Ormerod, *supra* n.2, at page 4

- 1) Was D's act dishonest by the standards of reasonable & honest people?
- 2) Did D realise that his act would be regarded as dishonest by reasonable & honest people?

A finding of dishonesty can turn a tax avoidance scheme into an indictable cheating offence.

7. It is no defence for a professional to argue that he was bound by his professional code or by contract.⁷
8. If a confiscation order has been made where a taxpayer has been found to have cheated the public revenue, the amount of that order is generally restricted to the appropriate amount of tax and interest involved, not the whole of the trader's undeclared profits.⁸

Statutory offences vs. Cheating at common law - legal argument

9. There are offences within Revenue legislation which deal with evasion and fraud that could replace the broad offence of cheating. The offence of cheating has in fact been challenge on numerous occasions as being superseded by specific legislation. However to date these have all failed.⁹ Revenue and Customs may feel safe using the wide offence of cheating as they will be unlikely to charge the wrong offence.

⁷ Garrett v. Arthur Churchill Glass Ltd [1970] 1 Q.B. 92

⁸ Attorney General's Reference (No 25 of 2001) [2001] STC 1309. The confiscation order was made under the Criminal Justice Act 1988 s 71 before repeal by the Proceeds of Crime Act 2002 Sch 12 (as to that Act, see A3.1665). However, see also R v Foggon [2003] STC 461, where the Court of Appeal upheld a confiscation order on a company chairman on the amount of the company income diverted into an undeclared account and used for the chairman's private purposes. In that case, the confiscation order was for an amount equal to the income that had been diverted, which was greater than the corporation tax due; the chairman's pecuniary advantage was the amount of the money diverted, not the amount of unpaid tax.

⁹ Ormerod, supra 2, page 10

10. It is argued however that there may now be fresh grounds for challenging the continued prosecution of the offence of cheating due to the recent House of Lords ruling in *R v Goldstein, R v Rimmington*.¹⁰ The facts relate to a public nuisance; one of the grounds of appeal related to the continuing offence of common law nuisance given subsequent legislative enactments. The House of Lords dismissed the appeal but Lord Bingham *obiter dicta* stated that where an individual could be prosecuted under both a statutory offence and a common law offence, the statutory offence should prevail save where special reasons could be provided. Lord Bingham stated:

There is in my opinion considerable force in the appellants' second contention under this head. Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and **not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited**[emphasis added]. If the directors in *R v Medley* 6 C&P 292 who were ignorant of what had been done, or the octogenarian owner in *R v Stephens* LR 1 QB 702 who was ignorant of what had been done and whose orders were disregarded, were today to be prosecuted for causing a public nuisance rather than under the relevant statutory provision, they would have powerful grounds for objecting, and the same point applies more generally. It cannot in the ordinary way be a reason for resorting to the common law offence that the prosecutor is freed from mandatory time limits or restrictions on penalty. It must rather be assumed that Parliament imposed the restrictions which it did having considered and weighed up what the protection of the public reasonably demanded. **I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise** [emphasis added].

¹⁰ HMRC's Powers and cheating the revenue, Tax Adviser, April 2006; [2005] UKHL 63 on appeal from:[2003] EWCA Crim 3450,

11. Furthermore there has also been recent debate in the House of Lords over cheating and the new fraud Bill:

Lord Kingsland moved Amendment No. 26:

After Clause 11, insert the following new clause—

"ABOLITION OF OFFENCE OF CHEATING THE PUBLIC REVENUE
The common law offence of cheating the public revenue is abolished."

The noble Lord said: The Minister may think that this amendment is definitely out of area. I came upon it because I had the privilege of meeting Professor Ormerod of Leeds University, who is now the learned editor of the great textbook, *Criminal Law* by Smith and Hogan.

Professor Ormerod is also a great expert on the offence of cheating the public revenue. I was discussing the issue of conspiracy to defraud with him, and he said "If you think conspiracy to defraud is an ill-defined offence, what about the offence of cheating the Revenue?".

That offence is even wider than conspiracy to defraud, and is committed whenever a person dishonestly does anything to the pecuniary disadvantage of the king, by act or omission. It is an offence of very long standing.

If the Minister is not tempted by our submissions on conspiracy to defraud, he may feel better disposed towards the suggestion that lies behind this amendment. I beg to move.¹¹

Specific legislation relating to PAYE and NI Fraud

13. Under the Taxes Management Act 1970 it is an offence with a punishment up to a fine of £3000 for assisting in or inducing:

The preparation or delivery of any information, return, accounts or other document which--

(a) he knows will be, or is or are likely to be, used for any purpose of tax, and

(b) he knows to be incorrect,

The sanction provided however would seem to be inappropriate for the Revenue's purposes of prosecuting an individual who has been a party to a multi million pound fraud.

14. Under the Social Security and Administration Act 1992 it is provided under sec. 144 that :

¹¹ Hansard debates 19 Jul 2005 : Column 1455

- 1) If a person fails to pay, at or within the time prescribed for the purpose, any contribution which he is liable under Part I of the Contributions and Benefits Act to pay, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.
[the Contributions and Benefits Act relates to NI payments]

This however would appear to be restricted to personal liabilities and also does not relate to those who assist or encourage a failure to pay. However under sec. 115 it is provided that:

- 1) Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence and be liable to be proceeded against accordingly.

This section would cover the offences committed by for example a company director or secretary. However the section would in fact appear to refer back to the offence of cheating as it simply says those culpable are “liable to be proceeded against accordingly.”

15. Section 144 of the Finance Act 2000 provides that:

- (1) A person commits an offence if he is knowingly concerned in the fraudulent evasion of income tax by him or any other person.
- (2) A person guilty of an offence under this section is liable-
 - (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine, or both.

(3) This section applies to things done or omitted on or after 1st January 2001.

The statute provides for a sentencing which reflects the potential seriousness of the offence, but proposes a limit of seven years, as opposed to the limitless sentencing under the offence of cheating.

16. Given the broad nature of the offence, despite vigorous and learned criticism from the likes of Professor Ormerod, cheating the revenue firmly remains a weapon in Revenue and Customs arsenal. Given a similarly broad approach taken by the new Fraud Act it seems unlikely that Cheating the Revenue will be consigned to the vaults of legal history anytime in the near future.