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SPOTLIGHT ON.....POCA

Confiscation orders – Turnover or Profits revisited.

The benefit of criminal activity, where that activity relates to the running of a business has, under the POCA legislation, frequently been assessed as the gross sales proceeds derived by the business. The level of profit generated by a business from its criminal activity has consistently been deemed irrelevant to the assessment of the benefit of criminal activity.

This was confirmed in the judgment in the case of **R v Beazley** ([2013] EWCA Crim 567). The Defendants were convicted of unauthorised use of a trade mark relating to their sales of branded car wheel trims. This activity comprised the whole of their business. The Court of Appeal found that it was appropriate to use gross sales proceeds, rather than profit, as the measure of criminal benefit. Para. 19 of the judgment states:

“There is nothing remotely disproportionate about removing from this unlawful business the proceeds which it has generated” and “The judgment in Waya specifically endorses the longstanding approval to the difference for confiscation purposes between gross proceeds on the one hand, which are the measure of benefit, and profit on the other, which is not.” (emphasis added).

The benefit figure, therefore, was determined based on the turnover of the business.

In the case of **R v Harvey** ([2013] EWCA Crim 1104) the calculation of criminal benefit by reference to sales was taken a step further by confirmation that the turnover figure to be used should be the total gross sales including VAT.

Mr Harvey had run a plant hire business. Many of the items of plant used in the business, however, were stolen property. A confiscation order was made based on a proportion of the VAT inclusive turnover of the business. One of the grounds of appeal was that “The judge erred in failing to deduct from the turnover figure the amount of VAT received by the appellant from customers”.

It was argued that the VAT amount was additional to the company’s actual charges and represented money that never belonged to the company but rather was collected on behalf of, and had to be passed on to, HM Revenue and Customs. The company did in fact pass that money on by correctly accounting for and paying VAT on a quarterly basis. It was noted that s464 of the Companies Act 2006 defines turnover as “the amount derived from the provision of goods and services..... after the deduction of value added tax”.

These arguments regarding the treatment of VAT, however were firmly rejected, and the use of total gross turnover including VAT as the measure of the benefit obtained was confirmed. The judgment stated:

“The total monies which those customers paid to JHL constituted property which JHL obtained as a result of criminal conduct. JHL then expended those monies in a variety of ways, including payments in respect of VAT, income tax and national insurance.

Those monies belonged to JHL until such times as JHL paid them over. JHL did not hold any of those monies on trust for the intended payees.”

“It would be wrong in principle to carry out an accounting exercise in respect of VAT which JHL collected through the use of stolen property.”

The above two cases paint a fairly bleak picture for defendants facing confiscation proceedings involving their trading business.

This has often been considered unfair by defendants who consider that they will only have actually benefited from the profit generated by their 'business' activities.

There may, however, be a slightly more positive position in circumstances where the underlying business is inherently legitimate, but tainted by some associated criminal activity as opposed to the above two cases in which the entire business comprised a criminal enterprise.

This was highlighted in the case of **R v King** ([2014] EWCA Crim 621).

Mr King traded as a used car dealer. For certain vehicles, however, he advertised and sold them as if he were a private seller in order to avoid providing a guarantee or warranty. There were 58 such vehicles.

The confiscation order was made in the sum of £109,970, being the turnover generated by the 58 cars sold privately.

The profit obtained by selling the cars, taking into account the purchase cost of the vehicles and work undertaken on them prior to sale amounted to £11,140 although this was before any deduction for other overheads of the business.

The question was whether the use of turnover in these circumstances could be considered disproportionate following the decision in *R v Waya*.

The Court of Appeal reviewed relevant cases, including those noted earlier in this article and summarised the position as follows:

"The authorities reveal there is a clear distinction to be drawn between cases in which the goods or services are provided by way of a lawful contract (or when payment is properly paid for legitimate services) but the transaction is tainted by associated illegality, and cases in which the entire undertaking is unlawful (e.g. a business conducted illegally, as in Beazley). When making a confiscation order, the court will need to consider, amongst other things, the difference between these two types of cases."

Clearly, establishing which category applies in any particular case will be of key importance to the ultimate level of confiscation order.

Unfortunately for Mr King, however, it was found that *"the present case falls squarely on the Beazley side of the line"* and his appeal against a confiscation order based on turnover was dismissed.

Whilst the above highlights that turnover will often be decided to be the proper measure of a defendant's benefit of criminal activity, we have consistently advised that this does not render the question of the profits generated by that activity irrelevant.

Our position has always been that the level of profits that a business generates will still be critical in determining and understanding the assets and wealth generated by a Defendant and the level of available assets to satisfy any confiscation order.

Explanation of how the profit of a business is derived and how the turnover of the business has been expended and distributed will often be the link between the value of 'criminal benefit' based on turnover, and a much lower level of available assets.

This is of particular importance where it is alleged that a large gap between the 'benefit' figure and the level of available assets is, in itself, evidence that the defendant must have a substantial value of hidden assets. In our experience this is a common prosecution approach.

The principle discussed above was considered in the June 2015 decision of the Court of Appeal in the case of **R v Yu and Lin**.

Mr Yu and Ms Lin (who were husband and wife) were involved in an online business selling counterfeit Rolex watches. The combined benefit of criminal activity of the two Defendants was found to be £1,537,017 and confiscation orders in that amount were made.

The question before the Court of Appeal was whether expenditure can be relied upon as evidence to rebut the assertion of hidden assets when determining the Defendants' "available amount".

The answer to this question was that:

- as a *matter of law* expenses were capable of being relevant to the calculation of the available amount.

However the determinative factor was whether the detailed evidence before the Court

- as a *matter of fact*, was relevant to the calculation of the available amount.

The Court was not persuaded by the Defendants' 'tangled and inconsistent' evidence in this case and the appeal was dismissed.

It will be important, therefore, if you have a client in this position to be able to provide robust, relevant, evidentially strong and well-reasoned and explained evidence of how the Defendant's criminal proceeds have been expended. DTE have significant experience of assessing and presenting such evidence.

Future Bulletins: For more information or to receive the next issue by email, simply email us at: forensic@dtegroup.com, quoting *PJW/Nov 15* and provide your name, company, telephone number and email address.

