

Angus and forfeiture applications:

The need to prove criminal conduct

Discussions of the impact of the Proceeds of Crime Act 2002 almost invariably involve the use of colourful adjectives such as inequitable and draconian. One of the prime objects of criticism is Part V Chapter 3 of the Act, which deals with cash seizures and forfeiture applications.

These provisions allow HMRC officers to seize from any person a sum of cash in excess of £1,000 if they have reasonable grounds for suspecting that the cash is obtained from or intended for use in criminal conduct. In practice, the requirement for a connection to specifically *criminal* conduct is often diluted by, or conflated with, the officer's refusal to believe the defendant's explanation about where the cash came from or what it would be used for. Once the cash is seized and detained, the officer will typically ask numerous questions which prompt the defendant to produce a small mountain of paperwork, as if the burden was upon the defendant to demonstrate beyond reasonable doubt the legitimacy of the cash.

In this context, the recent decision in *Angus v UK Border Agency* [2011] EWHC 461 (Admin) is a useful reminder of what an HMRC officer must prove if he seeks forfeiture of the cash. Mrs Justice Nicola Davies held that, in a forfeiture application, the officer has to demonstrate on the balance of probabilities that the cash was obtained through conduct of one of a number of kinds, each of which would have been criminal conduct. In other words, the officer has to explain why there is a connection between the cash and specifically *criminal* activity.

In one sense, the judgment simply paraphrases the forfeiture provisions of POCA 2002. However, the fact that the Court needed to paraphrase these provisions perhaps indicates a more profound judicial concern about the (willful or otherwise) misuse of the powers granted to HMRC officers in cash seizure cases. A successful forfeiture application must be based upon something more than the tired and inadequate

suggestion that carrying cash is the *modus operandi* of criminals. Although the officer does not need to prove that a particular person committed a particular offence on a particular occasion, it will be necessary to specify identifiable criminal offences in relation to which the cash was obtained. This is not necessarily straightforward, particularly where the defendant is a foreign national stopped at the UK's borders. In such cases, HMRC may need to obtain overseas evidence about why the defendant's activities violate the criminal law of his home country.

The case of *Angus* reminds us that the outcome of a forfeiture application is rarely pre-determined, even if the court has hitherto been easily persuaded to detain the cash on the basis that the criminal investigation was ongoing. In short, HMRC must always be put to proof of the connection between the cash and criminal activity.

Corker Binning © 2011

For further information about cash seizures and forfeiture applications, please contact Corker Binning on 0207 353 6000 or visit www.corkerbinning.com