False economies

Recent failures have exposed serious flaws in the prosecution's tactics in carousel fraud cases, say **John Binns** and **David Corker**

Prosecuting carousel fraud—a pernicious VAT scam—is the responsibility of the Revenue and Customs Prosecutions Office (RCPO). Undoubtedly RCPO's main activity is, and always has been, the prosecution of this type of fraud.

A variant on missing trader intra-community (MTIC) fraud, carousel fraud exploits the fact that sales of goods across EU borders are zero-rated for VAT. Instead, when a UK importer, for example, sells a consignment of mobile phones to his UK customer, the entire amount of VAT he receives has to be paid to HM Revenue & Customs (HMRC). The goods are sold on through a number of UK companies (buffers) before finally being exported back to the EU trader where they started. The UK exporter is entitled to reclaim the VAT he has paid back from HMRC, mostly comprising the sum the importer should have paid at the start, and the EU trader is able to start the process again.

RCPO was created in 2005. This was a consequence of a near universal loss of confidence in its predecessor, the Solicitor's Office, which was a part of HM Customs and Excise. Its reputation as a prosecutor had been ruined as a result of serial wrongful non-disclosure of unused material to the defence in criminal cases relating to this type of fraud.

ABUSE OF PROCESS

With this history RCPO clearly has a duty to ensure that its cases fully comply with the law on disclosure. Unfortunately it suffered a major reverse in this regard recently in the related cases of *R v Vocaturo* (Nottingham Crown Court, 8 October 2007) and *R v Olivier* [2007] EWCA Crim 2220, [2007] All ER (D) 170 (Sep). Here a substantial carousel fraud prosecution against 11 defendants was alleged; thousands of pages of evidence were served and millions of pounds of VAT were said to have been put at risk. The trial was listed to last three to four months. However, before it commenced the trial judge stayed the case for abuse of process relating to non-disclosure.

What went so spectacularly wrong for RCPO? It transpires that it made a number of fundamental errors in relation to its duties of disclosure:

- The schedule of unused material omitted to mention substantial quantities of material the investigators had obtained from third parties. This material showed the trading activity and associations of one defendant's companies—buffers in many of the allegedly fraudulent chains—and so was clearly relevant to the case.
- In applying the statutory tests of disclosure, RCPO considered only whether unused material would assist the defence in undermining the prosecution case. Despite being on notice that there was a likely cut-throat between the defendants, it ignored the possibility that material was disclosable because it would assist a defendant's case by undermining the credibility of another's. Thus boxes of material which were on this criterion clearly disclosable were withheld.
- An endemic feature of carousel fraud prosecutions is that they overlap with each other, and thus there is always a possibility that unused material listed in one case will be relevant and disclosable in another. Unfortunately this issue of linked investigations was overlooked and thus relevant material was not disclosed.

Both the trial judge and the Court of Appeal said RCPO had taken a blinkered and absolutist stance which was more designed to restrict disclosure as far as possible rather than to consider what was in the interests of justice. Clearly this débâcle should provide RCPO with much food for thought.

The fact that these cases are often under-resourced, as conceded in open court in this case by RCPO's leading counsel, should not be seen as an excuse. Equally, RCPO's understandable reluctance to give defence teams "the keys to the warehouse", disclosing an excess of material out of an abundance of caution, should be viewed with suspicion and never be allowed to obscure RCPO's responsibilities under the legislation. Indeed, RCPO's failure in this case shows that taking a restrictive and corner-cutting approach to disclosure for reasons of resource could be seriously counter-productive.

> **IN BRIEF**
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> Carousel fraud and disclosure:
> - The Revenue and Customs Prosecution Office (RCPO) has a duty to ensure that its cases fully comply with the law on disclosure.
> - RCPO failed to comply with this duty in *R v Vocaturo* and *R v O*.
> - Taking a restrictive and corner-cutting approach to disclosure for reasons of resource could be seriously counter-productive.

> "Clearly this débâcle should provide RCPO with much food for thought"

STARK WARNING

This case provides an interesting example of what can go wrong for the prosecutor when it seeks to exploit its new power under the Criminal Justice Act 2003 of appealing a terminating ruling to the Court of Appeal. Having to answer the searching and pointed questions from the court during the hearing of its appeal only served to further expose RCPO's errors. The court's ruling then resulted in an acquittal for the defendant O, which if the trial had gone ahead would have given RCPO serious difficulties in deciding how to present its case.

Moreover, it cannot put this defeat down to a maverick trial judge or to a failure of the serious fraud trial regime. Rather, the case shows a seriously flawed general approach to disclosure in these cases, and its conclusion should serve as a stark warning for future prosecutions.

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