Analysis

Dishonesty and the failure to prevent evasion

Speed read

In *Ivey v Genting Casinos (UK) Ltd*, the Supreme Court overturned 25 years of precedent of what it is to be dishonest. A failure to appreciate that what was done was dishonest is no longer a defence. As businesses are implementing measures to prevent tax evasion, the scope of what it is to evade taxes has just been expanded significantly.

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Mr Ivey is one of the world's leading poker players. In 2012 he played Punto Banco, a variant of Baccarat, at a casino in London. He won over £7m in a matter of hours deploying a technique called 'edge-sorting' which greatly improved his chances of winning. The gambling contract between Mr Ivey and the casino included an implied term that neither would cheat, and if Mr Ivey had cheated then he could not recover his winnings.

Mr Ivey's case was that cheating in the context of games and sport has the same meaning as under the criminal law, and that what he had done did not amount to cheating because there was no dishonesty.

The Supreme Court disagreed (*Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67). Cheating at games and sport does not necessarily involve dishonesty. Time wasting at football may be cheating, but it is not dishonest.

Dishonesty

That was enough for the casino to win. Nevertheless, Lord Hughes went on to consider at great length the different concept of 'dishonesty' as used in the criminal law.

'Cheating' is a common law criminal offence. It was largely abolished by the Theft Act 1968, but remains as 'cheating the public revenue' which is conduct that is intended to dishonestly and deliberately deprive HMRC of tax that would otherwise be due (*R v Less* [1993] WL 965668). Take away the dishonesty element, and this formulation pretty much describes any legitimate tax planning. What turns tax planning into tax evasion is merely the added ingredient of dishonesty.

The Supreme Court confirmed that judges do not and must not attempt to define dishonesty. Whether or not an act is dishonest is a question for the jury alone by reference to the contemporary standards of the ordinary reasonable and honest man or woman.

What had been settled for 25 years, since the decision in *R v Ghosh* [1982] QB 1053, had been that there was a second limb to this test: that the defendant must also have known that his or her conduct was dishonest by those standards. It was this second limb with which the Supreme Court disagreed.

This is best demonstrated by examples of those who would not have been caught under *Ghosh*, but may be now. There is the insurance fraudster who thinks that what he or she does is justified because insurance companies make too much money and never pay out. There is the gambler who thinks the casino is fair game because otherwise the odds are unfairly stacked against the punter. There are those who are too involved in manipulating the financial markets to remember the moral norms of society at large. There is the employee who takes money from the till because they think they are underpaid and exploited. Finally there are tax evaders as was spelt out by Lord Hughes: 'There is no reason why the law should excuse those who make a mistake about what the contemporary standards of honesty are … in the context of … tax evasion' (para 59).

The Supreme Court noted that the capacity of all of us to persuade ourselves that what we do is excusable knows few bounds, and that the more warped the defendant's standards of honesty are, the less likely he or she would have been of being criminally dishonest. *Ghosh* does not correctly represent the law, and the test for dishonesty has only one limb: does the jury consider that the defendant's conduct was dishonest by reference to the contemporary standards of the ordinary reasonable and honest man or woman?

The criminal offences of failing to prevent evasion

What does this decision mean for the new corporate criminal offences of failing to prevent tax evasion?

First, many of us involved in its implementation have had a niggling feeling that there was something not quite right about the second limb of the *Ghosh* test: the better trained an employee is, the harder it would have been to rely on the second limb of the *Ghosh* test in defence. At least now this counter-intuitive reason for not training employees about what it is to evade taxes has gone.

Secondly, tax – like other areas of finance – is an area where a practitioner's views of what is right and wrong can diverge from those of society at large. We live in a society where broadsheet newspapers castigate companies for relying on the quoted eurobond exemption, the substantial shareholding exemption and carried forward losses. How many juries might be persuaded that those who implement normal tax planning strategies have acted dishonestly? Under *Ghosh,* they could have had the defence that they did not realise the planning was dishonest because the profession and even the business community generally would have considered it to be legitimate.

Thirdly, I suspect this means there will be less moral opprobrium attached to whistle-blowing. An employee can confess all to avoid prosecution under COP9 without admitting they knew what they did was wrong. The employer then faces prosecution for failing to prevent.

Finally, it perhaps makes us all pause a little for thought about the risk of those whom we employ or our associated persons being dishonest. The general view had been that it could only be the 'bad egg': someone who knew what they were doing was wrong but carried on regardless. Now it might be anyone whose moral radar has diverged from that of the man on the Clapham omnibus. ■

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