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# DOES TAX EVASION GENERATE CRIMINAL PROCEEDS?

In recent years, the Financial Action Task Force has led a global push to criminalise laundering of the "proceeds of tax evasion". Yet many common law courts hold that tax evasion does not generate "proceeds" in the conventional sense. This article reviews the case law and explores its implications for money laundering offences predicated on tax evasion.

Kenny **FOO***
*LLM (Taxation) (New York University),*
*LLB (Hons) (National University of Singapore);*
*Attorney and Counsellor-at-Law (New York);*
*Advocate and Solicitor (Singapore).*

## I. Introduction

1 The anti-money laundering ("AML") rules are designed to combat serious crimes by interdicting criminal proceeds and facilitating their confiscation. Tax evasion was, historically, not on the list of such crimes. But that changed in February 2012, when the Financial Action Task Force ("FATF") designated tax crimes as predicate offences[1] for money laundering.[2] With a single stroke, the international AML framework was co-opted for the detection, reporting, interdiction and confiscation of the "proceeds of tax evasion". Predictably, the FATF announcement precipitated a surge of legislative and regulatory activity in many jurisdictions, including many common law jurisdictions. Amidst all this busyness, however, something appears to have gone unnoticed: some common law courts hold that tax evasion does *not* generate any "proceeds".

2 That the collective wisdom of the common law courts contradicts the FATF fiat is striking. The FATF acts at the behest of the

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1 Money laundering involves dealing with the proceeds of certain criminal offences. These offences are, in anti-money laundering parlance, "predicate crimes" or "predicate offences". In some jurisdictions all crimes are predicate offences for money laundering, while in other jurisdictions offences are qualified as predicate offences by their seriousness (as measured by the prescribed punishments) or are designated as such on prescribed lists. Some jurisdictions employ a hybrid approach.

2 In February 2012, the Financial Action Task Force (hereinafter "FATF") published a revision of its *Forty Recommendations on Money Laundering* which, for the first time, designated tax crimes as predicate offences for money laundering.

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Group of Seven ("G7") nations and holds itself out as the international standard-setter in the fight against money laundering. The common law jurisdictions have a shared legal heritage, a history of co-ordinated action in combatting international drug trafficking, and (for some of them) key roles in international finance. One might be tempted to explain the schism as simply a matter of the courts lagging behind fast-moving politicians, legislators and regulators. If that is the case, then it is only a matter of time before the courts fall into line. But if the contradiction expresses substantive differences of view, and if the courts are right, then AML rules that operate on the proceeds of crime[3] have nothing upon which to fasten in tax evasion cases, and the aforementioned legislative exertions (and the very idea of using the AML framework to combat tax evasion) will have been misguided.

3 This article outlines the historical context of the FATF's 2012 revision of its *Forty Recommendations on Money Laundering* ("Forty Recommendations"), surveys the commonwealth case law on this point, and considers its implications for money laundering offences predicated on tax evasion.

## II. Brief history of money laundering and tax evasion (1988–2012)

4 When the FATF first published its Forty Recommendations in 1990, its main objective was to push member jurisdictions to implement the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988[4] ("Vienna Convention").[5] The Vienna Convention requires Parties to criminalise the knowing conversion, transfer, concealment or disguise of property derived from specified drug offences.[6] Subsequently, the Forty Recommendations were extended to cover the implementation of the United Nations

3 In Singapore, the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) sets out substantive money laundering offences that target the "benefits" of criminal conduct. It has been argued in this journal that "benefits" really means "proceeds" in these provisions: Kenny Foo, "Money Laundering Offences under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act: Interpretative Difficulties and a Proposed Solution" (2017) 29 SAcLJ 163. Other common law jurisdictions, as will be seen below, tend to use the term "proceeds".

4 1582 UNTS 95 (20 December 1988; entry into force 11 November 1990) (hereinafter "Vienna Convention").

5 The FATF's *Forty Recommendations on Money Laundering* are not legally binding, but a high degree of compliance has been achieved through intergovernmental pressure amongst the 37 FATF member countries and organisations. FATF also exerts pressure on non-member jurisdictions by threatening to label them as "non-cooperative jurisdictions" (with negative consequences) if they fail to comply.

6 Vienna Convention Art 3.

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Convention against Transnational Organized Crime 2002[7] ("Palermo Convention"). The Palermo Convention requires Parties to criminalise the conversion, transfer, acquisition, possession or use of property that is the proceeds of crime.[8]

5 It is important to spell out the class of property that is targeted by the respective Conventions. The Vienna Convention targets property that is "derived from" specified drug offences;[9] such property is also referred to as the "proceeds" of the drug offences.[10] The Palermo Convention targets the "proceeds of crime", which is defined as "any property derived from or obtained, directly or indirectly, through the commission of an offence".[11] Clearly, in both cases, the targeted property – the "proceeds" – must have two qualities:

> (a) The property must have a criminal provenance. It must be "derived from" or "obtained through" the commission of a criminal offence. This denotes a causative relationship between the commission of the criminal offence and the offender's ownership of the property.
>
> (b) The property must be identified (or at least identifiable) at the relevant time. Unless it is so identified, one cannot be shown to have acted upon it – that is, to have converted, concealed, disguised, acquired, used, possessed, disposed of or moved it – with the required *mens rea*.

6 This conception of "proceeds" must be the starting point for the interpretation of the statutes that implement the Vienna and Palermo Conventions in each jurisdiction.[12]

7 Early versions of the Forty Recommendations did not address tax crimes. FATF member jurisdictions levy a wide range of taxes, and criminalise a wide range of related non-compliance. Some of these tax offences clearly produce proceeds: value added tax frauds, in which the perpetrators fraudulently obtain cash refunds from the Revenue, come to mind. But we are not concerned with tax fraud that extracts actual refunds or payments out of the government treasury. Such cases do not

7 2225 UNTS 209 (15 November 2000; entry into force 29 September 2003) (hereinafter "Palermo Convention").
8 Palermo Convention Art 3.
9 Vienna Convention Art 3.
10 Vienna Convention Art 5, providing for the confiscation of the proceeds of drug trafficking.
11 Palermo Convention Art 2(e).
12 *R v El Kurd (Ussama Sammy)* [2001] Crim LR 234 at [30]; *Ang Jeanette v Public Prosecutor* [2011] SGHC 100 at [32]; *Oei Hengky Wiryo v HKSAR (No 2)* [2007] 1 HKLRD 568 at [105].

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raise any difficult issue. We are concerned here with tax evasion *simpliciter*: the evasion of one's personal income tax liability by omitting or understating income in one's tax returns, or failing to file a return when required to do so. We assume, of course, that the income itself is not the proceeds of some other predicate offence.[13] In tax evasion cases, the offender fails to make a payment into the government treasury, but extracts no payment or refund from it.

8 Tax matters were expressly excluded from the scope of the Vienna Convention.[14] Subsequently, however, the FATF discovered that money launderers were making affirmative use of this exclusion – explaining away otherwise suspicious transactions as relating to "tax matters" or "just a little problem with tax" – in order to circumvent financial institutions' obligations to report those transactions to the Financial Intelligence Unit.[15] This came to be known as the "fiscal excuse loophole" in the AML framework.[16] To close this loophole, the FATF adopted a new Interpretative Note to Recommendation 15 on 2 July 1999, directing member jurisdictions to require financial institutions to report suspicious transactions regardless of whether the transactions were thought to "also" involve tax matters. The 2012 revision of the Forty Recommendations went significantly further: by listing tax crimes amongst its "designated categories of offences", the FATF created an affirmative obligation on member jurisdictions to develop lists of tax-related predicate offences for AML purposes.

9 The objective of the 2012 revision is clear: the interdiction and disclosure of untaxed income and assets, even if they are lawfully derived. To engage the AML machinery in this effort, the FATF had to designate tax crimes as a category of predicate offences for money laundering. But the mere designation of an offence as a predicate offence for money laundering does not necessarily imply that the offence generates proceeds; and if an offence does not otherwise generate proceeds, designating it as a predicate offence cannot change that fact. Many offences produce no proceeds. Murder, causing grievous hurt on provocation, outraging a person's modesty, lurking, "belonging to a wandering gang of thieves" and "possessing explosives under suspicious

13 Although income from illegal activities may, of course, be subject to tax: *Southern (Inspector of Taxes) v AB* [1933] 1 KB 713.

14 Vienna Convention Art 3(10); the FATF itself declared, as recently as 1994, that it would not deal with tax issues: FATF Annual Report V (Paris: 1994) at p 6.

15 Interpretative Note to Recommendation 15 (now Recommendation 13 as a result of the 2012 revision); see also the speech by Helen Liddell, Economic Secretary to the UK Treasury on 6 November 1997, quoted in Martin Bridges & Peter Green, "Tax Evasion and Money Laundering – An Open and Shut Case?" (1999) 3(1) JMLC 51 at 53.

16 FATF Annual Report X (Paris: 1999) at para 144.

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circumstances" are all predicate offences for money laundering in Singapore,[17] but they do not generate proceeds.[18] Listing them in the Second Schedule to the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act[19] ("CDSA") does not alter the position. Therefore, the designation of tax crimes as predicate offences for money laundering does not entitle one to skip over the prior question of whether tax evasion actually generates proceeds.

10 Nonetheless, this question appears to have been skipped over in much of the post-2012 legislative and regulatory activity. In a sense, therefore, the success of the FATF campaign in 2012 lay, not in the designation of a new category of predicate offences, but in the introduction of a new narrative regarding the "proceeds of tax evasion" and its unquestioned acceptance by member jurisdictions. The narrative is beguilingly simple: if you fail to declare your income to the Revenue and thereby evade a $100 tax liability, then $100 of your property that *ought* to have been paid in tax is the "proceeds" of tax evasion. This, it is said, is no different from embezzling $100 from the government treasury.

11 As it turns out, many common law courts disagree.

## III. Does tax evasion generate proceeds?

12 The question of whether tax evasion generates "proceeds" for purposes of the money laundering legislation has been exercising the courts (and legal commentators) for some time now, and at any rate long before the 2012 revision of the Forty Recommendations. In the following pages, we survey judicial opinion on this question in the UK, South Africa, New Zealand, Australia, Canada and the US.[20]

17 These are predicate offences in Singapore, listed in the Second Schedule to the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed).

18 Of course, where an offender commits the offence in exchange for a payment – as an assassin might do in the case of murder – one might argue that the payment constitutes proceeds in his hand. But there is a conceptual difference between an inducement to commit an offence and money *obtained as a result of the offence itself*. In the case of an assassin, the money consideration is not part of the offence of murder; the murder *per se* would not, without more, give rise to proceeds. The inclusion of murder in any list of predicate offences does not change that fact. The money received by an assassin may, however, be the proceeds of a conspiracy or incitement to commit murder.

19 Cap 65A, 2000 Rev Ed.

20 Readers will undoubtedly be aware of cases not mentioned here; the author would be grateful to hear about them.

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### *A. The UK*

13 Since 1988, the relevant UK legislation has included, in one form or another, this provision:

> If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

14 When it was originally enacted as s 71(5) of the UK Criminal Justice Act 1988[21] ("CJA"), this provision applied only to confiscation proceedings; money laundering offences were not part of the law then. A person who evaded a tax liability obtained a pecuniary advantage and was treated as having obtained "a sum of money" equal to the amount of tax evaded, and a confiscation order could be made on account of that amount.[22]

15 Money laundering offences were introduced in the UK in 1993.[23] There was considerable debate at the time as to whether tax evasion[24] was a predicate offence for money laundering; one objection was that tax evasion does not generate proceeds capable of being laundered. However, s 71(5) of the CJA – which survives today as s 340(6) of the Proceeds of Crime Act 2002[25] ("POCA") – seemed to settle the question as to the existence of such proceeds. The debate then moved on to questions of identification of the proceeds and whether the evasion of foreign taxes was also within the scope of the money laundering provisions.[26]

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21 c 33.

22 *R v Dimsey* [2000] 1 Cr App R (S) 497; *Attorney General's Reference No 25 of 2001 (Frank Adam Moran)* [2001] EWCA Crim 1770; *R v Joseph William Brack & Joseph James Brack* [2007] EWCA Crim 1205.

23 The money laundering offences were inserted into the Criminal Justice Act 1988 (c 33) (UK) as ss 93A–93D by the Criminal Justice Act 1993 (c 36) (UK).

24 In the UK, there is no specific offence of tax evasion *per se*. Tax evaders are typically charged with offences under the Theft Act 1968 (c 60) or the Fraud Act 2006 (c 35) or the common law offence of cheating the Revenue (or conspiring to cheat the Revenue). The common law offence of cheating the Revenue survives in some other jurisdictions, notably in Hong Kong.

25 c 29.

26 Aileen Barry, "Examining Tax Evasion and Money Laundering" (1999) 2(4) JMLC 326; Martyn Bridges & Peter Green, "Tax Evasion and Money-Laundering – An Open and Shut Case?" (1999) 3(1) JMLC 51; Martyn Bridges & Peter Green, "Tax Evasion: Update on the Proceeds of Crime Debate" (2000) 3(4) JMLC 371; Keith Oliver, "International Taxation: Tax Evasion as a Predicate Offence to Money Laundering" [2002] *International Legal Practitioner* 55; Peter Burrell, "Preventing Tax Evasion Through Money Laundering Legislation" (2000) 3(4) JMLC 304; Ben Brandon, "Tax Crimes Money Laundering and the Professional Advisor" (2000) 4(1) JMLC 37; Peter Alldridge, "Are Tax Evasion

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16 One consequence of s 71(5) of the CJA and s 340(6) of the POCA is that the courts in the UK have never had to squarely face the question of whether tax evasion generates any actual proceeds[27] for purposes of the *money laundering offences* under Pt 7 of the POCA.[28] But s 340(6) of the POCA does not apply to *civil recovery* proceedings under Pt 5 of the POCA, which empowers an enforcement authority to recover any property obtained "by or in return for" criminal conduct.[29] The civil recovery cases are therefore a good proxy for how the money laundering provisions might apply to tax evasion cases in the absence of s 340(6) of the POCA or a similar deeming rule. Granted, the civil recovery provisions in Pt 5 target a narrower class of property than the money laundering provisions in Pt 7: "property obtained by or in return for criminal conduct" is a narrower class than "property obtained as a result of or in connection with criminal conduct".[30] But the difference, as we will see in the cases below, is immaterial for present purposes.

17 In *The Director of the Assets Recovery Agency v William Joseph Lovell*[31] ("*Lovell*"), the defendant's substantial criminal record included burglary, theft, handling stolen goods and mortgage fraud. He also admitted that he had never made a declaration of income to the Revenue, and that he had never paid income tax or national insurance. The Agency sought a civil recovery order in respect of property held by the defendant and his family members. The High Court in Northern Ireland granted the order. An appeal to the Court of Appeal in Northern Ireland was dismissed. On the issue of whether tax evasion gives rise to "property obtained through unlawful conduct" for purposes of a civil recovery action, Kerr LCJ held that money "obtained" by withholding

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Offences Predicate Offences for Money Laundering Offences?" (2001) 4(4) JMLC 350; Jonathan Fisher QC, "The Anti-Money Laundering Disclosure Regime and the Collection of Revenue in the United Kingdom" [2010] *British Tax Review* 235.

27 To be precise, the property targeted by the money laundering offences in Pt 7 of the UK Proceeds of Crime Act 2002 (c 29) is "criminal property". Criminal property is – subject to a *mens rea* requirement – property that is obtained "as a result of or in connection with" a person's criminal conduct (or that represents such property): ss 340(3) and 340(5) of the Act.

28 In money laundering cases predicated on tax evasion, the courts have typically recited the relevant provisions of s 340 of the UK Proceeds of Crime Act 2002 (c 29) and assumed the existence of proceeds: *R v IK* [2007] EWCA Crim 491; *R v William* [2013] EWCA Crim 1262; *R v Yip* [2010] EWCA Crim 1381; *R v Geary* [2010] EWCA Crim 1925.

29 Proceeds of Crime Act 2002 (c 29) (UK) ss 240, 242 and 243.

30 *Wiese v UK Border Agency* [2012] EWHC 2549 (Admin) at [42]–[43]; *In the Matter of Crystal Ltd* 2002 CILR 497.

31 [2009] NICA 27.

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tax and insurance payments due to the Government is cash or property obtained through unlawful conduct.[32]

18 At about the same time, the English High Court accepted in *Serious Organised Crime Agency v Gale*[33] ("*Gale*") that property identified by the Interim Receiver in that case was obtained from "money laundering, tax evasion and drug trafficking". However, the court acknowledged that it was not possible to quantify the extent of the tax evasion nor to estimate the extent, if any, that it contributed to the defendants' capital wealth.[34] It nonetheless granted the civil recovery order sought by the Agency.

19 In the following year, however, another judge in the English High Court took the opposite view in *Serious Organised Crime Agency v Bosworth*[35] ("*Bosworth*"). In this case, the defendants were accused of handling stolen goods, evading tobacco duty and evading income tax. Although decisions of the Northern Ireland courts are not binding on English courts, the Agency relied on *Lovell* to claim that any income derived from a legitimate business, but deliberately not declared to the Revenue, is "property obtained through unlawful conduct" and hence subject to a civil recovery order. (*Gale* was, apparently, not cited to the court.)

20 The court found it "difficult to understand" the view expressed by Kerr LCJ (in *Lovell*) that a defendant "obtains" money as a result of not paying his debts out of available assets. Denying the application for civil recovery, the court held:

> (a) A person who fails to make tax returns of his income does not "obtain" anything. He merely "retains" sums that he would otherwise have had to pay to the Revenue. Those sums are his already, not assets which become his because he does not file a tax return or pay taxes properly due.[36]
>
> (b) It is necessary for the enforcement agency to link a particular asset of the defendant to the funds that ought to have been applied to discharging tax liabilities. It is not sufficient to merely demonstrate that someone has engaged in conduct which was unlawful *and* had property. The enforcement agency must prove that the person had particular identified property *as*

32 *The Director of the Assets Recovery Agency v William Joseph Lovell* [2009] NICA 27 at [32].
33 [2009] EWHC 1015 (QB)
34 *Serious Organised Crime Agency v Gale* [2009] EWHC 1015 (QB) at [140].
35 [2010] EWHC 645 (QB).
36 *Serious Organised Crime Agency v Bosworth* [2010] EWHC 645 (QB) at [25].

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> *a result of* engaging in the unlawful conduct.[37] In this case, the Agency failed to do so.

21 There is no way to reconcile *Lovell* and *Gale* with *Bosworth* on the issue of whether a person "obtains" anything as a result of his tax evasion. Their conclusions are diametrically opposed. But the force of *Lovell* and *Gale* is weakened considerably because: (a) no property was identified as having been obtained from the tax evasion; and (b) there was sufficient criminality unrelated to tax evasion to support the civil recovery orders made in those cases. For these reasons, it is submitted that *Bosworth* carries greater precedential force. The holding in *Bosworth* also underscores the crucial role of s 340(6) of the POCA in such cases: in the absence of s 340(6) of the POCA, a person would not otherwise be considered to "obtain" any property as a result of evading his tax liabilities.

### *B. South Africa, New Zealand and Canada*

22 In South Africa, s 50(1)(b) of the Prevention of Organised Crime Act 1998 provides for the forfeiture of the "proceeds of unlawful activities", which is defined in s 1 of the Act as:

> … any property or part thereof or any service, advantage, benefit or reward which was derived, received, or retained, directly or indirectly, in connection with or as a result of any unlawful activity carried on by any person … and includes any property representing property so derived.

23 *National Director of Public Prosecutions v Seevnarayan*[38] involved a defendant who opened an investment account using a fictitious name. He funded the account with capital from legitimate sources, then proceeded to buy and sell investments through that account; gains were reinvested for five years. During this period, he omitted the investment gains in his income tax returns and thereby evaded income tax. The Prosecution claimed that the entire amount in the account was subject to forfeiture. The South African Supreme Court of Appeal rejected the claim, holding that none of the funds were the "proceeds of unlawful activities":

> (a) The capital sum invested, having been originally derived from legitimate sources, did not somehow change its character in the course of the scheme so as to be tainted with

37 *Serious Organised Crime Agency v Bosworth* [2010] EWHC 645 (QB) at [92].
38 [2004] ZASCA 38; [2004] 2 All SA 491.

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the fraud that the defendant perpetrated by investing under false names.[39]

(b) The income derived from the investments was a direct result of the defendant's investment rather than his filing of false income tax returns.[40]

24 In New Zealand, s 49 of the Criminal Proceeds (Recovery) Act 2009[41] provides for the restraint and civil forfeiture of "tainted property", which is defined in s 5 of the Act as property that has, wholly or in part, been: (a) acquired as a result of significant criminal activity; or (b) directly or indirectly derived from significant criminal activity.[42]

25 *Commissioner of Police v Dryland*[43] involved a defendant who was found in possession of a large amount of cash that he claimed was derived from the operation of a legitimate business. The Commissioner sought to forfeit the cash, alleging that it was "tainted property" because: (a) the cash was the proceeds of drug dealing; or (b) the defendant had evaded taxes on his business income. The High Court held that the Commissioner failed to prove that the money was acquired by the defendant from the sale of illicit drugs. The court further held that, even if the defendant had committed the offence of tax evasion, he did not acquire or derive any money through tax evasion; the money was acquired through his lawful activities and therefore was not tainted property.[44] The Commissioner's application for forfeiture was accordingly dismissed.[45]

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39 *National Director of Public Prosecutions v Seevnarayan* [2004] ZASCA 38 at [69].

40 *National Director of Public Prosecutions v Seevnarayan* [2004] ZASCA 38 at [73]. The court also rejected the argument that the defendant "retained" any part of the income "in connection with or as a result of the offence", even where the offence was committed with the object of evading taxes on such income. *Cf* Bernd Schlenther, "The Taxing Business of Money Laundering: South Africa" (2013) 16(2) JMLC 126.

41 2009 No 8.

42 For purposes of the money laundering offences under the New Zealand Crimes Act 1961 (1961 No 43), s 243 thereof defines "proceeds" as "any property that is derived or realised, directly or indirectly, by any person from the commission of the offence". This is similar, though not identical, to "tainted property".

43 [2012] NZHC 2231.

44 *Commissioner of Police v Dryland* [2012] NZHC 2231 at [21]–[22].

45 The High Court's finding in relation to the drug dealing was reversed on appeal: *Commissioner of Police v Dryland* [2013] NZCA 247, but its decision on the question of tax evasion remains intact. The question of whether property is derived from, or acquired as a result of, tax evasion has arisen in a number of subsequent cases, but the courts have not had to rule directly on the point: *Commissioner of Police v Investments Ltd* [2015] NZHC 3139; *Commissioner of Police v Cheng* [2016] NZHC 2304. The High Court decision in *Commissioner of Police v Dryland* [2012] NZHC 2231 on the tax evasion issue therefore appears to be good law in New Zealand.

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26 In Canada, s 462.31 of the Criminal Code[46] makes it an offence to transfer possession of property with the intent to conceal or convert that property, while knowing that the property "was obtained as a result of the commission of an enterprise crime offence".

27 *R v Khan & Muellenbach*[47] involved a father and son who operated a business of selling fake identification cards. In order to conceal his assets and income from the Canada Revenue Agency, the elder defendant registered his business and properties in the names of nominees. The defendants were charged with forgery and income tax fraud. They were also charged with money laundering under s 462.31 of the Criminal Code. The money laundering charge specified the tax fraud as the source of the laundered funds. The Superior Court of Justice of Ontario dismissed the money laundering charge, holding that: (a) the source of the laundered funds was not the tax fraud allegedly perpetrated by the defendant; and (b) the tax fraud itself did not produce proceeds of crime, or any funds capable of being laundered.[48]

### *C. Commonwealth of Australia*

28 In Australia, the Commonwealth money laundering offences were first introduced by the Australian Proceeds of Crime Act 1987 ("APOCA"), and have since been consolidated into Division 400 of the Criminal Code.[49] These offences target the "proceeds of crime", which is defined as "any money or other property that is wholly or partly derived or realised, directly or indirectly, by any person from the commission of an [indictable] offence".[50]

29 In *Isbester v R*[51] ("*Isbester*"), an accountant created and administered tax evasion schemes for his Australian clients. On his advice, his clients – owners of companies carrying on business in Australia – caused their companies to make payments to offshore entities (that the accountant controlled) in return for fictitious services. The companies then claimed deductions for these payments on their Australian tax returns. The accountant later made cash payments back to the owners of those companies, disguising those amounts as loan repayments. Under Australian tax law, these amounts were deemed dividends and hence taxable income in the hands of the shareholders,

46 RSC 1985, c C-46.
47 2015 ONSC 7283.
48 *R v Khan & Muellenbach* 2015 ONSC 7283 at [642].
49 The Criminal Code was enacted as a schedule to the Australian Criminal Code Act 1995.
50 Criminal Code s 400.1; this definition is substantially the same as the one in s 4 of the Australian Proceeds of Crime Act 1987.
51 [2013] NSWCCA 230.

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but they filed tax returns deliberately omitting these amounts. The defendant had no part in the tax evasion scheme; he was merely a courier retained by the accountant to deliver bulk cash to the shareholders. He was nonetheless convicted of dealing with money that was the "proceeds of crime".

30 On appeal to the New South Wales Court of Criminal Appeal, the defendant argued that it was wrong, as a matter of law, to say that when tax is evaded on a person's otherwise lawful income, part of that income becomes the unpaid tax or is regarded as derived indirectly from the unpaid tax. However, Hoeben CJ felt unable to accept any construction of "proceeds" that would exclude money that was handled pursuant to tax evasion schemes. He opined that such a result "would be surprising"[52] and sought strenuously to avoid it:[53]

> [The defendant] accepted that the meaning of 'derived' in the context of tax evasion offences was correctly set out in *Saffron v DPP* [1989] 96 FLR 196 and *DPP v Jeffrey* [1992] 58 A Crim R 310. In *Saffron*, Clarke JA found that Saffron had derived a 'monetary benefit' being the tax saved which flowed from his commission of a tax evasion offence. Kirby P accepted as correct the conclusion that the profits from Saffron's unpaid taxes were a benefit 'indirectly' derived from the commission of a tax evasion offence. Hunt CJ at CL in *Jeffrey* by reference to *Saffron v DPP* concluded that property acquired by the use of money made available to Jeffrey by reason of him committing the offence of understating his income was indirectly derived from that offence.
>
> Another way of expressing the findings in *Saffron v DPP* is that Saffron directly derived the money he should have paid in tax because he retained it to use as he saw fit … Inherent in the approach of Hunt CJ at CL in *Jeffrey* was a finding that the money made available by the tax evasion offence was directly derived by the commission of that offence. Accordingly, it is difficult to reconcile the point taken by [the defendant] with the effect of those decisions.

31 With great respect to the learned Chief Justice, that is a very strained reading of *Saffron v Director of Public Prosecutions (Cth)*[54] ("*Saffron*") and *Director of Public Prosecutions (Cth) v Jeffrey*[55] ("*Jeffrey*").

52 *Isbester v R* [2013] NSWCCA 230 at [39].

53 *Isbester v R* [2013] NSWCCA 230 at [44]–[45]. Interestingly, Hoeben CJ chose to refer to the judgment of Hunt CJ (the decision of the court of first instance in *Director of Public Prosecutions (Cth) v Jeffrey* [1992] 58 A Crim R 310) instead of the decision of the New South Wales Court of Appeal (*Jeffrey v Director of Public Prosecutions (Cth)* [1995] NSWSC 47).

54 [1989] 96 FLR 196; (1989) 87 ALR 151.

55 [1992] 58 A Crim R 310; [1995] NSWSC 47 (CA).

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32 *Saffron* involved a defendant convicted of conspiracy to defraud the Commonwealth by evading the payment of taxes. The Prosecution sought a pecuniary penalty order under s 26 of the APOCA, calculated by reference to the "benefits" derived by the defendant from the offence. Pending an appeal on the conspiracy charge, the Prosecution applied for restraining orders under s 43 of the APOCA against the defendant's property. Such applications must be supported by an affidavit of a police officer stating his belief that: (a) the property is "tainted property" in relation to the offence; or (b) the defendant derived a "benefit", directly or indirectly, from the commission of the offence.[56] Tainted property includes the "proceeds of the offence", which is defined as "any property that is derived or realised, directly or indirectly, by any person from his commission of the offence".[57]

33 In *Saffron*, the police officer's affidavit asserted his belief that the defendant had derived a benefit from his tax evasion. The court of first instance granted the restraining orders; the defendant appealed. Both Matthews J (who issued the restraining order) and Kirby P (who presided over the appeal) observed that there was no suggestion at any time that the property in question was "tainted property";[58] neither the argument nor decision in *Saffron* proceeded on the basis that the defendant derived any property, directly or indirectly, from his tax evasion. In the light of this, it is difficult to see how Hoeben CJ could later (in *Isbester*) express the findings in *Saffron* as "Saffron directly derived the money he should have paid in tax because he retained it to use as he saw fit".[59]

34 *Jeffrey* involved a defendant who failed to file tax returns for a number of years. During that period, he bought real property, funding the purchases substantially with bank borrowings. He was later convicted of an unrelated drug offence, and the Prosecution sought and obtained restraining orders under s 43 of the APOCA in respect of property held by the defendant and his family members. Applications for such restraining orders, as we observed earlier, must be supported by an affidavit of a police officer stating that: (a) he believes that the property is "tainted property"; or (b) he believes that the defendant derived a benefit, directly or indirectly, from the commission of the offence.[60] Under the second limb, the Prosecution is *not* required to prove or allege, and the court is *not* required to find, any connection between the property and any offence. However, to prevent the automatic forfeiture of the restrained property, the defendant bears the

56 Proceeds of Crime Act 1987 (Cth) s 44(5)(c).
57 Proceeds of Crime Act 1987 (Cth) s 4.
58 *Saffron v Director of Public Prosecutions (Cth)* (1989) 87 ALR 151 at 153 and 156.
59 *Isbester v R* [2013] NSWCCA 230 at [45].
60 Proceeds of Crime Act 1987 (Cth) ss 44(1) and 44(7A).

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burden of satisfying the court that the property was *not* derived, directly or indirectly, by any person from unlawful activity.[61] In order to establish this negative fact, the defendant has not only to deny on oath in general terms that the property was so derived, but also to affirmatively establish what activities it was in fact derived from.[62] Hunt CJ found that the defendant failed to discharge this burden, notwithstanding the fact that he had already settled all outstanding tax liabilities with the Australian Tax Office.[63]

35 Returning again to Hoeben CJ's reasoning in *Isbester*, it is difficult to see how *Saffron* could have helped Hunt CJ to conclude in *Jeffrey* that "property acquired by the use of money made available to Jeffrey by reason of him committing the offence of understating his income was indirectly derived from that offence", since *Saffron* did not proceed on the basis that the defendant had derived property from the evasion of tax.[64] It is also difficult see how Hoeben CJ (in *Isbester*) was able to identify in Hunt CJ's approach (in *Jeffrey*) an inherent finding that "the money made available by the tax evasion offence was directly derived by the commission of that offence", since there is nothing in the published judgments to indicate that the restraining orders issued in respect of the property were made on that basis. It is true that the defendant in *Jeffrey* was unable to prove on a balance of probabilities that the property was *not* derived from any unlawful activity. But it is quite a different matter to say that Hunt CJ made an affirmative finding that the money was derived from the commission of the tax evasion offence.[65]

36 One should be very slow to suggest that Hoeben CJ was conflating "tainted property" and "benefit" in the statutory provisions relating to restraining orders in order to reach the desired conclusion.

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61 Proceeds of Crime Act 1987 (Cth) s 48(4).

62 *Director of Public Prosecutions (Cth) v Jeffrey* [1992] 58 A Crim R 310 at 313.

63 An appeal to the New South Wales Court of Appeal was dismissed on the basis that whether property is derived from any unlawful activity is a question of fact, and no error had been shown in Hunt CJ's conclusion that "the defendant had not satisfied him to the contrary": *Jeffrey v Director of Public Prosecutions (Cth)* [1995] NSWSC 47 at [43], *per* Cole JA, and [6], *per* Giles AJA.

64 *Isbester v R* [2013] NSWCCA 230 at [44].

65 For an example where the defendant successfully discharged the burden in New South Wales, see *Director of Public Prosecutions v Diez* [2003] NSWSC 238 (unreported). In *Diez*, the court endorsed the approach taken in *Director of Public Prosecutions (Cth) v Jeffrey* [1992] 58 A Crim R 310; [1995] NSWSC 47 (CA); it accepted that, for purposes of the forfeiture rules, property could as a matter of law be derived from the unlawful activity of tax evasion. On the evidence before it, however, the court found that there was either no tax evasion or, where there was, then it did not contribute meaningfully to the property sought to be forfeited. *Diez* does not seem to have been cited to the New South Wales Court of Criminal Appeal in *Isbester v R* [2013] NSWCCA 230.

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After all, the Chief Justice's reliance on *Saffron* and *Jeffrey* appears to express a simple but powerful argument: that the word "derived" should bear the same meaning when used in relation to "tainted property" (which includes "proceeds of crime") and in relation to a "benefit" from a crime. That the same word should mean the same thing throughout a statute – and different words should mean different things – is a fundamental principle of statutory construction not to be lightly displaced.[66] However, in this case the statute itself (the APOCA) draws a clear distinction between "benefits" (where no property has to be identified as derived from the offence) and "tainted property" (where specific property must be identified as having been derived from the offence). Therefore, a different construction of the word "derived" in each set of provisions is not only permissible,[67] it is mandated by the statute itself.

37 For these reasons, the reasoning in *Isbester* is unconvincing .[68] It nonetheless represents the current position in New South Wales, if not the Commonwealth; the Appeals Committee of the High Court of Australia, having heard counsel for the defendant, felt that there were "insufficient prospects for success" to warrant a grant of special leave to appeal.[69]

### *D. Singapore and Hong Kong*

38 In Singapore, the principal anti-money laundering law is the CDSA, which is derived from the UK Drug Trafficking Offences Act 1986[70] ("UKDTOA"). Tax evasion offences were added to the list of predicate offences for money laundering by way of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Amendment of Second Schedule) Order 2013.[71] The CDSA targets "any property or interest therein … held by the person at any time … being property or interest therein disproportionate to his known sources

66 See *Bennion on Statutory Interpretation* (Oliver Jones ed) (London: LexisNexis, 6th Ed, 2013) at p 1090 *ff* (s 373 of the Code).

67 *Bennion on Statutory Interpretation* (Oliver Jones ed) (London: LexisNexis, 6th Ed, 2013) at pp 438–439 (s 162 of the Code).

68 For a critique of *Isbester v R* [2013] NSWCCA 230 and some aspects of the Australian anti-money laundering regime, see Mathew Leighton-Daly, "Money Laundering Offences: Out with Certainty, In with Discretion?" [2014] *Revenue Law Journal* 6.

69 *Isbester v The Queen* [2014] HCA Trans 83.

70 c 32.

71 S 380/2013. To address dual criminality issues in relation to the evasion of foreign taxes that have no equivalent in Singapore, the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) was amended again in 2014 (by Act 21 of 2014) to introduce the concept of a "foreign serious tax offence".

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of income, and the holding of which cannot be explained to the satisfaction of the court".[72] It is possible to interpret this provision broadly to include the financial savings generated by evading taxes – the regulatory authority certainly takes that position[73] – but the courts in Singapore have yet to opine on the point.

39 The Hong Kong Organized and Serious Crimes Ordinance[74] ("OSCO") is also derived from the UKDTOA.[75] Under the OSCO, all indictable offences are predicate offences for money laundering, and these include tax evasion under s 82 of the Inland Revenue Ordinance[76] as well as the common law offence of cheating the Revenue. The OSCO targets property that the alleged launderer knows, or has reasonable grounds to believe, is the proceeds of any indictable offence.[77] A person's "proceeds of an offence" include "any pecuniary advantage obtained in connection with the commission of that offence".[78] In *HKSAR v Li Ching*[79] ("*Li Ching*"), the Court of Appeal and the District Court below both accepted the defendant's admission – in a cautioned statement – that he believed the funds he dealt with were the proceeds of tax evasion in China. The question of whether such tax evasion was capable of

72 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) s 8(1)(*a*). This formula is unworkable outside of a courtroom setting, unless "benefits" is read to mean "proceeds": see Kenny Foo, "Money Laundering Offences under the CDSA: Interpretative Difficulties and a Proposed Solution" (2017) 29 SAcLJ 163. Nonetheless, even though tax savings are not "property", they may be *indirectly* captured in the valuation process implied in the statutory formula. It is worth noting that the suspicious transaction reporting regime targets the "proceeds" of criminal conduct (s 40).

73 It was the Minister for Home Affairs who made the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Amendment of Second Schedule) Order 2013 (S 380/2013) to add tax evasion to the list of predicate offences in the Second Schedule to the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed). See also the Monetary Authority of Singapore's *Consultation Paper on Designation of Tax Crimes as Money Laundering Predicate Offences in Singapore* (P019-2012, October 2012) and its "Response to Feedback Received" (28 March 2013).

74 Cap 455.

75 Hong Kong has retained a separate set of money laundering provisions for drug dealing offences in the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405).

76 Cap 112.

77 Organized and Serious Crimes Ordinance (Cap 455) (Hong Kong) s 25.

78 Organized and Serious Crimes Ordinance (Cap 455) (Hong Kong) s 2(6)(a)(iii); *cf* s 1 of the South Africa Prevention of Organised Crime Act 1998 and *National Director of Public Prosecutions v Seevnarayan* [2004] ZASCA 38 above. Nicola Shaw QC observes that it is difficult to "launder" a pecuniary advantage: Nicola Shaw, "Tax and Proceeds of Crime" (2003) II GITC Review 41. There are unusual situations where a pecuniary advantage is captured in actual proceeds that can then be laundered. See, for example, *WBL Corp Ltd v Lew Chee Fai Kevin* [2012] 2 SLR 978 (selling stock on insider information prior to a precipitous price drop).

79 [1997] HKCA 243.

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generating proceeds was not raised or argued in either court, so it is unclear whether *Li Ching* established any precedent on this point. However, a 1997 amendment[80] to the OSCO put matters on the same footing as in the UK: a new s 12(12) of the OSCO provided that any person who obtains a pecuniary advantage in connection with the commission of an offence is to be treated as if he obtained, in connection with such offence, a sum of money equal to the value of the pecuniary advantage.[81] Thus, in Hong Kong it appears almost beyond argument that tax evasion generates proceeds for purposes of the OSCO; the Hong Kong Monetary Authority certainly takes this position.[82]

### *E. US*

40 The principal federal money laundering statute in the US is the Money Laundering Control Act of 1986,[83] which criminalises certain transactions and activities involving the "proceeds of specified unlawful activity".[84] "Specified unlawful activity" is defined in 18 USC § 1957(c)(7) and does not include income tax evasion or tax fraud. In other words, tax evasion *per se* is not a predicate offence for money laundering under federal law in the US.[85] However, that has not stopped the Department of Justice ("DOJ") from using the money laundering statute to attack tax evasion indirectly by characterising the underlying or associated activity as racketeering. Racketeering is a "specified unlawful activity"[86] and encompasses a wide range of criminal acts, including harbouring illegal aliens, mail fraud and wire fraud. Over the years, the DOJ has developed two main lines of attack: (a) the "cost savings" theory of liability, in which tax evasion is said to produce cost savings that result in enlarged racketeering profits; and (b) the "mail fraud" theory of liability, in which the mailing of fraudulent tax returns

80 Act 87 of 1997.

81 Section 12(12) of the Hong Kong Organized and Serious Crimes Ordinance (Cap 455) is substantially identical to s 340(6) of the UK Proceeds of Crime Act 2002 (c 29) (s 75(1) of the UK Criminal Justice Act 1988 (c 33) at the time).

82 HKMA Circular B1/15C on "Tax Evasion" (17 June 2009); HKMA Circular B10/1C (31 March 2015) and the accompanying "Guidance Paper on Anti-Money Laundering Controls over Tax Evasion" (March 2015).

83 Title 18 of the United States Code. Numerous states also have their own money laundering statutes, many of which are based on the Model Money Laundering Act.

84 18 USC § 1956. Other money laundering offences are set out in § 1957, which refers to "criminally derived property", which is defined in § 1957(f)(2) as "any property constituting, or derived from, proceeds obtained from a criminal offense".

85 The evasion of state taxes may, however, constitute predicate offences under some state anti-money laundering laws.

86 18 USC § 1956(c)(7)(A), referencing § 1961.

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through the US Postal Service is said to be a racketeering activity that results in the unlawful retention of government property in the form of unpaid taxes.

*(1) The "cost savings" line of attack*

41 The DOJ has prosecuted numerous money laundering cases that involve cost savings – and hence enlarged profits – achieved through the employment of unauthorised foreign workers in otherwise legitimate businesses.[87] In some of these cases, the evasion of federal and state taxes was an integral part of the cost savings that were achieved, so the courts had occasion to address the question of whether cost savings resulting from tax evasion constituted part of the "proceeds" of hiring unauthorised foreign workers.

42 In *United States v Maali*[88] ("*Maali*"), the defendants employed numerous unauthorised foreign workers in an otherwise legitimate business in Florida. This "specified unlawful activity" enabled the defendants to avoid paying the legal minimum wage or federal employment taxes. As part of the defendants' scheme, unauthorised foreign workers were paid "off the books" using cash skimmed from the gross takings of the business. Such sums were omitted from the tax returns of the business, thereby reducing its income tax liability. The DOJ brought money laundering charges, and the District Court held as follows:

87 The pre-2011 tax cases are analysed together with other categories of "cost savings" cases, and compared to their UK counterparts, in Richard C Alexander, "Cost Savings As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom" (2011) 45 Int'l Lawyer 750. Dr Alexander argued strenuously in favour of treating illegal cost savings as "proceeds" for money laundering purposes, but admitted that the weight of US case law at the time leaned against that view. See, for example, *Anderson v Smithfield Foods, Inc* 209 F Supp 2d 1270 (MD Fla, 2002) and *United States v Catapano* 2008 US Dist WL 2222013 (EDNY, 22 May 2008; affirmed 26 August 2008). In both cases, the courts held that money saved as a result of non-compliance with statutory requirements does not constitute "proceeds of unlawful activity". Post-2011, some Circuit Courts of Appeal have accepted the cost-savings theory in money laundering cases unrelated to tax evasion. In *United States v Esquenazi* 752 F 3d 912 (11th Cir, 2014), the reduction of a debt owed to a government entity resulting from the promise of a bribe made by the defendant to a public official was considered to be criminal "proceeds" laundered by the defendant. This case is, however, better explained on the basis that the funds actually paid to the public official were the proceeds of the offence (namely, promising to pay a bribe to the public official). The cost-savings theory also seems to have gained acceptance in forfeiture cases: *United States v Torres* 703 F 3d 194 (2nd Cir, 2012); *United States v Wong* 2014 WL 6976080 (CD Cal).

88 358 F Supp 2d 1154 (MD Fla, 2005).

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(a) The courts generally agree that "proceeds" are something that is obtained in exchange for the sale of something else as in, most typically, when one sells a good for money.[89]

(b) The term "proceeds" does not contemplate profits or revenues derived indirectly from labour or the failure to remit taxes.[90]

(c) To say that defendants deprived the state and federal governments of their interests in taxes is considerably different from saying that defendants obtained proceeds. As contrasted with obtaining proceeds, an individual need not engage in a sale or any other type of transaction to deprive a government of its interest in taxes; he simply needs to refrain from paying the tax.[91]

43 The decision in *Maali* was appealed to the Eleventh Circuit as *United States v Khanani*,[92] where the Court of Appeals affirmed the District Court on the money laundering count.[93] The "cost savings" theory of tax evasion giving rise to proceeds thus appears to have been put to rest, at least in the Eleventh Circuit.

*(2) The "mail fraud" line of attack*

44 In the US, the federal mail fraud statute and its close cousin, the wire fraud statute, also provide a line of attack if the US Postal Service or interstate wires[94] are used to perpetrate a tax fraud.

89 *United States v Maali* 358 F Supp 2d 1154 at 1158 (MD Fla, 2005). At the time, 18 USC § 1956 did not define "proceeds". A definition was added in 2009. See paras 55 and 56 below.

90 *United States v Maali* 358 F Supp 2d 1154 at 1160 (MD Fla, 2005) ("*Maali*"). The District Court specifically rejected the "but for" approach developed in *United States v Tyson Foods, Inc* 2003 US Dist LEXIS 26385 (ED Tenn, 4 February 2003) ("*Tyson Foods*"). *Tyson Foods* was a forfeiture case, in which the Tennessee District Court held that the "proceeds" of a thing are "that which would not have been obtained but for that thing". The *Maali* court opined at 1159 that the "but for" approach would "stretch the definition of 'proceeds' well beyond any ordinary conception of the term and thereby lay the foundation for an unprecedented expansion of the money laundering statute".

91 *United States v Maali* 358 F Supp 2d 1154 at 1160, fn 4 (MD Fla, 2005).

92 502 F Supp 3d 1281 (11th Cir, 2007). Khanani was Maali's co-defendant in the District Court.

93 *United States v Khanani* 502 F Supp 3d 1281 at 1296 (11th Cir, 2007).

94 *Pasquantino v United States* 544 US 349 (2005). In *Pasquantino*, the Supreme Court ruled that a scheme to defraud a foreign government of tax revenue (in that case, by smuggling alcohol into Canada and evading the Canadian excise tax) violated the federal wire fraud statute because the perpetrators used the interstate wires to plan and effectuate their scheme.

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45 In *United States v Yusuf*[95] ("*Yusuf*"), the defendants operated a chain of supermarkets in the US Virgin Islands. The defendants supervised the cash counting operations at the end of each day and skimmed a significant portion of the cash takings, so that it was not recorded on the books nor reported on the company's monthly gross receipts tax returns. The defendants thereby evaded the 4% Virgin Islands gross receipts tax that was payable on those amounts. They then entered into transactions to move the cash offshore.

46 The defendants were charged with tax evasion, mail fraud and money laundering. The DOJ argued that the mailing of fraudulent tax returns through the US Postal Service as part of a scheme to defraud the Government was mail fraud, and that the amount of tax evaded constituted the "proceeds" of the mail fraud (and not the tax fraud). Unlike tax fraud, mail fraud is a "specified unlawful activity" for purposes of the money laundering offence under 18 USC § 1956. The District Court of the Virgin Islands dismissed the money laundering charges, citing *Maali* and holding that the tax savings arising from the defendants' conduct could not constitute the "proceeds" of the mail fraud.[96] The DOJ appealed.

47 The Court of Appeals for the Third Circuit reversed the District Court, holding that: (a) just because the funds were originally procured through a lawful activity does not mean that one cannot thereafter convert those same funds into the "proceeds" of an unlawful activity; and (b) funds *retained* as a result of unlawful activity can be treated as the "proceeds" of the unlawful activity.[97] The Third Circuit drew support from its observation that "specified unlawful activities" for the purposes of 18 USC § 1956 includes the fraudulent concealment and retention of a bankruptcy estate's assets. Such offences involve the fraudulent *retention* of any property belonging to the bankrupt debtor regardless of whether the debtor originally procured the property through lawful or unlawful activity,[98] and the case law held that any property so retained constituted the "proceeds" of bankruptcy fraud.[99] Applying this logic to the mail fraud perpetrated in *Yusuf*, the Third Circuit held that lawfully-derived funds that are unlawfully retained as a result of mail fraud can be treated as the "proceeds" of the mail fraud for purposes of the money laundering statute.

95 536 F 3d 178 (3rd Cir, 2008).
96 *United States v Yusuf* 199 Fed Appx 127 (3rd Cir, 2006).
97 *United States v Yusuf* 536 F 3d 178 at 185 (3rd Cir, 2008).
98 *United States v Ladum* 141 F 3d 1328 (9th Cir, 1998); *United States v Levine* 970 F 2d 681 (10th Cir, 1992).
99 *United States v Brennan* 326 F 3d 176 (3rd Cir, 2003).

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48 The Third Circuit's analysis of the bankruptcy cases is clearly correct. But there is a crucial difference between the tax fraud (albeit in the guise of mail fraud) committed in *Yusuf* and bankruptcy fraud. The bankruptcy law criminalises the retention of *someone else's property*, while tax evasion involves the retention of *one's own property*. When bankruptcy proceedings are commenced under the US Bankruptcy Code, the ownership of all of the debtor's property as of the commencement of proceedings (as well as some property acquired thereafter) is vested, by operation of law, in a bankruptcy estate.[100] The bankruptcy estate is legally separate from the debtor, and exists to pay his creditors in accordance with the Bankruptcy Code.[101] Thus, the core of the criminality in bankruptcy fraud is the retention by the debtor, not of his own property, but of property now belonging to the bankruptcy estate. The Third Circuit purported to invoke a similar logic in *Yusuf*, referring to funds retained by the defendants as a result of their tax fraud as "government property"[102] and the "property of the Virgin Islands government".[103] But in doing so, the Third Circuit may have overlooked a crucial point: unlike the US Bankruptcy Code, the Virgin Islands tax code does not automatically vest ownership of a tax evader's property in the Virgin Islands government on account of unpaid taxes.[104] In other words, under Virgin Islands law, no part of a tax evader's property automatically becomes "government property"[105] upon his failure to pay taxes. Without this crucial element, the analogy between bankruptcy fraud and tax evasion breaks down.

49 In an alternate line of reasoning, the Third Circuit ruled that because the defendants' mail fraud allowed them to "pocket" the 4% gross receipts tax that they would have otherwise had to pay to the Virgin Islands government, such amounts (less minor expenses such as the costs of postage and tax return preparation) constituted the "profits" of the mail fraud. Citing the US Supreme Court decision in *United*

100 11 USC § 541(a).

101 11 USC § 726.

102 *United States v Yusuf* 536 F 3d 178 at 189 (3rd Cir, 2008).

103 *United States v Yusuf* 536 F 3d 178 at 190 (3rd Cir, 2008).

104 33 VIC § 1031 imposes a lien in favour of the Virgin Islands government over all of the property belonging to any person who fails to pay any internal revenue tax, but that falls short of vesting title to property in the Government.

105 *Pasquantino v United States* 544 US 349 (2005) does not assist the Third Circuit here. While the Supreme Court held that a government's right to uncollected taxes is "property" in its hands, and that the defendants had schemed to defraud the Canadian government of its "property", there is nothing in the Supreme Court judgment to suggest that such government property was either "obtained" or "retained" by the defendants or even found in their hands. Clearly, one may defraud another person or deprive that person of his property without "obtaining" or "retaining" it. The economic loss to the victim may be identical in any case, but these words denote very different *actus rei* for purposes of criminal liability.

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*States v Santos*[106] ("*Santos*") as authority for reading "proceeds" in the federal money laundering statute to mean "profits", the Third Circuit concluded that the "profits" gained by the defendants constituted the "proceeds" of the mail fraud.

50 But this application of *Santos* is questionable. In *Santos*, the first defendant (Santos) was the operator of an illegal lottery business. He employed runners to gather bets from gamblers. The runners retained a commission and paid over the rest of the takings to "collectors". Diaz (the second defendant) was one such collector. Diaz delivered the money to Santos, and Santos used part of it to pay Diaz's salary and to pay the winners. Santos was indicted for knowingly entering into financial transactions involving the "proceeds" of the illegal lottery (namely, paying Diaz's salary and paying the winners), in violation of 18 USC § 1956(a)(1)(A)(i). At that time, the federal money laundering statute did not define "proceeds", and the issue at the appeal was whether "proceeds" meant "receipts" or "profits"; Santos had paid Diaz from the "receipts" of the gambling operation, but not from its "profits".

51 The nine Supreme Court justices handed down three judgments, disagreeing not only on the merits but also on the precedential force of their decision.

> (a) A plurality of four justices held that there was a case of genuine ambiguity in 18 USC § 1956, and that the "rule of lenity" established by a long line of Supreme Court decisions required the ambiguity to be resolved in favour of the defendants. Since the "profits" interpretation of "proceeds" would always be more "defendant-friendly" compared to the "receipts" interpretation, the plurality of justices felt compelled to adopt the "profits" interpretation.[107] The plurality of justices also felt driven to this interpretation in order to avoid a "merger problem", where individual acts constituting the predicate offence could be independently prosecuted as money laundering offences, thereby causing the money laundering offence to "merge" into the predicate offence. This would significantly enhance the penalties beyond what Congress had deemed appropriate for the predicate offence, because the penalties for the money laundering offence are often harsher than those for the predicate offence. For these reasons, the plurality of justices held that an offender who paid expenses incurred in the course of committing the predicate offence

106 553 US 507 (2008).
107 *United States v Santos* 553 US 507 at 514, *per* Scalia J.

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could not be convicted of laundering the amounts so expended.[108]

(b) Stevens J concurred with the plurality judgment, but only to the extent of holding that "proceeds" means "profits" *in the context of an illegal lottery*. He rejected the plurality's broad application of the rule of lenity, noting that the legislative history of 18 USC § 1956 indicated that Congress intended "proceeds" to include gross revenues if the specified unlawful activity was the sale of contraband.[109] Stevens J therefore based his decision principally on the need to avoid the merger problem.

(c) The four dissenting justices in *Santos* held that "proceeds" meant "the total amount brought in" by the predicate offence, rejecting the broad application of the rule of lenity and arguing that the merger problem could be addressed at the sentencing stage.[110]

52 In *Yusuf*, the Third Circuit interpreted *Santos* as holding that the rule of lenity should be applied broadly to construe the ambiguous term "proceeds" in 18 USC § 1956 to mean criminal "profits" and not criminal "receipts". This is broadly consistent with the plurality opinion in *Santos*. Nonetheless, given the split judgment of the Supreme Court, there is a wide range of appellate opinion on the precedential impact of *Santos*,[111] and the Third Circuit's view is not shared by the other US Courts of Appeal.[112]

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108 *United States v Santos* 553 US 507 at 517.

109 *United States v Santos* 553 US 507 at 526, *per* Stevens J, concurring. The plurality dismissed Steven J's reference to "an imagined legislative history": see fn 8 in Scalia J's opinion.

110 *United States v Santos* 553 US 507 at 531 and 547, *per* Alito J, dissenting.

111 *United States v Van Alstyne* 584 F 3d 803 (9th Cir, 2009). See also Stefan D Cassella, "*United States v Santos*: The US Supreme Court Rewrites the Money Laundering Statute" (1999) 12(3) JMLC 221 (noting that "the decisions by the lower courts have been all over the map") and Brian Dickerson & Klodiana Basko, "Confusion in Defining 'Proceeds' Under the Money Laundering Statute: A Survey of Circuit Opinions" *The Federal Lawyer* (June 2010) 23.

112 The Fifth Circuit noted that "the precedential value of *Santos* is unclear outside of the narrow factual setting of that case": *United States v Brown* 553 F 3d 768 (5th Cir, 2008). The Eleventh Circuit interpreted *United States v Santos* 553 US 507 ("*Santos*") as holding only that the gross receipts of an unlicensed gambling operation were not "proceeds" for the purposes of 18 USC §1956; accordingly, *Santos* did not apply to the laundering of funds obtained from drug trafficking: *United States v Demarest* 570 F 3d 1232 (11th Cir, 2009). The Sixth Circuit took the view that the true holding of *Santos* was that "proceeds" means "profits" only in cases where interpreting "proceeds" to mean "receipts" would present a merger problem on the particular facts of that case: *United States v Kratt* 579 F 3d 558 (6th Cir, 2009).

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53 More importantly, the Third Circuit's decision turns the reasoning of the *Santos* plurality on its head. The *Santos* plurality felt compelled by the rule of lenity to prefer the "profits" definition because it is "always more defendant-friendly that the 'receipts' definition".[113] Clearly, the "profits" definition is more defendant-friendly only because "profits" are always a subset of "receipts" ("profits" equals "receipts" *less expenses*). By holding that the mail fraud in *Yusuf* could generate "profits" without first generating any "receipts", the Third Circuit subverts the *Santos* plurality's reasoning and broadens the definition of "proceeds" in a decidedly defendant-*unfriendly* way.

54 For these reasons, it is respectfully submitted that *Yusuf* was wrongly decided. It certainly has not been followed in other Circuit Courts of Appeal. Besides, it has been overshadowed by legislation.

*(3) Fraud Enforcement and Recovery Act of 2009*

55 Soon after the Supreme Court decision in *Santos*, Congress amended 18 USC § 1956 by introducing a definition of "proceeds" by way of the Fraud Enforcement and Recovery Act of 2009[114] ("FERA"). "Proceeds" is now defined in § 1956(c)(9) as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, *including the gross receipts of such activity*" [emphasis added].

56 The impact of the 2009 amendment has yet to be fully worked out. On the one hand, it is clear that the plurality decision in *Santos* has been reversed by the inclusion of "gross receipts" in the new definition of "proceeds". On the other hand, the merger problem was not addressed in the statutory amendment, but rather left to congressional oversight over the exercise of prosecutorial discretion.[115] The precise effect of the FERA on *Yusuf* is unclear, since the mail fraud in *Yusuf* did not produce any gross receipts. And, notwithstanding the DOJ's position that the

113 *United States v Santos* 553 US 507 at 514.

114 Pub L 111-21 (20 May 2009); 123 Stat 1617.

115 The Fraud Enforcement and Recovery Act of 2009 (US) recorded the "sense of Congress" that prosecutions that would implicate the merger problem should be undertaken only with the prior approval of the Attorney General or his senior deputies. Such approvals were to be subject to Congressional oversight for the five years following the enactment of the Act.

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new definition of "proceeds" also resurrects the "cost savings" theory,[116] at least one District Court has disagreed (twice).[117]

### *F. Results of the survey*

57 The foregoing survey of commonwealth decisions demonstrates that a substantial body of judicial opinion holds that tax evasion does not generate proceeds. That is not to say there is not also a body of judicial opinion to the contrary; however, the reasoning in those cases appears unconvincing. Thus, in jurisdictions where the courts have yet to rule on this issue, one cannot assume that tax evasion generates proceeds simply because it is designated as a predicate offence for money laundering. The matter should be fully argued before the courts.

## IV. Implications

### *A. If tax evasion does not generate proceeds, then it is impossible to commit money laundering offences that require actual proceeds of crime*

58 If tax evasion does not generate proceeds, it follows that no property can ever be the "proceeds of tax evasion". This has profound implications.

59 Clearly, if no property can ever be the "proceeds of tax evasion", then tax evasion can never be the predicate for any money laundering offence that requires the property in question to be the *actual* proceeds of crime. The requirement for actual proceeds of crime is clearly expressed in some statutes.[118] In other statutes, it is implied. For example, the House of Lords ruled in *R v Montila*[119] ("*Montila*") that the POCA offences of dealing with property while "knowing or having

116 An unnamed Department of Justice official was reported as saying that the new wording was intended, not only to reverse *United States v Santos* 553 US 507 (2008), but also to bring cost-savings within the scope of 18 USC § 1956: Richard C Alexander: "'Cost Savings' As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom" (2011) 45 Int'l Lawyer 750 at 785.

117 *United States v Delgado-Ovalle* 2013 US Dist LEXIS 181000 (D Kan, 2013); *United States v Keith Countess* 2015 US Dist LEXIS 150936 (D Kan, 2015); *cf United States v $256,235.97 in Proceeds From Universal Life Insurance Policy #62826776 Issued by New York Life Insurance* 691 F Supp 2d 932 (ED Iowa, 2010) (the court declined to rule on whether cost savings constitute proceeds of harbouring illegal aliens, but considered that *United States v Maali* 358 F Supp 2d 1154 (MD Fla, 2005) has been mooted by *United States v Santos* 553 US 507 (2008)).

118 See, for example, 18 USC § 1956(a)(1); ss 340(3) and 340(5) of the UK Proceeds of Crime Act 2002 (c 29); and s 400.3(b)(i) of the Australian Criminal Code 1995.

119 [2004] 1 WLR 3141; [2004] UKHL 50.

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reasonable grounds to believe" that the property is the proceeds of crime require that the property *actually is* the proceeds of crime.[120] Whether the requirement for actual proceeds is express or implied, it is impossible to perpetrate the *actus reus* of the money laundering offence if the predicate offence does not generate proceeds.

60 But not all jurisdictions, and not all money laundering offences, require the property in question to be the actual proceeds of crime. In some statutes this is clear on the face of the provision. In Australia, for example, the offence of dealing with property reasonably suspected of being proceeds of crime contrary to s 400.9 of the Criminal Code does not require proof of actual proceeds.[121] In relation to other statutes, the courts have ruled that *Montila* is either inapplicable[122] or not to be followed.[123] But even where the *actus reus* of the offence does not require actual proceeds of crime, the Prosecution has the challenge of proving that a defendant has *reasonable grounds* to believe or suspect the existence of something that cannot exist in law. In other words: can a person ever have reasonable grounds to believe a legal impossibility?

120 *R v Montila* [2004] 1 WLR 3141; [2004] UKHL 50 at [37]. The House of Lords was interpreting s 49(2)(b) of the UK Drug Trafficking Act 1994 (c 37) and s 93C(2) of the UK Criminal Justice Act 1988 (c 33), but their decision remains good law under the UK Proceeds of Crime Act 2002 (c 29). See also the Singapore High Court decision in *Ang Jeanette v Public Prosecutor* [2011] 4 SLR 1.

121 The defendant in *Isbester v R* [2013] NSWCCA 230 could very well have been charged and convicted under this provision of the Criminal Code without putting undue strain on *Saffron v Director of Public Prosecutions (Cth)* [1989] 96 FLR 196; (1989) 87 ALR 151 and *Director of Public Prosecutions (Cth) v Jeffrey* [1992] 58 A Crim R 310.

122 The failure to file a suspicious transaction report ("STR") or similar disclosure is not money laundering. But it is an example of a related offence that does not require proof that the subject property is actually the proceeds of crime. *Ahmad v HM Advocate* [2009] HCJAC 60 (Scot) ("*Ahmad*") holds that, to secure a conviction for failure to file a STR when the defendant had "reasonable grounds to suspect" X, it is not necessary to prove X; *R v Montila* [2004] 1 WLR 3141; [2004] UKHL 50 was held to be inapplicable, notwithstanding the similar "knows or has reasonable grounds to suspect" language in the STR provision and the substantive money laundering offences in the UK Proceeds of Crime Act 2002 (c 29). *Ahmad* is a decision on Scots law. The issue has yet to come before the English appellate courts and remains unresolved: see United Kingdom, Law Commission, "Anti-Money Laundering: The SARs Regime" (Consultation Paper No 236) (20 July 2018) at paras 8.56–8.59; United Kingdom, House of Lords, *Parliamentary Debates* (25 March 2002) vol 633 at col 64 (Lord Goldsmith); Jonathan Fisher QC, "The Anti-Money Laundering Disclosure Regime and the Collection of Revenue in the United Kingdom" [2010] 3 BTR 1 at fn 36; and Rudi Fortson QC, "Money Laundering Offences under POCA 2002" in *Banks and Financial Crime: The International Law of Tainted Money* (William Blair QC, Richard Brent & Tom Grant eds) (Oxford: Oxford University Press, 2nd Ed, 2017) at pp 176–177.

123 *R v Montila* [2004] 1 WLR 3141; [2004] UKHL 50 is not followed in Hong Kong due to a difference in the wording of the Hong Kong Organized and Serious Crime Ordinance: *HKSAR v Yeung Ka Sing, Carson* [2016] HKCFA 52.

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### *B. Impossibility of committing the substantive money laundering offence may also afford a defence in associated inchoate offences*

61 The impossibility of committing the substantive money laundering offence may also have implications for its associated inchoate offences. At common law, impossibility historically afforded a defence in inchoate crimes such as attempts[124] and conspiracies[125] (but not incitement).[126]

62 One must proceed cautiously, though: statutory developments have eviscerated the common law defence of impossibility under English law. For example, the common law offence of conspiracy was abolished in the UK and replaced with a statutory offence by the Criminal Law Act 1977,[127] which was in turn amended by the Criminal Attempts Act 1981.[128] As a result of s 1(2) of the 1981 Act, the defence of factual impossibility in attempts is no longer available in the UK.[129] It is now also possible in the UK for a defendant to conspire with someone else to launder property that is unidentified at the time the conspiracy was formed, but which they intend will be the proceeds of criminal conduct; liability for the conspiracy may arise even if the substantive offence

124 In *R v Smith (Roger)* [1975] AC 476, the House of Lords held that a completed act of handling goods that are not stolen goods at the time of handling cannot constitute an attempt to handle stolen goods simply because the defendant believed them to be stolen.

125 In *Director of Public Prosecutions v Nock* [1978] AC 979, the House of Lords held that the principles laid down in *R v Smith (Roger)* [1975] AC 476 in relation to attempts applied equally to common law conspiracies, so that "an agreement upon a course of conduct which could not in any circumstances result in the statutory offence alleged" could not amount to a conspiracy (*per* Lord Scarman at 998). Their Lordships observed that the course of conduct agreed upon was very specific and limited in that case, prompting a suggestion that the problem of impossibility can often be overcome with "an indictment drafted in suitably broad terms (*per* Lord Diplock at 993).

126 In *R v McDonough* (1962) 47 Cr App R 37 ("*McDonough*"), the Court of Criminal Appeal held that the principles applicable to impossible attempts do not apply to the common law offence of incitement. In *McDonough*, the defendant's conviction on a charge of inciting another to receive stolen goods was upheld even though there were no stolen goods to receive on the appointed date. Thus, it may be possible for one to be convicted of inciting an unlawful act that turns out to be impossible on the facts, but it is not entirely clear whether a distinction is to be drawn between cases where the unlawful act *may or may not be impossible* depending on the facts, and cases where the unlawful act is *always impossible* as a matter of law.

127 c 45.

128 c 47.

129 However, under the UK Criminal Attempts Act 1981 (c 47), the minimum *mens rea* required for attempted money laundering is higher ("intent" or "belief") than for the substantive offence ("suspects"): *Pace v R* [2014] EWCA Crim 186.

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(money laundering) was never carried out and even if the property never materialises or never exists.[130] One wonders, however, whether the conspirators can "intend" something that *as a matter of law* (not merely on the facts of the case) is impossible.

### *C. Even if tax evasion generates proceeds, that is not the end of the inquiry*

63 Finally, it is necessary to address briefly the implications for the money laundering offence if tax evasion is considered to produce proceeds. We earlier observed that the Australian courts and some US courts hold this view. A number of common law courts have yet to rule on this question and may follow their approach. We also observed how the UK and Hong Kong have legislated such proceeds into existence: a tax evader who obtains a pecuniary advantage as a result of his crime is treated, by virtue of s 340(6) of the POCA or s 12(12) of the OSCO, as having obtained a sum of money equal to the amount of tax evaded.

64 But the mere existence, in the abstract, of proceeds from tax evasion is not enough. Fictional or theoretical property cannot be converted, transferred, acquired, possessed or used.[131] Actual property must be identified as the proceeds of crime (or as representing such proceeds); the *actus reus* of the money laundering offence must be perpetrated upon that property; and the requisite *mens rea* (knowledge or belief) must be held in respect of that property. When a person is accused of money laundering, each item of property that is alleged to be laundered must be examined individually to determine whether it is the proceeds of crime and the court must make a finding of fact in respect of it.[132] Proceeds that cannot be identified in the form of actual property cannot be laundered.

65 This is where tax evasion, as a predicate offence for money laundering, presents an unusual set of challenges. Consider a person who, at the end of 2018, has $100 of legitimate income in Bank

130 *R v Saik* [2006] UKHL 18 at [23]–[24], *per* Lord Nicholls, and [78]–[79], *per* Lord Hope; *R v EK* [2007] EWCA Crim 1888. This is likely why counsel in *R v Montila* [2004] 1 WLR 3141; [2004] UKHL 50 at [44] conceded that the defendant could have been convicted of attempted money laundering. As a matter of pure common law (which may still govern in some jurisdictions), that concession would have been unnecessary.

131 Professors Alldridge and Mumford observe that "[it] is simply impossible to conceal, disguise, convert or transfer property whose existence is only hypothetical. It is no more possible to conceal (and the rest) property that does not exist than it is to conceal a unicorn": Peter Alldridge & Ann Mumford, "Tax Evasion and the Proceeds of Crime Act 2002" (2005) 25(3) *Legal Studies* 353 at 368.

132 *R v Trac* 2013 ONCA 246.

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Account A, $400 in savings in Bank Account B and $500 worth of silver bullion held in Bank C. He evades a 20% tax on the income and this results in $20 of "proceeds". Only dealings with sums consisting wholly or partly of that $20 can constitute money laundering. The question in relation to any sum withdrawn from his $1,000 estate is therefore: does it contain any part of the $20? Whether the $20 owes its existence to a statutory rule (*eg*, in the UK) or to a judicial finding (*eg*, in Australia), the question is the same.

66 The problem here is that we are dealing with fictional dollars. Although the tax evader is considered to have "obtained" a sum of $20, in reality he still has only $1,000 (and not $1,020) of assets.[133] However, to give effect to s 340(6) of the POCA or to a judicial ruling, we must now identify $20 of *actual property* as the proceeds of the tax evasion. Since the tax evader never actually obtained anything, fictional "proceeds" must be identified within the actual $1,000 that he owned before ever committing the offence. The question, then, is: which $20 within the tax evader's $1,000 are the proceeds of his crime? The intuitive answer is that it is $20 in Bank Account A, where the offender has kept his income. But closer analysis exposes a series of difficult doctrinal and evidential questions. Why Bank Account A and not any other account? If the proceeds are to be found in Bank Account A, which $20 out of the $100 are the proceeds? And so on.

67 At the turn of the century, some commentators thought that these difficulties were insurmountable and effectively took tax evasion cases outside the scope of the money laundering offence; others were confident that the courts would eventually work out the rules for doing so.[134] The case law that has since emanated from the courts suggests that neither side was entirely right (or wrong). An examination of those cases

133 The tax evader's net worth remains unchanged at $1,000 (and not $1,020) since the tax is still due. Nonetheless, a confiscation order can be made for $20. This is a point where doctrine appears to have given way to pragmatism, but the matter appears beyond argument now, at least in the UK: *R v Dimsey and Allen* [2000] 1 Cr App R(S) CA 497; *Attorney General's Reference No 25 of 2001 (Frank Adam Moran)* [2001] EWCA Crim 1770; *R v Joseph William Brack & Joseph James Brack* [2007] EWCA Crim 1205; *R v Ahmad* [2014] UKSC 36. Other jurisdictions may consider that English law took a wrong turn here and may chart their own paths.

134 Martyn Bridges & Peter Green, "Tax Evasion and Money-Laundering – An Open and Shut Case?" (1999) 3(1) JMLC 51 at 52; Martyn Bridges & Peter Green, "Tax Evasion: Update on the Proceeds of Crime Debate" (2000) 3(4) JMLC 371; Peter Burrell, "Preventing Tax Evasion Through Money Laundering Legislation" (2000) 3(4) JMLC 304; Keith Oliver, "International Taxation: Tax Evasion as a Predicate Offence to Money Laundering" [2002] *International Legal Practitioner* 55 at 57; Ben Brandon, "Tax Crimes Money Laundering and the Professional Advisor" (2000) 4(1) JMLC 37; Peter Alldridge, "Are Tax Evasion Offences Predicate Offences for Money Laundering Offences?" (2001) 4(4) JMLC 350.

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must await a separate article. Suffice it to say, in the meantime, that the controversy between the FATF and the common law courts cannot be resolved simply by insisting, by legislation or otherwise, that tax evasion generates proceeds. Without a coherent and consistent set of rules for identifying those proceeds, the law on this point – with its attendant criminal sanctions – will be capricious and disorderly.

## V. Conclusion

68 To hold that tax evasion does not generate proceeds is not to condone the unlawful evasion of taxes. It is a frank acknowledgment that the AML framework, which was conceived to support the confiscation of the "proceeds of drug trafficking" (and later of the "proceeds of crime"), cannot be co-opted for the disclosure and interdiction of untaxed income without undermining its fundamental premise. Other more effective and more appropriate tools exist for combating this particular genre of unlawful conduct; the large scale and automatic exchange of taxpayer information under the Common Reporting Standard and the establishment of beneficial ownership registers come to mind.[135] The better course, it is submitted, is to use the AML framework to do what it does best – interdicting the actual and identifiable proceeds of crime – and to rely on other, purpose-built tools for detecting and interdicting untaxed income and assets.

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135 For a survey of the global "toolbox" for combatting tax evasion, see Stephen Phua, "Convergence in Global Tax Compliance" [2015] SingJLS 77. Whether these tools strike the right balance between an individual's right to privacy, the State's right to collect revenue and the burden placed on financial institutions, is another matter. For a flavour of the debate in Europe, see the following articles by Filippo Noseda, "CRS and Beneficial Ownership Registers – What Serious Newspapers and Tabloids Have in Common" (2017) 23(6) T&T 601; "CRS and Beneficial Ownership Registers – A Call to Action" (2017) 23(5) T&T 496; "Common Reporting Standard and EU Beneficial Ownership Registers: Inadequate Protection of Privacy and Data Protection" (2017) 23(4) T&T 404; and "Caught in the Crossfire Between Privacy and Transparency" (2016) 22(6) T&T 599. A formal complaint was filed with the UK's Information Commissioner's Office in 2018 on behalf of a European Union citizen domiciled in Italy: David Pegg, "Mishcon de Reya Complains about Anti-Tax Evasion Measures" *The Guardian* (2 August 2018).

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