

## **Money Laundering**

(Relevant to PBE Paper IV – Business Law and Taxation)

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### **Introduction**

Money laundering refers to various methods used to change illegally obtained money so that it appears to have originated from a legitimate source. It is illegal to participate in or to assist in money laundering. Members of the public also have a duty to disclose any suspicious transactions that they are aware of, rather than merely complying with the rules themselves. This is a slight departure from the general principle in criminal law that no one owes a duty to report a crime.

There are three essential stages in money laundering. First, money obtained through criminal means is placed into the financial system. Second, that money is converted into another form and covered with many layers of transactions in order to remove the audit trail and to conceal the true ownership of the funds. Finally, the money is transferred back into the market with a new, legitimate veil.

### **The Governing Laws**

There are four ordinances governing money laundering in Hong Kong. They are: (i) the Organized and Serious Crimes Ordinance (Cap. 455); (ii) the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405); (iii) the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575); and (iv) the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615). These ordinances are all intended to deal with money laundering, and their differences are owing to the specific underlying offences that they address. In this article, we are going to focus on the Organized and Serious Crimes Ordinance (Cap. 455).

### **The Offence**

Section 25 of the Organized and Serious Crimes Ordinance states that “a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person’s proceeds of an indictable offence, he deals with that property”. This section aims at criminalizing dealing with money obtained in a criminal manner. The section makes no distinction as to the culpability of a money launderer based on his reasonable belief or actual knowledge of the underlying offence.

There are three core elements in this offence:

The first element is “knowing or having reasonable grounds to believe”. This means that a person will be convicted so long as he knew or even had reasonable grounds to

believe that the money under consideration came from criminal activity. This is quite a burdensome requirement, as it means that no one can close his eyes to a possible crime. The second element concerns “any person’s proceeds of an indictable offence”. This means that the law applies whether the proceeds are the result of one’s own or someone else’s crime. The third element concerns an “indictable offence”. This refers to an offence tried by indictment, for which the court may punish the defendant with a custodial sentence.

In a nutshell, it is illegal for a person to deal with any money for which he knew with certainty or had a suspicion that it may be related to some criminal activity.

### **Avoidance of Liability**

Section 25A (1) states that if a person knows or suspects that any property represents any person’s proceeds of an indictable offence, then he must, as soon as possible, disclose that knowledge or suspicion to an authorized officer (police or customs and excise). This means a person has a duty to report money laundering, and he can also avoid commission of the offence described in section 25(1) if he makes disclosure pursuant to section 25A.

The meaning of suspicion is an acknowledgement of “more than a mere wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust” (*Queensland Bacon Pty Ltd v Rees* [1966] 115 CLR 266). In layman’s terms, this means that suspicion may arise if there is concrete evidence unfolding, though this suspicion is more than just thinking that “something is wrong” and should be a reasonable guess based upon some evidence.

Therefore, if a person discloses any suspicions concerning a transaction as described under section 25A(1), he does not commit the offence detailed in section 25(1) (dealing with crime money), though this is subject to two conditions: the disclosure was made before the act was completed; and that person also has the consent of an authorized officer (section 25A(2)). A person may still be exonerated from the offence described in section 25(1) even if he made the disclosure after the relevant act, provided that he made the disclosure of his own initiative as soon as possible (section 25A(2)).

A person can raise a defence to section 25(1) if there exists a reasonable excuse for his failing to disclose his suspicion in accordance with sections 25A(2) and 25(2). Here, “reasonable excuse” means an honest belief on reasonable grounds that the subject matter (the proceeds) or the act (related to the indictable offence) were lawful, or for an innocent purpose or a purpose connected with crime prevention. A mistaken knowledge of the facts may also become a valid defence, but the threshold for proving this is very high.

## **Suspicious Activities**

The following situations may be related to money laundering:

- Huge sums of money coming from countries without anti-money laundering laws, or from countries infamous for drug production and illegal trafficking
- A business with a complex corporate structure that conceals ultimate ownership
- Frequent changes in ownership and assets without any clear business meaning
- Unreasonable over- or under-valuing of invoicing
- Paying or receiving money from unrelated parties
- Substantial payment / receipt of funds without corresponding transactions.

Generally, auditors or banks are on the frontlines in coming into contact with suspicious monetary transactions. Both groups are bound by strict rules on confidentiality to protect the personal information of their clients, though this duty does not exempt them from their obligations to disclose knowledge of, or protect them in dealings with, crime proceeds. They must always try to strike a balance and adopt prudent due diligence procedures.

## **Examination**

Candidates are usually required to demonstrate understanding of the ordinance itself. This means that the candidate must understand the elements that constitute the offence in dealing with crime money. Candidates must also understand the requirements for making proper disclosure and its role in exempting them from criminal liability. Unlike other common law principles, there are few cases to be examined in money laundering. Candidates can therefore focus their efforts on improving their understanding of the statutes themselves, though fully understanding all of the core elements in the relevant ordinances is not an easy task. Fortunately, most of the actual questions on money laundering are relatively straightforward.