

Account Freezing Orders skyrocket

Michelle Sloane and Keziah Mastin consider HMRC's dramatic increase in the use of Account Freezing Orders (AFOs) and Forfeiture Orders (FOs) over the past three years, as part of its crackdown on suspected criminal behaviour

Account Freezing Orders (AFOs) and Account Forfeiture Orders (FOs) were introduced into Part 3B, Proceeds of Crime Act 2002 (POCA) in January 2018, as part of the wide-ranging powers provided to law enforcement agencies in the Criminal Finances Act 2017.

AFOs are granted by a Magistrates' Court on application of an officer and do not require authorisation by a senior judge, or indeed a qualified lawyer. AFOs freeze the monies in a bank or building society account to enable a full investigation to be conducted as to whether the monies in that account are the proceeds of crime. AFOs can apply to accounts with balances over £1,000 and enable authorities to preserve funds for subsequent forfeiture.

FOs and Account Forfeiture Notices (AFNs) are the two procedures by which monies already frozen may be forfeit as being the proceeds of crime.

Since their introduction, AFOs and FOs have been adopted by all eligible investigators, including HMRC officers. They are wide reaching and can, if granted, significantly impact a party with assets in the UK both financially as well as reputationally.

Obtaining an AFO

For AFOs, rather than proving criminality to the usual standard of beyond reasonable doubt, the relevant law enforcement agency only needs to prove its case on a balance of probabilities that there are reasonable grounds for suspecting that the money held in the bank account is recoverable property, or intended by any person for use in unlawful conduct. Recoverable property is defined as property obtained through unlawful conduct unless it has been acquired by an innocent third party in good faith, for value and without notice. Unlawful conduct encompasses conduct which is unlawful both in the UK and overseas.

The application must be made in writing to the Magistrates' Court setting out the basis for the application and the evidence relied upon. A copy of the written application and notification of the hearing of the application must be given by the applicant to any person by, or for whom, the account which is the subject of the application is operated,

unless that person cannot be identified. Applications can also be made without notice if there are reasons to believe that notifying the account holder would prejudice the law enforcement's efforts to seek forfeiture of funds.

The written evidence supporting the application (by way of witness statement) will usually be confirmed by oral witness evidence which may expand on the contents of the witness statement.

If the court is satisfied that the grounds for making an AFO have been met, it can order monies in the bank account to be frozen for a period of up to two years.

If an AFO is granted, either party can apply for a variation of an AFO, including for reasonable living expenses, to carry on business, or to pay legal expenses in relation to an AFO, AFN or FO. Such variation applications require evidence to support the variation. Any variation ordered will usually be limited in both scope and amount.

Not all AFOs will result in a forfeiture, which occurs only when the court is satisfied that the moneys seized are the proceeds of crime or used to facilitate a crime.

Obtaining a FO

Once an AFO has been granted, a senior enforcement officer may give an AFN confirming that they are forfeiting the monies in the frozen account, if they are satisfied that the monies are recoverable property or intended by any person for use in unlawful conduct.

If no objection to the AFN is received within the stated period, the senior enforcement officer can apply to the court for the funds to be forfeited. There will be no court hearing and objections will not be invited.

If an objection is received to the AFN, the enforcement officer must make an application to a Magistrates' Court for an FO.

Like an AFN, an application for an FO must be made while an AFO is in place. An enforcement officer commences a FO application by filing a written application with the same Magistrates' Court which granted the AFO. A copy of the application, and evidence in support of the application, must be served on every person who was served with the AFN and any other person identified by the court.

The court must schedule a date for a directions hearing not earlier than seven days after the date of the application. If no objections are received to the application, the court can order the FO at the directions hearing. If any objections are received, the court will fix a date for the FO application to be heard and may give directions in relation to the management of the proceedings, which will usually include directions for when each party must file and serve any evidence that it intends to rely on during the hearing,

together with a timetable for when each witness will be called and how long they will take giving their evidence.

At the hearing, witnesses will be called to give evidence on oath and may be cross-examined. It is not uncommon for expert witness evidence to be called.

Following the hearing, the court may issue a decision straight away, or schedule a time to issue its decision.

If the court decides to grant an FO, anyone negatively affected by the decision can appeal the decision to the Crown Court within 30 days of the court making the FO.

Rise in the use of AFOs/FOs

According to data revealed by the Freedom of Information request that we have made, the number of AFOs granted to HMRC has risen from 125 in the 2021/2022 financial year to 252 in 2022/2023, and has increased to 341 in 2023/2024, representing an increase of more than 170% over a three-year period.

Additionally, the value of assets frozen by AFOs has increased from £43m in 2021/2022 to £57m in 2023/24.

The number of Forfeiture Orders has also increased over the same period, rising from 92 in 2021/2022 to 144 in 2023/2024, when the total value of assets seized was close to £23m.

HMRC are not having it all their way as in the 2023/2024 financial year, £14.5m of assets were returned, relating to 75 AFOs.

The low evidential threshold for obtaining an AFO means that this increase in their use is concerning. Since their introduction, given the application process is straightforward and inexpensive, we have seen HMRC invoking these powers on an increasingly regular basis, even though we know that in many cases they do not lead to a subsequent successful forfeiture of assets or criminal prosecution. While money can be returned, this is of little consolation for the individuals and businesses that see their operations unduly impacted as a consequence of their funds being frozen.

Conclusion

If the government spending on HMRC to crackdown on tax evasion materialises, we are likely to see even higher rises in the use of AFOs and AFNs.

As AFOs and FOs become more frequent, it is critical that individuals and businesses are aware of their rights and how to successfully challenge them. Those affected should

immediately contact a specialist solicitor, who will be able to consider the lawfulness of any order and advise on appropriate next steps to minimise disruption to their lives and business operations.

Time is of the essence. If you want to register an objection to an AFO, AFN or FO, there are narrow time frames in which this can be done. It is essential that the grounds for an AFO, AFN or FO application are carefully reviewed, particularly as there is often a very short timeframe in which to obtain evidence to support any objection. It will be necessary to demonstrate with compelling evidence the 'clean' origins of money and this may take some time to assemble.

There is no protection for information provided at any stage of the process and what is said in objecting to an AFO, AFN or FO, may be used in a criminal prosecution against the person, a joint owner of the property, or third party. In addition, AFO applications are generally made in open court which means that grounds contesting the application will be heard in open court and therefore can be reported by the media. It is essential therefore that expert legal advice is taken at the outset and a considered long-term strategy devised.

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