

# A Brief Discussion on the Confiscation Procedure of Illegal Gains

Baoqi Tian\*

School of Marine Law and Humanities, Dalian Ocean University, Dalian, China

\*Corresponding Author: Baoqi Tian

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## ABSTRACT

Along with China's economic and social development and progress, corruption and bribery crimes as well as terrorist activities and other crimes of the transfer of stolen money also showed a pluralistic trend, criminals usually carry money and flee from the country, the defendant or criminals in the case of suicide, or other reasons cause death to escape legal investigation phenomenon generally increased. The establishment of the illegal income confiscation procedure is of great significance for combating corruption and bribery crimes, terrorist activities crimes, crimes against national security crimes and other crimes, should further clarify the identification of illegal income, standardize the trial procedure of the case, and fully protect the legitimate rights and interests of the interested parties right to know and the right to appeal.

## KEYWORDS

Criminal Procedure; Illegal Gains; Forfeiture Proceedings.

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## 1. INTRODUCTION

China's Criminal Law already has relevant provisions on "general confiscation procedures" and "special confiscation procedures", but the premise of "general confiscation" is that the perpetrator has been convicted by the court. Although the "special confiscation procedures" can deal with the illegal gains and property involved in the undetermined crime, the provisions on the special confiscation system in China's criminal law are more general and abstract. In judicial practice, criminal suspects, defendants in order to hide property and commit suicide, or because of other reasons caused by death, the occurrence of flight, resulting in the already started criminal proceedings are forced to suspend or terminate, and can not confiscate the illegal gains of criminals who flee abroad. The loss caused by the state, the society and the victim can not be compensated in a timely and effective manner, and the judicial organs often seem helpless in the pursuit of the property involved.

In order to maintain social order and stability, fight against corruption, terrorist crimes and other vicious criminal crimes. In the field of judicial practice in China, especially in corruption cases, due to the absence of criminal suspects and defendants, the case can not be solved by the normal litigation system and procedure, resulting in the economic loss of the state, the collective and the victim can not get effective relief. After the establishment of the illegal income confiscation procedure, it effectively maintains the property rights of the state and the victims, effectively cracks down on the illegal crimes, and is also conducive to the relief of the criminal suspects and defendants to their legitimate property rights in criminal cases.

## **2. OVERVIEW OF THE ILLEGAL GAINS CONFISCATION PROCEDURE**

### **2.1. The Concept of Illegal Gains Forfeiture Procedure**

The procedure of confiscation of illegal gains refers to the procedure of depriving the property involved in the crime of illegal gains in the criminal field. This procedure is aimed at criminal cases and is one of the special procedures of criminal proceedings.

In judicial practice, there are often some special circumstances that make the money and property involved in the case have legal uncertainty. Therefore, the Criminal Procedure Law amended in 2012 added a special procedure, which is to confiscate the illegal gains of criminal suspects and defendants in case of their absconding or death.<sup>[1]</sup> This procedure can separately apply confiscation procedures to unconvicted criminal suspects, effectively crack down on corrupt elements, and solve the problem of fugitives recovering stolen assets.

### **2.2. Characteristics of the Confiscation Procedure of Illegal Gains**

The operation of this procedure is not based on the conviction of criminal suspects and defendants, so it is also called "unconvicted case confiscation procedure".<sup>[2]</sup> It mainly reflects the preventive function of criminal law. The confiscation procedure of illegal gains is only for some special types of criminal cases, such as embezzlement and bribery crimes, terrorist activities crimes, which has great social impact and poses a great threat to the country and society. Corruption and bribery crimes, criminal suspects absconded for one year before the case, or after death, their illegally obtained property can still be investigated.

The subject of confiscation of illegal gains is special. Especially for some special objects, such as absconding or dead criminal suspects and defendants, the court can hear the relevant application in the absence of the defendant, and directly sentence the confiscation of the property involved, realizing the confiscation without conviction, reflecting the unified exercise<sup>[3]</sup> of judicial power.

The object of the illegal income confiscation procedure is special. The core content of the procedure of confiscation of illegal gains is to deal with the property involved, which includes not only illegal gains, but also contraband and criminal gains.

### **2.3. The Significance of Setting up the Illegal Gains Confiscation Procedure**

#### **2.3.1. Protect Legitimate Rights and Interests and Crack Down on Corruption and Other Crimes**

In terms of protecting the interests of the victims, Article 64 of the Criminal Law clearly stipulates that the lawful property of the victims shall be returned immediately. The condition for compensation is that the victim's property has been legally controlled by the state power, and confiscation of illegal gains is a form of control. This procedure protects the rights and interests of the victim to a certain extent. The illegal gains confiscation procedure can confiscate the illegal property obtained by the offender after the end of the crime, so as to protect the rights and interests of the victim. When the Criminal Procedure Law was revised in 2012, the system of confiscation of illegal gains was included for the first time, providing a legal basis for the confiscation of illegal gains when criminal suspects or defendants are fleeing or dead, which helps to fundamentally combat corruption crimes and protect the interests of the state.

#### **2.3.2. Fulfill International Obligations and Strengthen International Judicial Cooperation**

With the internationalization and transnationalization of corruption crimes, corrupt elements often commit embezzlement and bribery crimes in their own countries and take the stolen money abroad, which is an effective means for them to evade legal sanctions. It is also a huge obstacle for many

countries in the world to effectively punish corruption crimes. Corruption is a crime that all countries focus on combating, no matter in the international scope or in our country.<sup>[4]</sup> At the same time, it seriously affects a country's economic construction, transfers funds from corruption, causes a huge waste of the country's material, financial and human resources, and damages the tax revenue and resources of the country and society.

International cooperation in the field of criminal justice has become inevitable. In the face of the increasingly rampant crime of corruption, it is not enough to rely on one country or region or a few countries or regions to combat and sanction it, and international judicial cooperation is imperative. The international community will not tolerate such violations of human rights. Relevant functional departments in China use political, diplomatic, judicial assistance, police cooperation and other channels and methods to recover corrupt assets across borders through international or regional judicial assistance and cooperation, which is of great significance to China's anti-corruption and rule of law construction.

### **3. IDENTIFICATION AND DISPOSAL OF ILLEGAL GAINS**

#### **3.1. Characteristics of Illegal Income**

The illegality of illegal gains is one of the characteristics of illegally obtained property. The so-called illegal income refers to the property obtained in an illegal way, while the legal interests obtained in a legal way cannot be identified as illegal income. However, property obtained in an illegal manner is prohibited by law. The means of the actor to gain profit is illegal, so the actor to obtain benefits is illegal.

The economic value of illegal gains is one of the characteristics of illegal gains. When a perpetrator pursues economic property in violation of the provisions of the criminal law, what he pursues is the economic value of the property. It includes the value of the accused person's property, the income obtained from the criminal act, the proceeds of the accused person's assets, etc. The term "illegally obtained property" refers to the money and stolen goods obtained by the perpetrator through illegal means.<sup>[5]</sup>

The evidentiary value is also one of the characteristics of illegal gains. Illegal income can be used as evidence of crime facts, but also reflect the severity of crime circumstances. Illegal gains are the things obtained from illegal acts and are closely related to illegal acts. In criminal law, if the property of the perpetrator is not directly related to the illegal and criminal activities, it cannot be identified as illegal income. It is the ultimate goal of the perpetrator to obtain the illegal income.

#### **3.2. Determination of Illegal Income**

According to the Criminal Procedure Law of our country, the illegal income determined basically refers to the illegal income in the criminal law.<sup>[6]</sup> As for the scope of illegal income, it can be generally understood to include the following parts: (1) All property interests obtained directly or indirectly through the implementation of illegal and criminal acts should be identified as "illegal income". (2) When all or part of the illegal gains are converted into other forms of property through trading, investment or other legal or illegal means, the transformed property shall still be regarded as the continuation of the illegal gains, and its legal attributes are consistent with the original illegal gains. (3) The income generated by the conversion, appreciation or other means of the illegal income, or the corresponding part of the property formed after mixing with the legal property, shall be included in the scope of the illegal income.

### **3.3. Treatment of Illegal Gains**

According to the relevant provisions of the Criminal Law of the People's Republic of China, the procuratorial organs shall initiate a public prosecution of the property obtained by the criminal perpetrators in accordance with the law, and the judicial organs shall make a judgment to recover the property or order the return of compensation. The lawful property belonging to the victim shall be promptly returned, and the contraband and personal property directly used in the crime shall be confiscated according to law.

## **4. OPERATION OF ILLEGAL GAINS CONFISCATION PROCEDURES**

### **4.1. Initiation of the Illegal Gains Confiscation Procedure**

In the Criminal Procedure Law of our country, under normal circumstances, the procedure of confiscation of illegal gains shall be applied by the procuratorial organ to the intermediate people's court in the place where the criminal suspect or defendant committed the crime or lived. If the people's court finds the property to be illegal gains according to law after hearing, it shall order to confiscate it.<sup>[7]</sup> For a case that has not yet been heard, it may rule to terminate the trial of the defendant, and after the procuratorial organ has submitted the application, it shall be tried by a collegial panel in accordance with the confiscation procedure. If the defendant dies in the course of second instance or review, and the people's court finds, after hearing the case, that the original judgment or order on confiscation of property was not improper, it shall rule to uphold the original judgment or order on the part of property confiscation.

### **4.2. Trial of the Confiscation Procedure of Illegal Gains**

#### **4.2.1. Participation of Interested Parties in the Proceedings**

An interested party refers to a person who has a direct interest in the confiscated property, including criminal suspects or defendants, victims, creditors, etc. After the commencement of criminal proceedings, the judicial organ shall promptly fulfill its obligation to inform the interested party.

In the process of confiscation of illegal gains, the people's court shall fully protect the lawful rights and interests of the defendant when convicting and sentencing him or her and when recovering and confiscating the illegally obtained property. The interested parties who require participation in the proceedings shall provide supporting materials related to the defendant, and the persons whose property has been confiscated have the right to require participation in the proceedings, including the interested persons related to the property. The close relatives of the parties to the court to file a lawsuit need to provide relevant proof.<sup>[8]</sup> In the confiscation procedure, the source of the property provided by the criminal suspect or defendant should be investigated and verified, and their right to know, hearing and other rights should be respected. The victim needs timely relief and protection when recovering the infringed property. The victim may file a civil lawsuit with the court, request the return of the infringed property on the basis of the tort, or apply to join the criminal procedure. As one of the interested parties, the rights of the creditor need to be fully protected. The creditor can apply to the court to join the procedure in the confiscation of illegal gains to protect its legitimate rights and interests. When the property of the criminal suspect or defendant in the procedure of confiscation of illegal gains involves creditor's rights and interests, the court needs to verify the rights and interests of the creditor before confiscation, and give corresponding compensation.

#### **4.2.2. Trial of Illegal Gains Forfeiture Procedure**

The people's Procuratorate shall appoint a public prosecutor to attend the court, and the court shall form a collegial panel to try the case. During the trial, the rights and obligations of both parties shall be explained and explained in detail to achieve good trial results. If the parties fail to appear without

reason and no other agent AD litem appears, the court may not hold a hearing<sup>[9]</sup>. During the trial, the opinions of both parties should be fully expressed, especially the legitimate rights and interests of criminal suspects and defendants' close relatives and other interested persons, and their property rights should be prevented from being improperly infringed upon.

### **4.3. Rights Relief for Interested Parties**

#### **4.3.1. Interested Parties Have the Right to Know**

The interested party shall enjoy the right to know, which is the premise and basis for realizing other litigation rights. Only when the interested party knows in advance, can it have more time to prepare for litigation to protect its rights. After accepting an application, the people's court shall fulfill the obligation of notification to protect the right of interested parties and other relevant right holders to know. Public announcement and direct notification are commonly used. Based on this, for the interested parties in the procedure of confiscation of illegal gains, they should enjoy the right to know the relevant procedural information. Specifically, the interested party may clearly state in the judgment documents the specific circumstances of the property involved, including the source, type, value and status of the property involved, as well as the circumstances that the property may be transferred, concealed or lost during the confiscation process; If the interested party does not know the relevant facts, the people's court shall make corresponding explanations of the relevant facts in the judgment documents.

After the court makes a ruling on confiscation of illegal gains, it shall inform the interested parties of the contents of the ruling and the relevant circumstances and explain the relevant legal provisions. The interested parties may also learn about the condition of the property involved and participate in the confiscation procedure by participating in the proceedings. The court may contact the interested party by telephone, short message, E-mail and other means and inform the interested party of the relevant litigation rights. The interested party may attend the court hearing or apply to the people's court to notify the witness to testify in court.

#### **4.3.2. An Interested Party Shall Have the Right of Appeal**

The Criminal Procedure Law gives the interested party and the agent AD litem the right to participate in the court hearing, so that the interested party can fully protect their legitimate rights and interests. China's relevant laws provide that if you are not satisfied with the judgment, you can appeal to a higher people's court within five days. It is mainly for the subject of the ownership of the property, the people's court at a higher level to try, if the court of first instance is really wrong in determining the situation, should promptly return the property, in order to protect the legitimate rights and interests of the interested parties, so as to achieve procedural justice.<sup>[10]</sup> And the appeal of the interested party has a positive effect on safeguarding the legitimate rights and interests of the right holder and timely correcting the unfair and inaccurate judgment of the trial. In judicial practice, the confiscation of illegal gains needs to fully consider various factors, such as the family livelihood and social relations of criminal suspects or defendants, so as to avoid causing unnecessary losses to innocent people. Only by adhering to the premise of handling cases according to law can the confiscation system of illegal gains play a better role and better safeguard social fairness and justice.

In the procedure of confiscation of illegal gains, the relief and protection of the rights of the stakeholders are very important. Only by fully respecting the rights of the stakeholders in the criminal procedure can a dynamic balance between criminal management and rights protection be established, so as to maintain social fairness and justice.

## **5. SUGGESTIONS FOR IMPROVING ILLEGAL GAINS CONFISCATION PROCEDURES**

### **5.1. Expand the Scope of Application of the Procedure**

The reasonable expansion of the scope of application of the illegal gains confiscation procedure can better adapt to the actual needs of the fight against crime, so as to give full play to the function of the illegal gains confiscation procedure. The inclusion of the types of crimes stipulated in international conventions in the scope of application of illegal gains confiscation procedures can promote the convergence with international conventions and legal provisions of other countries, strengthen cooperation with other countries in combating transnational crimes and recovering illegal gains, improve international judicial assistance and jointly maintain the rule of law order of the international community.

### **5.2. Strengthen and Improve International Cooperation Mechanisms**

International cooperation on confiscation of illegal gains is crucial to combating transnational crimes. Actively signing agreements on judicial assistance with more countries will help provide a clear legal basis and operational procedures for cross-border asset recovery, evidence collection, extradition and other aspects, so as to strengthen international cooperation and cooperation.

### **5.3. Clearly Specify the Standard of Proof**

It is of great significance to clarify and refine the standard of proof of illegal gains in the confiscation procedure and the reasonable standard of proof for judicial justice and efficiency and the protection of the legitimate rights and interests of the parties. The court system establishes a case guidance system to ensure the uniform application of proof standards, and clarifies the application of proof standards in different types of cases through the release of typical cases to provide reference and guidance for judicial practice.

### **5.4. Strengthen the Protection of the Rights of Stakeholders**

To protect the legitimate rights and interests of stakeholders, the court can use a variety of platforms to make announcements after accepting applications to broaden the channels for stakeholders to obtain relevant information. During the trial process, the rights of stakeholders to speak and cross-examine are fully protected and sufficient speaking time is provided for them, and the cross-examine opinions put forward by them are carefully reviewed and responded to, so as to ensure the fairness and legality of the confiscation procedure of illegal gains.

Specific measures to provide legal aid to stakeholders who are unable to hire lawyers due to economic difficulties and other reasons are clearly specified, so as to ensure that stakeholders can obtain information such as statements and excuses of criminal suspects and defendants related to the case, so as to maximize their rights and interests.

## **6. CONCLUSION**

The procedure of confiscation of illegal gains is a new procedure in the newly revised Criminal Procedure Law in 2012, which breaks through the limitations of traditional means. The confiscation procedure can be applied separately to unconvicted criminal suspects to effectively crack down on corrupt elements and solve the problem of recovering stolen assets from corrupt officials who have fled abroad. The confiscation procedure of illegal gains has opened up a new way for China to pursue overseas stolen money. The establishment of the confiscation procedure of illegal gains, in a sense,

has played a certain role in preventing corruption and other crimes such as corruption, terrorist activities and other crimes. A system of confiscation of illegal gains has been established to effectively crack down on all kinds of property crimes represented by corruption. The recovery of stolen money from overseas has effectively protected state-owned property and citizens' property rights. At the same time, the criminal behavior of government workers has been curbed.

The establishment of illegal income forfeiture procedure plays an important role in our criminal legislation, and at the same time has great significance in the construction of the rule of law in our country. This procedure plays an important role in the cross-border recovery of corrupt assets, the elimination of domestic corruption and the prevention of corruption, and is of great significance to the construction of a country ruled by law. The related judicial interpretations and laws and regulations will also be produced accordingly. So as to make judicial activities more perfect and reasonable, in view of the illegal income confiscation procedure, we should combine theory with practice, find the deficiencies in the theory, and then targeted solutions, accurately find the problems existing in the procedure. The process of our country's rule of law continues to advance, the illegal income confiscation procedure will be more and more perfect, become an important part of judicial activities, promote the progress of the rule of law in China.

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