

The Preliminary Research of Non-convicted Illegal Gains Confiscation Proceeding Applicable Charges

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Abstract

The new implemented "criminal procedural law" additionally established confiscation proceeding of the criminal suspect, defendant escaping and death cases illegal gains for the first time on January 1, 2013. The confiscation proceeding in the application of the crime, there are many disputes, whether only apply to corruption and bribery crime, terrorism crime or not, if it can be applied to other crimes, and then how to define the specific charges of confiscation proceeding. This article takes the system function of confiscation proceeding and the value pursuit as the breakthrough point, determine the essential charges of confiscation proceeding applied scope, combining with the judicial practice, seek form of legal basis at the same time,, define the applicable scope of confiscation proceeding, the author's point of view is proposed.

Keywords

Efficiency, expansion, personal interests.

1. The Origin of the Problem

The "criminal procedural law" article 280 paragraph 1 provides: the corruption and bribery case, terrorism crime and other major crimes, the criminal suspect, defendant escaping, after wanted a year later the criminal are not under arrest, or criminal suspects and defendants died, according to the provisions of the criminal law, the illegal gains and other property involved should be recovered, the people's procuratorate can submit an application to confiscate illegal gains for the people's court. According to the provision, under the situation that the criminal suspects or defendants die, escape, even if criminal charges in the suspension or termination state, for the criminal suspect or defendant' illegal gains, the judicial offices can also be recovered. This is the pre-sentence property confiscation proceeding and illegal gains confiscation proceeding that scholars said. Given that special procedure of confiscation of illegal gains launch under the premise of criminal suspect, the defendant has not been convicted, the author calls the system as the non-convicted illegal gains confiscation proceeding.

For Applicable charges of confiscation proceeding, the provisions of new "criminal procedural law" are the "serious crimes such as corruption and bribery crime and terrorism crime cases". From the point of view of literal interpretation, the new "criminal procedural law" did not explicitly prohibited except for corruption and bribery crime, terrorism crime, the possibility of confiscated program for other major crimes. In practice, there are flexible explanation space foe other major crimes; the scholars also have many differences on the issue. The cognition is inconsistent with the understanding can lead to application unified in practice. So, what exactly cover on applicable charges of confiscation proceeding, there are analysis and discussion in this article.

2. The Combing of point, the Summarization and Analysis of the Different Opinions

Many view is to establish confiscation proceeding, which is in order to adapt to the requirements of United Nations Convention against Corruption and other international conventions, so that obtain the judicial assistance of the other contracting state; In addition, many scholars in the discussion of the application scope of confiscation proceeding, and should pay attention to charges of violating the interests of the state social interests, it does not take into account the applicable confiscation proceeding application possibilities when interests of the individual is violated by criminal behavior.

First of all, whether it is the crime that the international convention stipulated, which is not the only standard to determine the application scope of confiscation proceeding. No doubt when the criminal suspect or defendant flee to other countries, obtain the judicial assistance of other countries, it is an important way to recover losses. Our country law does not allow absent trial of criminal cases, if not applicable to confiscation proceeding, it will not be able to provide the required valid judgment for contracting states, eventually cannot obtain judicial assistance. So the crime that the international convention stipulated, it belongs to the applicable scope of the confiscation proceeding. But it is not concluded " confiscation proceeding are only apply to the crime of international convention stipulated". When the criminal suspect or defendant died, there is also no necessity of applying to international law and obtaining the judicial assistance of other contracting state. The new "criminal procedural law" provides when the criminal suspects or defendants' death is one of the premises to applicable confiscation proceeding, so applicable charges of confiscation proceeding is limited to the crime that the international convention stipulated lack reasonable basis.

Secondly, whether criminal behavior is violated the national interest, social interests or individual interests, they are not basis that determine applicable scope of confiscation proceeding. From the point of constitution and general jurisprudence, national interests, social interests and personal interests are protected by law. With the gradual progress of legal thought, there are gradually strengthened trend for the protection of individual interests. Although there are many disputes and contrary in the national interest, social interest is a priority in the interests of the individual, but at least we can't say that confiscation proceeding in protecting national interests and social interests at the same time, can be completely ignored the protection of the individual interests. The application scope of confiscation proceeding is limited in the corruption and bribe crime, terrorist activities two kinds, or only to extend the certain endangering public security crime, interfering social management order crime, ignore the protection of the interests of the individual.

3. Theory Foundation, the System Function and the Value Pursuit of Confiscation Proceeding

To determine the applicable charges of confiscation proceeding, the author thinks that first confiscation procedure theory foundation should be determined, namely, system function and value pursuit. Confiscation procedure is recovered property on the premise that the defendant are not convicted and sentenced, the fundamental is to recover losses that criminal behavior violate the state, social, personal interest. The recovering loss function of confiscation proceeding, it is the fundamental basis of the program. At the same time, the criminal behavior is a violation of the law, the criminal suspect or defendant is always in order to obtain certain benefits, including economic interests. The confiscation proceeding through the recovering of loss, eliminate the expected benefits of crime; On the other hand, for some organized crime, fixed organization and huge financial support is the foundation that it continue to implement illegal criminal activities. Through the confiscation proceeding recovered illegal gains, and weakened the ability that organization continue to crime.

The author thinks, although can't deny litigation justice is one of the values of the confiscation proceeding, but compared with ordinary criminal proceedings, the confiscation proceeding is more inclined to the efficiency of lawsuit. "Property confiscation proceeding before judgment focused on how

to prevent lawsuit delay and lawsuit termination caused by the criminal suspects, defendants' escaping, death, it is under the premise that don't solve the conviction and sentence problem of the criminal suspect or defendant, how to effectively recovered the illegal gains and other properties involved, it is how to better fulfill the obligation of international conventions and prevent large loss of state-owned property, the program design itself is biased towards the pursuit efficiency rather than lawsuit justice."

4. The Application Scope Overview of Confiscation Proceeding

4.1 The interpretation of legislation evolution sense

In January 1998, the supreme People's Court, the Supreme People's Procuratorate, Ministry of Public Security, Administration of National Security, Department of Justice, legal work committee of the Standing Committee of the National People's Congress "the regulation of several issues on implementation of the criminal procedure law" article 19: the people's procuratorates, public security organs can't deduct the deposit, remittance, for criminal suspects' death in the investigation, examination and prosecution, the deposits or remittances of the criminal suspect should be confiscated or returned to the victim in accordance with law, it may apply to the people's court ruled to inform freeze criminal suspects deposits or remittances financial institutions return to the state treasury or the victim. In September 1998, the supreme people's court in "about execution (criminal procedure law of the People's Republic of China) the explanation of some issues" paragraph 2, article 294 stipulate: the people's procuratorates and the public security organ, because criminal suspects die, apply to the people's court rule and notify to freeze the criminal suspect deposits or remittances' financial institutions, the deposits or remittances of the criminal suspect return to the state treasury or the victim, the people's court should after marking, review relevant evidence materials for ruling.

From the point of the above provisions, while confiscation proceeding are no relevant provisions in the old criminal procedure law, but the public security bureau, procuratorate, court all has its own general rules. Whether the provisions of the six organs or judicial interpretations of the Supreme Court, there are not application scope of confiscation proceeding that limited corruption and bribery, terrorist activities, and case type requirements. From spirit of new criminal procedure law, in order to continue to accumulate practice experience, avoid the program randomly start, to limit the application scope of confiscation proceeding is reasonable. But considering that the program tend to the efficiency of lawsuit, even if the defendant is not present, it also isn't related to the conviction and sentence of defendant, therefore, the author thinks that confiscation proceeding is not limited to corruption and bribery crime and terrorism crime.

4.2 The system explanation based on the criminal procedure law chapter 3 paragraph 5

For the processing of the property involved, in the provisions 64 of the criminal law in our country the "recover", "order to pay compensation forit" and "confiscate" way, namely all money and property that criminals illegally obtained, which should be recover or order to pay compensation forit; Contraband and possessions of the crime should be confiscated. Whether legislation or judicial practice, the "recover", "orders to pay compensation forit" and "confiscate" way should be treated separately. Taking corruption and bribery crime for example, the corrupted money should be "recovered"; Article 280 of the criminal procedure law clearly stipulates that the corruption and bribery crime is applicable to confiscation proceeding. The conclusion can be drawn from the above analysis, this chapter prescribed "confiscate" and prescribed "confiscate" in article 64 in the criminal law is not the same concept. The criminal law used general "confiscation", including "recover" "order to pay compensation forit" and "confiscate" prescribed in article 64 of the criminal law, For theft, fraud and other cases, generally through "recover", "order to pay compensation forit" means to deal with property involved. Since the confiscation proceeding used a broad "confiscation" concept, then the theft, fraud, etc, there are also applicable to confiscation proceeding.

First part of the paragraph 1 of article 282 provisions in the criminal procedure law, after the people's court try, the verified illegal gains and other property involved, except return to the victim according to

law, should make a written order and confiscate. It can be seen from this article that in the application in confiscation proceeding, there are the possibility illegal income "returned to the victim according to law". For corrupted money, it should return murdered units in accordance with the law, for bribed money, it should be "confiscated". In practice, the illegal gains should return to the victim, mostly exist in theft, fraud and other crimes. So the law did not make clear a regulation on theft, fraud and other crimes apply to confiscation proceeding, but according to the first half of the first paragraph in article 282, we can't simply get the conclusion that application scope of confiscation proceeding is limited to corruption and bribery crime, terrorism crime.

4.3 The interpretation of article 280 in the criminal procedure law

For the applicable scope of confiscation proceeding, the criminal procedure law is used "corruption and bribery crime, terrorism crime and other major crimes". From the perspective of interpretation, criminal procedure law does not limit the program's applicable charges in specific provision in corruption and bribery crime, terrorism crime. "Such as" in the use of habit, or list or list end. The provisions of article 280 in the criminal procedure law, there are no clear limit applicable scope of confiscation proceeding, but it gives the interpreter, the judicial practice personnel huge interpretation space.

5. The application scope of confiscation proceeding

5.1 The expansion of application scope of confiscation proceeding for the first time, focus on protecting national interests and social interests.

Corruption and bribery crime and terrorism crime seriously damage national interests, social interests. From the perspective of the legislative spirit of the criminal procedure law, and emphasizes the protection of national interests and social interests. From the perspective of domestic fighting crime situation, compared with the terrorism crime, drug crime, money laundering crime, gangland crime go even farther than in the social harmfulness, and these crimes directly or indirectly take money or property as criminal purposes, or money or property as the continued crime of security, maintain continued crime power. Since criminal procedural law stipulate confiscation proceeding can be applicable to terrorism crime, so we can't deny possibility that confiscation proceeding is applicable to other violating the interests of the state interests, social crime such as drug crimes, money laundering crime, and underworld crime nature and son on.

5.2 The second expansion of applicable scope of confiscation proceeding - focus on the protection of the interests of the individual

1, In recent years, economic crime involving the mass is frequent. the author retrieves economic crime involving the mass with wide impact on the Internet,, listed as follows: 1, Beijing's biggest-ever cases involving pyramid schemes "Yilin Corporation Case", more than 20000 people purchase the national forest land fund. Since 2004, more than two years of time, the illegal business revenue of corporation reached 1.6 billion yuan; 2, between 2003 and 2008, Beijing Oriental Senmao technology development co., LTD illegally absorbing public savings more than 160 million yuan from 1600 people in the name of purchase forest, from May 2005 to January 2007, Wu Ying pay high interest rates as bait illegally raise more than 770 million yuan.

This kind of crim presents the feature that victim is numerous, huge amount involved and the victim's loss is huge etc. Whether out of fairness and justice of law, or from the social harmony and stability, meet the point of view of the victim's basic needs, the necessity of economic crimes case recovering losses has greatly increased in recent years, these crime should be given the possibility of applying confiscation proceeding.

The confiscation proceeding is focused on the efficiency of lawsuit in value pursuit. Lawsuit efficiency also has expanding basis of the applicable scope of the confiscation proceeding. Compared that the victim additionally brings civil lawsuit separately, theft, fraud and other crimes that is applicable to confiscation proceeding to improve the efficiency of lawsuit. The criminal suspects, defendant escape,

die; which can happen before the investigation stage, stage of investigation, stage of review and prosecution and trial phase. For next three phases, investigation has been completed or partially completed; the corresponding evidence has been fixed. At this point if start confiscation proceeding., can reduce repeated proof of parties, and make full use of evidence obtained by investigation organ; Under the current system, evidence obtained by investigation organ in the criminal cases, it is also hard to apply to civil cases, if the victim can only be filed civil lawsuits, the judicial organs, the parties are hard to avoid repeated work, waste of judicial resources. In addition, both the victim and civil trial, they all can't extract words evidence of the dead defendant again in a civil case; The judicial organs will ask the victim to provide relevant evidence in the process of investigation, such as transfer stub, original copy of receipt for a loan, etc., when the victim provide the relevant evidence original case for the judicial organ, the civil filed lawsuit separately, will also face many difficulties of putting to the proof. If criminal suspect or defendant escape, die, before the investigation of investigation organ, start confiscation proceeding at this time also conform to the principle of lawsuit economy: the criminal suspect or defendant first flee then are contumacious, it also can avoid the repeated labor of judicial authority, the parties; The death of a criminal suspect or defendant, starting confiscation proceeding is not a waste of judicial resources.

From the lawsuit effect of criminal, civil case, the damage caused by criminal behavior to citizens, the investigated effect of the use of confiscation proceeding is more ideal, the rights and interests of the victim also can get more guarantee. Investigation organ when carries on the preliminary investigation in economic crime, illegal gains of the defendant often take measures to seal up, detain, freeze or other measures to ensure that the victim receive compensation with largest degree. So is the confiscation proceeding, compared that the parties filed lawsuit separately, from lawsuit effect of criminal, civil case, it is more conducive to protect the lawful rights and interests of citizens inviolable.

6. Perfect way selection and some suggestions to the confiscation proceeding

6.1 The applicable charges of confiscation proceeding - clear or describe

Based on the above analysis, the author thinks that article 280 of new criminal procedure law should expand the interpretation, except for corruption and bribery crime, terrorism crime, other major crimes case does not do too much limitation in applying confiscation proceeding. So, what charges should be applicable to confiscation proceeding, whether using the method of clearly listing related charges, or describe feature for charges, whether apply or not is specifically controlled by judicial organs. The author thinks that real life is colorful, case is various. In order to avoid c confiscation proceeding applies to minor criminal cases, a waste of judicial resources, the authors agree on confiscation proceeding applicable to major crimes. On the other hand, we can't specifically anticipate what kind of crime happened in future, the way of clearly listed unavoidably attend to one thing and lose another. Therefore, the case involving illegal income is applicable to article 64 of the criminal law, they all has the possibility of applying confiscation proceeding.

6.2 The related rights of the victim in the confiscation proceeding - whether give program launch power, the right of appeal

The confiscation proceeding is the same as incidental civil action, which has ability to protect the citizen property, improve the efficiency of lawsuit. In incidental civil action, the prosecutor has the independent program launch power, the prosecutor and the defendant has the right to appeal. So in the confiscation proceeding, whether they should give the victim program start right and right of appeal, the article 282 No.2 of new criminal procedure law expand the size of the explanation. The confiscation proceeding substantive law is according to article 64 of the criminal law, it still belongs to the criminal lawsuit in nature, but it has certain particularity on the specific procedures.

In the common criminal procedure, except private prosecuting case, the victim has no prosecution right, the victim does not have the right to appeal for property involved crime, it can only protest for a people's

procuratorate. From the perspective of maintaining legal unity, it seems that should not give the victim program start right and right of appeal. It can be seen from provisions 280 of new criminal procedure law, the victim does not have program launch power, but from the spirit of the law, the victim may apply to the people's procuratorate to people court to confiscate the illegal income. For the scope of "other interested party", the supreme people's court on applying "Criminal Procedure Law of the People's Republic of China > the article 513 paragraph stipulate: the people who claim ownership to confiscate property, it should be identified as criminal procedure law paragraph 2 article 280 the " other interested persons ". According to the regulation, the victim belongs to other interested parties; the victim has the right to appeal. The confiscation proceeding belongs to special procedures, it may have different rules with ordinary criminal procedure. From a loss, maintaining the lawful rights and interests of the parties' point of view, the authors agree to the provisions of the supreme people's court judicial interpretation.

6.3 The connection of confiscation proceeding and civil lawsuit-- and discuss the cognizance of the illegal gains and other property involved

The supreme people's court on the applying "Criminal Procedure Law of the People's Republic of China > the interpretation of the 509th stipulate: the property and interest obtained by criminal behavior, as well as the defendants' illegal possessed contraband, and the property used by crime, it should regard as paragraph 1 article 280 the criminal procedure law stipulate" the and other involved assets ". The judicial explanation] "the illegal gains and other involved assets" is the same as article 64 of criminal law, jointly assigned applicable object of the confiscation proceeding. It can be seen from comparing civil lawsuit, the illegal gains and other property involved has been carried out through the confiscation proceeding, the loss of victim still may not be able to be fully compensated, such as the interest of the victim losing money, the defendant' assumed liability for breach of contract cannot be confiscated by the confiscation proceeding. According to the incident no longer principle, after the people's court make sentence to the criminal suspect or defendant' illegal income, and other property involved in accordance with the law, the victim separately filed a civil lawsuit to a people's court, the people's court shall not accept it. But after recovering or compensation and can't make up for the loss, the victim separately filed a civil lawsuit to the people's court, the people's court can accept it.

6.4 The some suggestions to perfect the confiscation proceeding:

The criminal suspect or defendant escape and does not arrested, after wanted a year later, or the criminal suspect or defendant died in accordance with the provisions 64 of the criminal law, their illegal income or other property involved should be recovered, the people's procuratorate may submit an application for the confiscate the illegal gains to the people's court;

The victim and other interested parties may request the people's procuratorate to confiscate the illegal gains;

After the people's court make sentence to the criminal suspect or defendant' illegal income derived and other property involved in accordance with the law, the victim and other interested parties still separately filed a civil lawsuit to a people's court, the people's court shall not accept it. But after recovering or compensation and can't make up for the loss, the victim and other interested parties separately filed a civil lawsuit to a people's court, the people's court may accept it.

7. Conclusion

From 2008 to 2013, the local people's court has accepted 56.105 million pieces of case, 29.3% rise year on year respectively. More and more units and individuals choose to settle disputes through procedure. This on the one hand reflects our country citizen's legal consciousness' enhancement, on the other hand, the pressure of judicial organs also increases gradually, some departments over load operated, someone called "lawsuit explosion" era. Under such a background, saving judicial resources and reducing respect of the parties allow of no delay. Confiscation proceeding take the recovering losses as the basic system function, which is focus on the efficiency of lawsuit in the design. We need to release the applicable

scope of confiscation proceeding to optimize effect, It's important to note that confiscation procedure is a "baby" in our country, which still needs to accumulate experience from practice, step by step toward mature, so this article is preliminary discussion of confiscation proceeding applicable charge, intended to throw away a brick in order to get a gem, provide reference for the perfection of the confiscation proceeding together.

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