

ASSET RECOVERY MECHANISMS



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HISTORY OF FORFEITURE/CONFISCATION

- ANCIENT HISTORY

BIBLE

“ And whoever shall not do the Law of thy God or the Law of the King, let judgment be executed speedily unto him whether it be by death, banishment, **confiscation of goods** or imprisonment” Ezra 7:26

HISTORY OF FORFEITURE/CONFISCATION

QURAN

{ وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبُطْلِ وَتُدْלוּا بِهَا إِلَى الْحُكَّامِ لِتَأْكُلُوا فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ }
]Surah Al-Baqarah: 1: 188]

And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].

HISTORY OF FORFEITURE/CONFISCATION

- { وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جِزَاءً بِمَا كَسَبَا نَكَالًا مِّنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ }

Surah Al-Mā'idah:5:38]

[As for] the thief, the male and the female, amputate their hands in recompense for what they earned [i.e., committed] as a deterrent [punishment] from Allāh. And Allāh is Exalted in Might and Wise.

HISTORY OF FORFEITURE/CONFISCATION

- The Laws of the twelve tables (c450 B.C)

(Roman Law)

“If a quadruped causes injury to one, let the owner tender him **estimate amount of the damage;** and if he is unwilling to accept it, the owner shall....**surrender the animal that caused the injury**”

ASSET FORFEITURE OR CONFISCATION

- The terms “**asset forfeiture** or **confiscation**” usually used synonymously, meaning a final order by the court which changes ownership of an asset from the individual to the State.
- Asset Forfeiture is generally the last action that is taken in a case.(It begins when the Court makes a final confiscation order that is no longer subject to review or Appeal and ends when the order is executed)

Confiscation: permanent dispossession of property by court order.

ASSET FORFEITURE/CONFISCATION

- It is now globally accepted that criminals are more hurt when they are deprived of their properties than being sent to prison.
- Asset Recovery is therefore considered an adequate and effective tool of combating corruption and other organized crimes.

WHY ASSET RECOVERY?

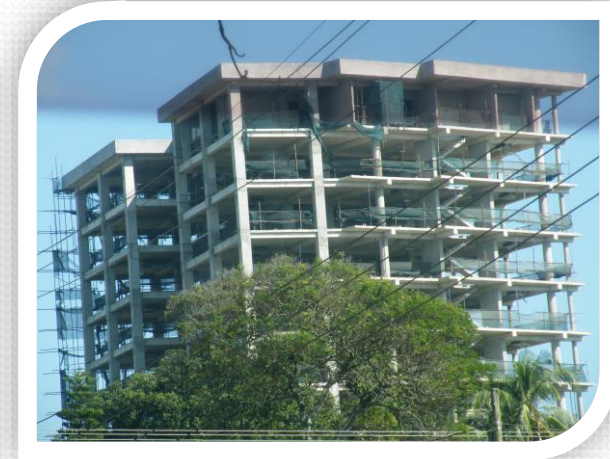
- It incapacitates criminals from committing future crime and prevent them from interfering a due process.
- It deters present and future criminals by removing incentives for crime, thus sending a strong message that crime does not pay.
- It serves to compensate victims for their stolen properties
- It reimburses the State its costs incurred in fighting crimes thereby strengthening law enforcement agencies.

CRIMES THAT PROMPT ASSET TRACING

- Corruption
- Money Laundering
- Terrorist Financing
- Wildlife crimes eg. poaching
- Forest offences
- Offences related to taxation
- Financial Fraud & Theft
- Illicit trafficking in narcotics
- Drug trafficking

THINGS TO FORFEIT

- Money in bank
- Real Estate
- Businesses
- Cars
- Boats
- Cash



THINGS TO FORFEIT cont...

Other assets

- Instrumentalities
- Co-mingled/Intermingled property (See section 91 (e) of the AMLA
- Any lawfully acquired properties where proceeds can not be located, see section 91 of the AMLA and in case of Pecuniary penalty order see section 92 of the AMLA).
- Proceeds in converted forms or transformed and accrued interest are also liable to forfeiture.
- Properties of corresponding value.

Recovery of Assets – The Last Step !

- Must be preceded by an investigation aimed at:
 - Proving the crime
 - Tracing
 - Provisional/Preventive measures/Interim orders (Seizing (See section 61 of the AMLA, Freezing/Restraining (See section 71 of the AMLA & 53 of the Anti-Corruption Act of 2009)
 - Prosecution
 - MLA (See Part VI of the AMLA)
 - Enforcement of foreign orders

ASSET RECOVERY MECHANISMS INTERNATIONAL PERSPECTIVE

- Conviction based
- Non-conviction based forfeiture
- Civil action
- Civil law suit

CONVICTION BASED FORFEITURE

- Requires conviction
- Burden of proof required
 - Prior to conviction ? (beyond reasonable doubt)
 - After conviction ? (beyond reasonable doubt)
- Often has a “substitute asset” provision – untainted property

NON-CONVICTION BASED FORFEITURE

- In rem process - civil action against the property
 - No conviction required
 - Standard of proof – to seize ??(reasonable or probable course) to forfeit ?? (on balance of probabilities)
 - Unrestricted use
 - Restricted use
- Only if person is fugitive or dead

CIVIL LAW SUIT

- Can be filed in foreign jurisdictions
- Standard of proof
- Need private lawyer
- Possibly expensive
- Not limited by public action

CIVIL LAW ACTION

- Used in some Civil Law jurisdictions
- Runs within the criminal process by law
- It is a civil action, intended to provide compensation for damages
- Plaintiff can use evidence obtained through the criminal case
- Does not require conviction
 - Criminal trial can fail – the civil action continues

CONVICTION BASED FORFEITURE/CONFISCATION: EXISTING LAWS – IN UGANDA

- Section 83 and 86 of the AMLA of 2013 as amended
- Section 63 and 64 of the Anti-Corruption Act of 2009
- **See also section 202 of the Magistrates Courts Act**

CONVICTION BASED FORFEITURE/CONFISCATION

Section 83 of the AMLA (1) Where a person is convicted of an offence under this Act; court may in addition to any other sentence make the following orders— (a) a confiscation order against property that is tainted property in respect of the crime; (b) a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the crime; or (c) a confiscation order against property in which the person convicted has interest. (2) Whenever after conviction of the person, any other tainted property is discovered, an authorized officer or any other person may apply to court for additional confiscation orders in respect of the tainted property. (3) An application under subsection (2) may be made in respect of more than one crime. (4) An applicant may apply to amend an application under subsection (1) to include any other tainted property or benefit, as the case may be, and the court may upon being satisfied that— (a) the tainted property or benefit was not reasonably capable of identification when the application was made; (b) necessary evidence became available only after the application was originally made; and (c) it is in the interest of justice that the application be amended, grant the application.

CONVICTION BASED FORFEITURE/CONFISCATION

Section 86 of the AMLA. Confiscation order on conviction. (The Court should give careful consideration when granting an order for confiscation.

Where an applicant applies to court for an order of confiscation; and court is satisfied that the property is tainted property in respect of the crime, court may, if it considers it appropriate, order that the property, or such part of the property as is specified by the court in the order, be confiscated. (2) In determining whether property is tainted property, the court shall be satisfied that—

- (a) the property was used in or in connection with committing the crime of which the person was convicted; or
- (b) that the property was derived, obtained or realised as a result of committing the crime of which the person was convicted, and the court is satisfied on a balance of probabilities that the income of that person from sources unrelated to criminal activity cannot reasonably account for the acquisition of that property.

(3) Where the court orders that property, other than money, be confiscated, the court shall specify in the order the amount that it considers to be the value of the property at the time when the order is made and in arriving at this value, the court may seek professional advice.

Confiscation order on conviction.

86 (4) In considering whether to make a confiscation order under subsection (1), the court shall have regard to— (a) the rights and interests, if any, of third parties in the property; (b) the proportionality of the value of the property to be forfeited to the gravity of the crime in question ; (c) the role and culpability of the owner of the property in the crime; (d) the nexus between the crime and the property and the involvement of the property in the crime; (e) whether the use of the property was deliberate and planned or merely incidental and fortuitous; (f) whether the purpose of acquiring, maintaining or using the property was to carry out the crime; and (g) the extent of the instrumentality of the property in the commission of the crime. (5) Where the court makes a confiscation order, the court may give such directions as are necessary or convenient for giving effect to the order. (6) Without limiting the generality of subsection (5), where a court makes a confiscation order against registrable property, the court may direct an authorised officer to do anything necessary to obtain possession of any document necessary for the transfer of the property.

NON-CONVICTION BASED (NCB) FORFEITURE

Section 85 of the AMLA of 2013 provides for procedure for confiscation order where person dies or absconds.

- (1) Where (a) a person is either under investigation or is about to be charged or has been charged with the commission of a crime under this Act; and a warrant for the arrest of the person has been issued in relation to that charge, and the person has died or absconded; or (b) a person has been convicted of a crime, and the person has died or absconded; or (c) a person dies before the commencement of investigations or charges, an applicant may apply to the court for a confiscation order in respect of any tainted property and the court may, if satisfied on a balance of probabilities, order that the property or such property as is specified by the court be confiscated. (2) For the purposes of subsection (1), the person is deemed to have absconded if reasonable attempts to arrest the person under the warrant have been unsuccessful during the period of one year commencing on the day the warrant was issued, and the person shall be deemed to have so absconded on the last day of that period.

NB: It's crucial to note that the burden of proof under this provision contradicts the one under section 65 of the Anti-Corruption Act of 2009. Given this, it's of utmost importance to consider harmonizing these provisions, preferably by maintaining this provision under AMLA.

NON-CONVICTION BASED (NCB)FORFEITURE **CONT...**

Discussion Question: Does Uganda have other NCB provisions?

CHALLENGES TO ASSET RECOVERY

- Political Will
- Weak domestic legal framework
- Cash based economy, unregistered properties
- Lack of technical competence, (proving the criminal case vs following the money trail)
- Lack of adequate domestic resources
- International Cooperation
- Difference in Legal systems
- Complex and lengthy procedures
- Problems of internal coordination and cooperation and lack of clear structure of communication
- Asset Management

CONCLUSION

- Asset Recovery is an effective tool of combating corruption and other organized crime.
- Asset Investigation has to be done along with criminal investigation

ANY QUESTIONS ?

