Principle 4 Have effective powers to freeze, seize and confiscate assets

Jurisdictions should have the ability to freeze / seize assets in the course of a tax crime investigation, and the ability to confiscate assets.

Introduction

68. Freezing or seizing of assets involves "temporarily prohibiting the transfer, conversion, disposition or movement of assets or temporarily assuming custody or control of assets on the basis of an order issued by a court or other competent authority" (UNODC, 2004[1]). Freezing is an action that temporarily suspends rights over the asset and for example, may apply to bank accounts which are fungible. Seizure is an action to temporarily restrain an asset or put it into the custody of the governmentand may apply to physical assets such as a vehicle. Generally, these measures are used to temporarily prevent the movement of assets pending the outcome of a case.

69. Confiscation of assets, on the other hand, can be defined as "the permanent deprivation of assets by order of a court or other competent authority" (UNODC, 2004[1]). Confiscation (which may be referred to as asset forfeiture) is generally used after the final outcome of a case, as it is a final measure that stops criminals from accessing assets obtained from a crime. Freezing, seizing and confiscation powers must be exercised in accordance with national law, including requirements as to proportionality.

70. In order to be able to successfully conduct criminal investigations and to ensure that the assets that gave rise to, or are the product of tax crime are adequately secured throughout the investigations, it is important that the investigation agencies can freeze or seize such assets for the duration of the investigation and the criminal procedure. As noted above, in the investigation of tax offences, being able to interrupt the movement of financial assets can be essential in identifying or preventing an offence. In addition, agencies should have the authority to confiscate assets that gave rise to, or are the product of

tax crimes. This is particularly relevant in fighting tax crimes, as financial assets are easily removed from one jurisdiction to another and can lead to financial losses for governments.

71. The freezing, seizing and confiscation of assets are necessary in order to prevent the proceeds of a crime from being disposed of or being enjoyed by a suspect, or to preserve physical evidence of a crime. In some jurisdictions, the confiscation or forfeiture of an asset may be a sanction on its own, or a means to ensure pecuniary fines are paid. Freezing, seizing and confiscation disrupts criminal activity by inhibiting access to assets that would have been beneficial to the individual or organisation committing the crime or can prevent the criminal assets from being employed to commit further crimes. The freezing, seizing and confiscating of criminal assets is also a deterrent measure as it can reduce the profitability of committing tax crimes.

72. The availability of relevant freezing, seizing and confiscation powers amongst survey respondents is set out in the country chapters and below. Throughout this section of the guide, it is noted that the precise circumstances and legal procedures that need to be followed in order to use freezing, seizing or confiscations measures vary. The representation of jurisdictions as having a particular mechanism "available" is not intended to reflect that the mechanism can be used in all investigations of a tax offence, but that the mechanism is available at least in some cases for tax offences and provided that the necessary legal and procedural authorisations have been obtained.

73. Jurisdictions should ensure that the freezing, seizing and confiscating of assets is possible for both domestic and foreign tax investigations and judgments. The legal power to do so should be in domestic law, or for international cases may be undertaken in response to a request for mutual legal assistance in accordance with international agreements such as a mutual legal assisstance treaty(MLAT). (See Principle 9 for more details). Survey respondents have the legal ability to apply seizing and confiscation powers in respect of foreign tax investigations and foreign court judgments (e.g., following an MLAT request) as follows:

Table 4.1. Survey responses: Availability of seizing and confiscation powers in respect of foreign tax matters

Available			Not available
Argentina	France	The Netherlands[1]	Honduras
Australia	Georgia	New Zealand	
Austria	Germany	Norway	
Azerbaijan	Greece	South Africa	
Brazil	Hungary	Spain	
Canada	Israel	Sweden	
Colombia	Italy	Switzerland	
Chile	Japan	United Kingdom	
Costa Rica	Korea	United States	
Czech Republic	Mexico		

1. In the Netherlands, courts are able to execute foreign states' confiscation orders that forfeit the property to the relevant foreign state, based on reciprocity, and have done so in practice. However, courts cannot enforce a foreign state freezing or seizure order in criminal tax matters.

74. The available mechanisms for the freezing, seizing and confiscating of assets will vary between jurisdictions, but the mechanisms described below may be relevant to consider. Whether all of these mechanisms are available in a particular jurisdiction or in a particular agency will depend on the organisational structure for investigating tax offences and taking enforcement actions, as well as the particular legal system which may not permit certain measures which involve the deprivation of assets.

Rapid freezing of assets

75. Speed can be essential when it comes to freezing and seizing assets, as criminals can quickly transfer funds out of the agencies' reach or dispose of property if they become aware that the criminal investigation agencies are investigating them. The legal authority and operational capacity to freeze assets rapidly in urgent cases is relevant, for example, where the loss of property is imminent. Agencies should generally be able to execute rapid freezing orders within 24 and 48 hours. This power is available in respect of tax crimes in survey respondents as follows:

Table 4.2. Survey responses: Availability of powers for rapid freezing orders

Available		Not available	Indirect powers via another agency
Argentina	Japan	Azerbaijan	Brazil
Australia	Hungary	Canada	Italy
Austria	Mexico	Chile	Korea
Colombia[1]	The Netherlands	Greece	Chile
Costa Rica	South Africa	Honduras	
Czech Republic	Spain	Israel	
Finland	Sweden	New Zealand	
France	Switzerland	Norway	
Georgia	United Kingdom		
Germany	United States		
Greece[2]			

1. Limited to protecting potential compensation damages (art. 92 of the Criminal Procedure Code).
2. FIU.

Extended confiscation

76. This is an action that involves not only confiscating property associated with a specific crime, but also additional property which the court determines constitutes the proceeds of other crimes. This might be useful to effectively tackle organised criminal activities to not only confiscate property associated with a specific crime, but also additional property which the court determines to be the proceeds of other crimes. This power is available in respect of tax crimes in survey respondents as follows:

Table 4.3. Survey responses: Availability of powers for extended confiscation

Available		Not available	Indirect powers via another agency
Argentina	Italy	Azerbaijan	Colombia
Australia	Mexico	Chile	New Zealand
Austria	South Africa	Costa Rica	Japan[2]
Brazil[1]	Spain	Ireland	Korea
Canada	Sweden	Georgia	
Czech Republic	Switzerland	Greece	
France	The Netherlands		
Germany	Norway		
Honduras	United Kingdom		
Hungary	United States		
Israel			

1. Only to crimes with maximum sanction over six years of imprisonment. Thereby, it is not applied to tax crimes.
2. While Japan notes that it does not have powers to confiscate assets based on convictions for tax crimes, it may do so on money laundering convictions where tax crime was a predicate offence.

Value-based confiscations

77. This is a method of confiscation that enables a court to impose a pecuniary liability equivalent to the amount of the criminal proceeds. This applies once the court determines the amount of the benefit accruing directly or indirectly to an individual from criminal conduct, and the order is realisable against any asset of the individual. This power is available in respect of tax crimes in survey respondents as follows:

Table 4.4. Survey responses: Availability of powers for value-based confiscations

Available			Not available	Indirect powers via another agency
Australia	Hungary	Sweden	Argentina	Italy
Austria	Israel	Switzerland	Chile	Korea
Azerbaijan	Japan	The Netherlands	Colombia	
Brazil	Mexico	United Kingdom	Greece	
Canada	Norway	United States	Honduras	
Czech Republic	Germany		New Zealand	
France	South Africa		Switzerland	
Georgia	Spain			

Third party confiscations

78. This is a measure made to deprive someone other than the offender – the third party – of criminal property. This applies where that third party is in possession of assets which are knowingly transferred to him/her by the offender to frustrate confiscation. Third party confiscation can alleviate the risk that an agency could be frustrated by the suspect transferring criminal property to a third party to avoid confiscation. This power is available in respect of tax crimes in survey respondents as follows:

Table 4.5. Survey responses: Availability of powers for third party confiscations

Available		Not available		Indirect powers via another agency
Argentina	Hungary	Azerbaijan	Sweden	Brazil
Australia	Israel	Canada	United Kingdom	Italy
Austria	Japan	Chile		New Zealand
Costa Rica	Mexico	Colombia		Korea
Czech Republic	The Netherlands	Greece		
France	Spain	Norway		
Germany	Switzerland			
Georgia	United States			

Non-conviction based confiscation

79. Non-conviction based confiscation is the power to seize assets without a criminal trial and conviction and is an enforcement action taken against the asset itself and not the individual. It is a separate action from any criminal proceeding and requires proof that the property is the proceeds or an instrumentality of crime. In some jurisdictions, the criminal conduct must be established using a standard of proof of the balance of probabilities, which reduces the burden for the agency and means that it may be possible to obtain the assets even where there is insufficient evidence to support a criminal conviction. This power is available in respect of tax crimes in survey respondents as follows:

Table 4.6. Survey responses: Availability of powers for non-conviction based confiscation

Available		Not available		Indirect powers via another agency
Australia Austria Czech Republic Costa Rica[1] Germany Israel	Mexico Norway Spain[2] United Kingdom United States	Argentina Azerbaijan Brazil Canada Chile Colombia France[3] Georgia Greece Honduras Hungary	South Africa Spain Sweden The Netherlands Switzerland	Italy New Zealand Korea

1. Costa Rica only allows non-conviction based confiscations if the case is being treated as one of organised crime.
2. Non-conviction based confiscation can be applied as an exception, under the authorisation of the courts, only where the confiscated asset is perishable, was abandoned by the owner, its conservation costs are greater than the asset itself, its conservation is dangerous for public health or safety, and if it depreciates over time.
3. There is no confiscation procedure in the absence of a criminal conviction (so-called civil confiscation) in French law. However, the non-return of seized property resulting directly or indirectly from the offense can be permitted in certain circumstances.

80. In order to effectively recover criminal assets, jurisdictions should consider the following:

- Having the necessary governance framework to ensure criminal law enforcement agencies operate transparently and are adequately supervised in connection with the handling of assets to ensure integrity;
- Having the necessary investigative, legal and operational expertise;
- Putting in place a clear organisational structure to manage asset cases. Given that these cases can require specialised investigative and legal expertise which may be located across different agencies, it can be efficient to put in place a specialised multi-agency unit with trained practitioners and adequate resources focussing on asset recovery;
- Ensuring that the rights of suspects are protected during an asset recovery process;
- Having a process to safely manage the assets; and
- Efficiently using international co-operation, given that asset recovery cases can be complex and involve criminal assets located in foreign jurisdictions.

References

UNODC (2004), *United Nations Convention Against Transnational Organized Crime and The Protocols Thereto*, United Nations, New York, http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. [1]

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