

The Doctrine of “Unexplained Wealth” and the Confiscation of Criminal Proceeds

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INTRODUCTION

Our topic concerns the process of identifying and locating the proceeds of crime

- To state the obvious, if someone is convicted of a serious offense that generated a lot of illegal income
- Say, public corruption or drug trafficking or fraud
- and he or she is convicted of that offense, we want to recover the proceeds
- that’s part of the punishment for committing the offense
- and if there is a victim, we want to return the property to the victim.

There are also cases, where we may want to recover the proceeds of a criminal offense even if we cannot obtain a conviction

- where, for example, the offender is deceased or is a fugitive or committed the crime in one country and invested the proceeds in another

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- in those cases, where national legislation permits, we can recover the property through non-conviction-based (NCB) or civil forfeiture

Either way, the Government must do three things:

1. prove the crime
2. locate the defendant's assets
3. tie the assets to the crime

It has been suggested that there is a shortcut to this problem:

- A number of countries now have legislation that permits the confiscation of assets based on the concept of unexplained wealth.
- The idea is that if a person with only a modest income from legitimate sources and no apparent access to inherited wealth from family has a lot of assets or lives an extravagant lifestyle, he must have gained that property by doing something illegal
- We see this most often in public corruption cases
- If a public official with a modest salary has a huge bank account, or is investing in luxury property, the assumption is that he is corrupt and that the assets were stolen from public funds

Under the concept of unexplained wealth, in its purest form, the burden is on the public official in that situation to prove that the money came from a legitimate source,

- and if he cannot prove it – if he cannot explain the source of his wealth -- the money is confiscated, even if the Government cannot prove that he committed a criminal offense or that his money was derived from an offense that he may have committed.

I am often asked if the United States has such a provision in its laws, or if I would support its enactment at home or elsewhere.

It may surprise those who know me as a strong supporter of recovering the proceeds of crime by all legal means to hear that I have my doubts about this.

- As I will explain, I think that a person's inability to explain his wealth is an appropriate factor to be considered, along with other evidence, in determining whether he has committed a crime, and whether his property should be confiscated
- But the question is, how much of a factor should it be, and what other evidence should be required before it applies

I don't think unexplained wealth, standing alone, provides a viable path to recovering criminal proceeds and returning them to victims

- and even if I thought it was, I don't think that there is any way such a concept would find political acceptance in the United States
- but I do think that, in combination with other evidence, the existence of unexplained wealth can be used to prove that a criminal offense occurred and that the defendant's assets are the proceeds of that crime.
- Let me explain

THE PROBLEM

The essential problem with this concept in my view is that it conjures up the image of the State going up to each apparently wealthy individual

- whether or not he is suspected of committing a crime
- and saying, "explain where this money came from"

As the title of this year's Symposium suggests, I suspect that to most people in my country, the appropriate response would be, "none of your business!"

I understand that some of the unexplained wealth statutes limit their application to Politically Exposed Persons (PEPs), or require a preliminary showing of corruption before the burden shifts to the person to explain his wealth

- but even so, such legislation runs counter to the view that people are entitled to obtain money or property by any legal means and as long as

they pay their taxes, it is none of the Government's business how they earned it

— unless the Government first establishes that they committed a crime

Now, the caveat I mentioned – as long as they pay their taxes – does give the Government a way of looking into an otherwise law-abiding citizen's source of income

— tax evasion is a crime

— a person who acquires significant assets presumably has a source of income

— and if he is not paying taxes on that income, he could well be guilty of tax evasion

This summer, we were witness to a celebrated trial in the United States in which a wealthy and politically-connected individual, Paul Manafort

— the President's former campaign manager

— was on trial for tax evasion in connection with his receipt of millions of dollars in foreign income (largely from political clients in Ukraine)

— and not paying taxes on it.

The evidence for this was, in large part, his conspicuously lavish lifestyle

— spending hundreds of thousands of dollars on men's clothing, for example, including \$15,000 for an ostrich leather jacket

The Government's theory was that if he could spend that much on luxury items, he must have had a substantial income –

— and because the income did not appear on his tax returns he must be guilty of tax evasion

But at no time did the Government allege or have to prove that the defendant's income was derived from an illegal source

- nor did the defendant have to explain the source
- whatever the source, once the Government established that he had undeclared income, the only issue was his violation of the tax laws

LACK OF LEGITIMATE INCOME AS EVIDENCE OF CRIME

Tax evasion aside, we generally take the view that acquiring wealth is an inalienable right, up there with "life, liberty and the pursuit of happiness"

- and it's none of the government's business how it was accomplished
- if the Government wants an explanation for someone's wealth, it has to first present some evidence that he committed a crime.

But here's the point:

- while simple possession of unexplained wealth is not – and should not be, in my view – enough to justify a confiscation order
- or even to shift the burden to the individual to prove that his assets have a legitimate source
- I do believe that a person's lack of sufficient legitimate income to explain his wealth can, in combination with other evidence, establish that a person has engaged in criminal activity
- And that the assets in question were derived from that activity

What would be an example of an appropriate case?

The issue comes up most often in drug cases, and in particular where a person is found with a large sum of currency

- For example, an extremely common case for us in the US is one where a police officer makes a traffic stop and finds tens of thousands of dollars in cash in the vehicle.

- In the typical case, a drug dog alerts to the money, the money is found wrapped in bundles with rubber bands, often inside vacuum-sealed bags
- And the traveler tells a story that is demonstrably false or highly implausible
- He was on his way to California to invest in property but can't name any property agents and does not know the location of the property that he was planning to see
- Or he was going to use the money to open a restaurant but cannot name any person in the restaurant business he was going to meet.

All of that is helpful to establishing that the person is either a drug trafficker or a courier for a drug organization and that the money is drug proceeds

- But there is one missing piece to the puzzle, and this is where the concept of unexplained wealth comes into play

Anticipating that the property owner will claim that he derived the money from a legitimate source,

- and knowing that the Government bears the burden of proof on the connection between the money and a crime,
- a seasoned investigator will not attempt to rely solely on the circumstantial evidence to tie the currency to a crime, but will ask, where did you get the money?
- and will then seek to corroborate or refute whatever answer is given by looking at the person's sources of income

He will look at his tax returns

- He will look at his bank records
- He will look at his claim to have recently sold a ranch in Mexico, or a house in Afghanistan, or to have cashed a large insurance check

- And if he finds that the person lacked sufficient legitimate income from all sources to explain his possession of the seized currency, *that*
- in combination with the other circumstantial evidence
- will usually be considered sufficient to establish that the money came from a criminal source, and accordingly that it is subject to confiscation

The cases on this point in the United States are legion:

- here are some examples from civil or NCB cases where the lack of legitimate income was a major factor establishing the forfeitability of the property:
 - *United States v. \$174,206.00 in U.S. Currency*, 320 F.3d 658, 662 (6th Cir. 2003) (affirming summary judgment for the Government based on claimants' lack of legitimate income and absence of any rebuttal showing a legitimate source);
 - *United States v. \$30,670 in U.S. Funds*, 403 F.3d 448, 465-66 (7th Cir. 2005) (district court is entitled to rely on claimant's bankruptcy filing and tax returns in determining that claimant lacked sufficient legitimate income to account for possession of large quantity of currency);
 - *United States v. \$11,640.00 in U.S. Currency*, 2014 WL 4217389, *8-9 (N.D.N.Y. Aug. 25, 2014) (collecting cases holding that a great disparity between claimant's legitimate income and amount of cash seized is sufficient to prove connection to illegal activity by a preponderance of the evidence; granting summary judgment based on income reported in claimant's tax returns compared with currency seized);
- And here are some from criminal forfeiture cases
- That is, cases in which the crime was already established but the lack of legitimate income was used to prove the connection between the property and the crime.
 - *United States v. McKinnon*, 2005 WL 2035227, *15 (M.D. Pa. 2005) (drug dealer's lavish lifestyle, lack of legitimate income, and efforts to conceal his money from law enforcement amply supported jury's verdict that \$17,500 in cash was drug proceeds);
 - *United States v. Hernandez*, 417 Fed. Appx. 416, 417-18 (5th Cir. 2011) (lack of legitimate income, combined with evidence that defendant used 13 cashier's checks

in amounts of \$10,000 or less to pay for a house, was sufficient to establish the forfeitability of the property by a preponderance of the evidence);

- *United States v. Adams*, 2009 WL 1766794, *4 (W.D. Va. June 24, 2009) (drug dealer's lack of legitimate income and the timing of his acquisition of real property was sufficient to establish that the property was acquired with drug proceeds);

CONCLUSION

So, here is my point:

- That someone has a great deal of unexplained wealth is not by itself -- regardless of the person's profession or station in life -- a sufficient reason for the Government to force him to come forward with evidence of the source of his money
- Or to confiscate his money if he fails to do so

But if there is other evidence of the person's involvement in criminal activity

- his lack of sufficient legitimate income to explain his possession of substantial assets may be probative evidence of his wrongdoing,
- as well as strong evidence that the assets themselves are derived from that offense.

I have given examples of what the additional evidence might be in a drug case

- In a public corruption case it might be witness testimony regarding bribes or kickbacks
- Or evidence that public funds went missing during the defendant's tenure in an office responsible for maintaining the integrity of such funds

But in all cases, the defendant's lack of sufficient legitimate income to explain his wealth may be the critical piece of evidence that the Government needs to prove that a crime occurred and that the defendant's assets are traceable to that crime.