

FINANCIAL INVESTIGATION AND MEASURES FOR CONFISCATION AND ASSET RECOVERY IN THAILAND

*Athitiya Dairerkngam**

I. INTRODUCTION

Corruption and money-laundering are interrelated since corruption causes massive financial gain that is necessary to be laundered to make such financial gain appear legitimate. For this reason, the existence of corruption will lead to money-laundering activities. In order to counter corruption and money-laundering, it is essential to provide the process of financial investigation, identification, tracing, freezing and confiscation of such illegal benefits effectively. In Thailand, the Anti-Money-Laundering Office (AMLO) and the Office of the National Anti-Corruption Commission (NACC) are the two significant organizations which deal with corruption and anti-money-laundering cases. However, this paper shall focus on merely the National Anti-Corruption Commission's roles and authorities in preventing and combating corruption. Also, it shall demonstrate the National Anti-Corruption Commission's legal framework and measures in financial investigation and confiscation of illicit assets and illustrate a corruption case to show the collaboration between the NACC, the Attorney-General and the U.S. government.

II. DUTIES AND POWERS OF THE NATIONAL ANTI-CORRUPTION COMMISSION IN CONDUCTING FINANCIAL INVESTIGATION, FREEZING, CONFISCATION AND ASSET RECOVERY

Under the Organic Act on Anti-Corruption B.E. 2561 (2018), the NACC has the duties and power to conduct an inquiry and prepare an opinion when there is an allegation that a person holding a political position, a judge of the Constitutional Court or a person holding a position in an independent agency is involved in circumstances of unusual wealth, corruption or deliberate performance of duties or exercise of powers contrary to the provisions of the Constitution or laws, or a severe violation of or failure to comply with ethical standards. Moreover, it has the power to conduct an inquiry and decide whether a public official is unusually wealthy, has committed an offence of corruption, or malfeasance in public office or malfeasance in judicial office. Additionally, it has the power to obligate persons holding political positions, judges of the Constitutional Court, persons holding positions in independent agencies and state officials to submit accounts showing particulars of their assets and liabilities and those of their, spouses and children who have not yet become *sui juris*, and to inspect and disclose the results of the inspection of such accounts.¹

* Asset Inspection Officer, Office of the National Anti-Corruption Commission, Thailand.

¹ The Organic Act on Anti-Corruption B.E.2561, section 28.

III. THE PROCEEDINGS OF FINANCIAL INVESTIGATION, FREEZING, CONFISCATION AND ASSET RECOVERY IN A CORRUPTION CASE UNDER THE ORGANIC ACT OF ANTI-CORRUPTION B.E. 2561

The NACC has the power and authority to conduct a financial investigation when it appears to the NACC, regardless of whether there is an allegation or the NACC has reasonable grounds to suspect, that any public official is unusually wealthy.² Under the Organic Act of Anti-Corruption B.E. 2561, the property of the alleged culprit shall include the property that is under the ownership of another person and there are circumstances indicating that the property or its ownership is held by a nominee. In such a case, the person holding title to the property has the right to prove that the property is not unusual wealth.

In order to conduct a financial investigation in a corruption case, the NACC sets the proceedings of financial investigation, confiscation and asset recovery by implementing the United Nations Convention against Corruption (UNCAC) through the Organic Act on Anti-Corruption B.E. 2561. Accordingly the NACC shall conduct the following.

A. Tracing and Identifying Financial Assets

In order to identify and trace the movement of money during the course of criminal activity, investigators need to find the link between the origins of the money, the beneficiaries, when and where the money was received, transferred and deposited, and where it is stored, since such movement of money can provide information about and proof of criminal activity.³

For identifying a financial transaction, the NACC shall have the power to inspect the sources of the assets and liabilities, financial movement or transactions of such person and perform any other acts to obtain relevant facts. If the alleged culprit has submitted the account of assets and liabilities, the NACC shall compare the account of assets and liabilities with the existing assets at the time of inquiry, including the income and expenses and also the income tax of such person. For this purpose, the NACC shall have the power to order the alleged culprit to submit the account of assets and liabilities according to the list and time period as prescribed by the NACC regardless of whether such person has previously submitted the account of assets and liabilities.⁴ Thus, the NACC has the power to request relevant documents from all institutions directly. Evidence of corruption may be found through the account of assets and liabilities of public officials that is submitted to the NACC.

B. Financial Evidence Analysis

The NACC uses *the specific method*; this method is used when there is evidence that can directly trace the flow of money from the corruption activity to the official together with *the source and application of funds method*; the method that the investigator will have to determine whether

² The definition of unusual wealth under the Organic Act on Anti-Corruption B.E.2561 is having an unusually large amount of assets, or having an unusual increase in assets, or having an unusual decrease in liabilities, or acquiring assets without legitimate grounds in consequence of the performance of duty or the exercise of power in office or in the course of duty, including the case of having an unusual increase in assets upon comparison of the accounts showing particulars of assets and liabilities.

³ APEC Anticorruption and Transparency Working Group, 'Best Practices In Investigating And Prosecuting Corruption Using Financial Flow Tracking Techniques And Financial: A Handbook' (2015) 91.

⁴ The Organic Act on Anti-Corruption B.E.2561, section 116.

public officials are living significantly above their legitimate means.⁵ Typically, the investigator needs to prove that the alleged culprits have underreported income by making a comparison of total assets owned by the alleged culprits relative to their tax returns. Consequently, if the alleged culprits have assets more than their taxable income and the legitimate source of funds for those assets cannot be explained, the NACC shall consider that circumstances are indicative of unusual wealth and shall conduct an inquiry for a subsequent request for assets to be confiscated.⁶

C. Asset Freezing

The objective of this method is the preservation of the assets that may later be subject to confiscation and to prevent their removal. The applicable standard to determine the assets subject to these measures is the reasonable suspicion or belief that the assets are the proceeds or an instrumentality of a crime.

Under the Organic Act on Anti-Corruption B.E. 2561, if it appears from the inquiry that the facts convincingly indicate the possibility of the transfer, move, transformation or concealment of the property that the alleged culprit has used in the commission of an offence or is unlawfully acquired in connection with the commission of the offence that is under the duties and powers of the NACC or the property vis-à-vis unusual wealth, the NACC shall issue a freeze order or a temporary seizure in two cases: one is in cases where the commission of the offence has a criminal penalty and another is in cases of property vis-à-vis unusual wealth. However, in cases of unusual wealth, the NACC shall have the power to issue a temporary seizure or freeze order which must be within one year from the date of the seizure or freeze or until the Court passes a final judgment dismissing the case.⁷ Nevertheless, if the owner or a person who possesses such property is able to prove that the property is not unusual wealth, the NACC shall issue an order of release of seizure or freeze without delay.⁸ Additionally, the NACC also sets the regulations in order to manage the assets that are frozen or are temporarily seized to preserve their safety and value until they are eventually confiscated or released.⁹ Such regulations are mainly the proceeds of administration of the seized assets, the asset manager, expenses, use and sale of restrained assets.

D. Confiscation Proceedings

The NACC uses both a property-based confiscation system¹⁰ and a value-based confiscation system¹¹ as stated in section 83 of the Organic Act on Anti-Corruption B.E. 2561, permitting the NACC or the Attorney General, as the case may be, to file a motion with the Supreme Court's Criminal Division for Persons Holding the Political Positions for the confiscation of the following properties:

- (1) property which any person used or had in his or her possession for use in the commission of the offence,

⁵ Ibid. n. 4, 111.

⁶ The Organic Act on Anti-Corruption B.E.2561, section 113.

⁷ The Organic Act on Anti-Corruption B.E.2561, section 69.

⁸ Ibid. n. 6.

⁹ The Organic Act on Anti-Corruption B.E.2561, section 85.

¹⁰ This system allows the confiscation of assets found to be the proceeds or instrumentalities of crime. See n. 4, 152.

¹¹ This system allows the determination of the value of the benefits derived from crime and the confiscation of an equivalent value of assets that may be untainted. See. n. 4, 152-153.

- (2) property or interest that can be calculated into monetary value, which has been given, requested to give or pledged to give to the alleged culprit by any person in an unlawful manner,
- (3) property or interest that can be calculated into a monetary value which a person has obtained from the commission of or from his involvement as an instigator, an aider and abettor, or a publisher or announcer in order for another person to commit the offence,
- (4) property or interest that can be calculated into a monetary value which a person has obtained from the disposal, distribution or transfer in any manner of the property or interest under (1) or (3),
- (5) fruits or any other interest occurring from the property or interest under (1), (3) or (5).¹²

Under the Organic Act on Anti-Corruption B.E. 2561, the assets which are confiscated shall become properties of the state as from the date of the court ruling. However, in case there is a request for assistance from a foreign country under the law on mutual legal assistance in criminal matters to proceed against a foreign public official, an official of a public international organization or any other person on the grounds that an offence was committed under section 140 of the Organic Act on Anti-Corruption, the management of the confiscated assets shall be in accordance with the agreement made with the requesting country.¹³

IV. CORRUPTION CASES

Ms. J, the former governor of the Tourism Authority of Thailand (TAT), was charged with demanding a bribe from Mr. G and his wife, an American couple, in exchange for their being awarded an over 13 million U.S. dollar contract to organize the annual Bangkok International Film Festival. Ms. J's daughter helped her mother commit the offences by opening accounts in numerous foreign banks, and the American couple concealed the bribes in the shell companies, some with fake addresses and phone numbers, and paid the money, 1.8 million U.S. dollars, into bank accounts in many different jurisdictions in the name of Ms. J's daughter and a friend of the governor.

This case was initiated by the Federal Bureau of Investigation (FBI), and the United States Attorney for the Central District of California conducted the investigation regarding the bribes made to influence the awarding of contracts to manage the Bangkok International Film Festival. Tracing the transactions between the American couple and Ms. J, including her nominees, found that some bribes were given in cash and some by transferring to the accounts of Ms. J's daughter and friend.

Additionally, the evidence presented and witness hearings established that Mr. G and his wife were granted the sole rights to run the event despite lacking the necessary expertise, experience or any related proven work record. Besides, there was no other organizer attending the competition

¹² The Organic Act on Anti-Corruption B.E.2561, section 83.

¹³ The Organic Act on Anti-Corruption B.E.2561, section 140.

for the contract, which the court decided was an attempt to inhibit other potential competitors from taking part. As a result, the film festival rights were secured by three companies, all of which were created by the couple to receive the contract from the TAT on Ms. J's advice.

In 2010, the U.S. Court sentenced the American couple to six months in jail and six months of home detention for their part in paying bribes to secure the rights to run the festival. The couple was found guilty of money-laundering and violating the Foreign Corrupt Practices Act.

On the part of the Thai proceedings, the NACC gathered the evidence from Thailand and other countries in order to convict Ms. J. The NACC determined that Ms. J was engaged in corruption in the course of duty, constituting a criminal offence under the Act Concerning Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999) and the Act on the Offence of the Officials in Public Organization, B.E. 2502 (1959). Her daughter was found guilty of conspiracy to commit corruption. Consequently, the NACC furnished the report and inquiry file, including all related evidence to the Attorney-General to file a case against Ms. J in Court. In addition, regarding the unusual wealth offence, the NACC also passed a resolution declaring that Ms. J is unusually wealthy. Now the legal proceedings for the unusual wealth offence are in recess in order to wait for judgment in the criminal case.

In 2017, the Central Criminal Court for Corruption and Misconduct Cases rendered the verdict that Ms. J was guilty of receiving bribes from the American business couple. Ms. J was sentenced on 11 counts of corruption and imprisoned for 50 years, while her daughter was imprisoned for 44 years. In addition, the Court also ruled to confiscate all the money plus interest for 1.8 million U.S. dollars from the overseas bank accounts of the defendants to become property of the state. The case is now pending in the Supreme Court.

V. CONCLUSION

Thailand has been aware that corruption is one of the most severe threats undermining the country in every aspect. Consequently, the NACC, as the organization which has the duties and powers in dealing with the corruption cases of high-ranking officials, has been trying to find the best practices in countering corruption, especially enhancement of the effectiveness of the proceeds of freezing, confiscation and asset recovery. Enforcement of confiscation orders in other jurisdictions is seen as one of the crucial challenges in asset recovery procedure in Thailand. Since the confiscated property will frequently be located in a foreign jurisdiction, it will be essential to restrain it as soon as possible in order to avoid dissipation. For this reason, quick and effective freezing and confiscation measures should be applied. Therefore, Thailand should enhance cooperation with other countries by seeking and providing mutual legal assistance agreements in order to allow direct enforcement of a foreign confiscation order because indirect enforcement can cause dissipation of the asset quickly, making future confiscation difficult, which could lead to inefficiency in preventing and countering corruption.