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Seizure of property: development of legislation and improvement of law enforcement practice

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Abstract

Questionable questions are studied on the annulment of the measure of procedural coercion applied in the form of seizure of property in the event of termination of a criminal proceeding (criminal prosecution) with voluntary compensation for damages caused by a crime. The authors propose to specify the cases in which it is possible to cancel the seizure of property, that is, in case of expiration of the period of detention imposed on the property established by the court, or refusal of extension, as well as in cases of termination of the criminal case (criminal proceedings) and the refusal of the plaintiff of the declared civil claim. Attention is also given to the issues of seizure of property to compensate for moral damage caused by a crime. Based on the results of the consideration of this issue, it is concluded that the use of a measure of procedural coercion in the form of a seizure of property is possible not only for the purpose of compensating for property damage but also to create legal guarantees. Guarantee compensation for moral damage caused by a crime, as specific additions to the current criminal procedure law in Russia are justified.

Keywords: criminal proceedings; material evidence; confiscation of property; procedural guarantees; measures of procedural coercion.

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Incautación de bienes: desarrollo de legislación y mejora de la práctica de aplicación de la ley

Resumen

Se estudian cuestiones discutibles sobre la anulación de la medida de coacción procesal aplicada en forma de embargo de bienes en los supuestos de terminación de un proceso penal (persecución penal) con indemnización voluntaria por los daños ocasionados por un delito. Los autores proponen especificar los casos en los que es posible cancelar la incautación de bienes, es decir, en caso de expiración del plazo de detención impuesto sobre los bienes establecido por el tribunal, o denegación de prórroga, así como en los casos de terminación de la causa penal (proceso penal) y la negativa del demandante de la demanda civil declarada. También se presta atención a las cuestiones de la incautación de bienes para compensar el daño moral causado por un delito. Con base en los resultados de la consideración de este tema, se llega a la conclusión de que el uso de una medida de coerción procesal en forma de embargo de propiedad es posible no solo con el propósito de indemnizar por daños a la propiedad sino también para crear garantías legales. Garantizar una indemnización por el daño moral causado por un delito, ya que se justifican adiciones específicas a la actual ley procesal penal en Rusia.

Palabras Clave: procedimientos criminales; evidencia material; confiscación de propiedad; garantías procesales; medidas de coacción procesal.

Introduction

Multifaceted and consistent activities aimed at ensuring compensation for the harm caused by the crime are carried out constantly and systematically at all stages of the preliminary investigation. Currently, the importance of the activities of the preliminary investigation bodies in this process is significantly increasing, since it is in pre-trial proceedings that there are significant opportunities to establish the actual amount of harm caused by a crime and the production of a complex, both organizational measures and procedural actions aimed at ensuring the claims of persons, victims of crimes and compensation for harm.

An effective procedural way of securing a civil claim in criminal proceedings is the use of such a preventive measure of procedural compulsion as the seizure of property.

Monitoring of problematic issues arising both in theory and in law enforcement practice has shown the timeliness and relevance of studying

the grounds for the application and cancellation of procedural coercion measures in the form of seizure of property.

The seizure of property is a measure of procedural compulsion applied, as follows from Art. 115 of the Criminal Procedure Code of the Russian Federation (hereinafter referred to as the Code of Criminal Procedure of the Russian Federation), for the following purposes:

1. ensuring the execution of the sentence in terms of a civil claim for compensation for property and compensation for moral damage caused by a crime.
2. ensuring the execution of the sentence in terms of the collection of a fine and other property penalties.
3. ensuring the execution of the sentence in terms of the possible confiscation of property obtained by criminal means, specified in paragraphs. “A”, “b” Part 1 of Art. 104.1 of the Criminal Code of the Russian Federation (in criminal cases on crimes under investigation by investigators of the internal affairs bodies, for example, provided for in paragraph “g” of part 2 of article 111 of the Criminal Code of the Russian Federation, articles 186, 241 of the Criminal Code of the Russian Federation).
4. ensuring the execution of the sentence in terms of the possible confiscation of tools, equipment or other means of committing a crime (clause “d”, part 1 of article 104.1 of the Criminal Code of the Russian Federation).

The basis for the application of this measure of procedural coercion is the availability of sufficient and reliable data that the suspect (accused) can hide or subject to alienation, destruction of property that could potentially become the subject of arrest.

Directly to ensure the satisfaction of the claims of the victim (civil plaintiff), the investigator, the inquirer may apply to the court with a petition to seize the property of the accused or persons who are legally liable for their actions, or other persons who have property acquired by criminal means ...

At the same time, imposing, in order to ensure the execution of a sentence in terms of a civil lawsuit, arrest of the property of a person who is legally financially liable to a civil plaintiff, involves the involvement of this person as a civil defendant in a criminal case in accordance with Art. 54 of the Criminal Procedure Code of the Russian Federation. It is not allowed to seize the property of such a person if, by virtue of an agreement or law, it should bear material responsibility for the failure of the suspect (accused) to fulfill his obligations arising from grounds other than causing harm.

Of practical importance is the sequence of seizure of property, provided for in Part 3 of Art. 69, art. 94 of the Federal Law "On Enforcement Proceedings":

Stage I - cash and other valuables in rubles, including those on accounts (except for loan, collateral, nominal, trading and clearing accounts), in deposits or in custody in banks and other credit institutions.

Stage II - funds in foreign currency, including those on accounts (except for ship, pledge, nominal, trading and clearing accounts), in deposits or in custody in banks and other credit institutions.

III stage - precious metals (gold, silver, platinum, palladium), including those in accounts, in deposits or in storage in banks and other credit institutions (can be in the form of ingots, commemorative and investment coins, as well as impersonal metal accounts);

IV - other movable property (things - objects of the material world);

V - real estate (for example, residential and non-residential premises, construction in progress, land plots, aircraft, and sea vessels, including small vessels, subject to state registration).

The above sequence of seizure of property is applied only when seizure is imposed to secure: a civil claim, as well as a court verdict in terms of collecting a fine and other property penalties.

Priority does not apply in the case of confiscation of property obtained because of the commission of a crime, as well as funds, equipment and instruments of the commission of a crime.

1. Materials and methods

The basis of the research methodology was the dialectical method. Thus, in the course of the conducted research, the validity of the cancellation of the applied measure of procedural coercion in the form of seizure of property in cases of termination of a criminal case (criminal prosecution) with voluntary compensation for damage caused by a crime was proved.

The method of analysis made it possible to study individual parts of the object of research, and in particular, to identify existing problems of applying and canceling the measure of procedural coercion in the form of seizure of property.

The method of the systematic approach allowed us to consider the procedural order when canceling the measure of procedural coercion in the form of seizure of property in cases of termination of a criminal case (criminal prosecution) with voluntary compensation for damage caused by

a crime. The comparative legal method allowed us to study the domestic and international legislation regulating the procedural order for revoking the measure of procedural coercion in the form of seizure of property, as well as to identify similarities and differences.

Via the use of methods of analysis and synthesis, the statistical indicators of the cancellation of the seizure of property in cases of termination of a criminal case (criminal prosecution) with voluntary compensation for damage caused by a crime are studied and analyzed.

Using the concrete sociological method of research, the real results of empirical research are obtained, their analysis, systematization, and generalization are carried out. The use of the formal legal method allowed us to characterize the existing situation associated with a number of problems that arise in the practical sphere of the activities of state bodies and officials, during the application and cancellation of the measure of procedural coercion in the form of seizure of property.

As a result of the application of this methodology, methods have been developed for the subsequent modernization of the application and cancellation of the measure of procedural coercion in the form of seizure of property.

2. Result analysis

The seizure of property is a measure of procedural coercion applied, as follows from Article 115 of the Criminal Procedure Code of the Russian Federation (hereinafter referred to as the Code of Criminal Procedure of the Russian Federation), for the following purposes:

1. ensuring the execution of a sentence in terms of a civil claim for compensation for property and compensation for moral damage caused by a crime.
2. ensuring the execution of the sentence in terms of collecting fines and other property penalties.
3. ensuring the execution of the sentence in terms of possible confiscation of property obtained by criminal means, specified in paragraphs "a", "b" of Part 1 of Article 104.1 of the Criminal Code of the Russian Federation (in criminal cases of crimes under investigation by investigators of internal affairs bodies, for example, provided for in paragraphs "d" of Part 2 of Article 111 of the Criminal Code of the Russian Federation, Articles 186, 241 of the Criminal Code of the Russian Federation);

4. ensuring the execution of the sentence in terms of possible confiscation of tools, equipment, or other means of committing a crime (item “d” of Part 1 of Article 104.1 of the Criminal Code of the Russian Federation).

At the same time, the following goals require special explanation: 1) the purpose of ensuring the execution of the sentence in terms of collecting other property penalties; 2) the purpose of securing the sentence in terms of possible confiscation of property (Ukhanova, 2017; Rekunkov and Orlova, 1981).

Other property penalties include:

- monetary penalty that may be imposed by the court on the guarantor in case of violation by the suspect (accused) of the preventive measure provided for in Article 103 of the Code of Criminal Procedure of the Russian Federation, as well as on the person who was placed under the supervision of a minor, in case of violation by the latter of the preventive measure provided for in Article 105 of the Code of Criminal Procedure of the Russian Federation.
- procedural costs (Part 2 of Article 131 of the Code of Criminal Procedure of the Russian Federation), according to Paragraph 13 of Part 1 of Article 299 of the Code of Criminal Procedure of the Russian Federation.

In regard to securing a sentence in terms of possible confiscation of property, it should be clarified that according to Article 104.3 of the Criminal Code of the Russian Federation, for compensation for damage caused by a crime, the court may levy a penalty on the property subject to confiscation according to Article 104.1 of the Criminal Code of the Russian Federation (obtained as a result of the commission of a crime, as well as tools, equipment or means of committing a crime).

In this regard, the arrest may be imposed on property obtained as a result of the commission of a crime, as well as on tools, equipment, and means of committing a crime, which are subject to confiscation, according to paragraph “a”, “b”, “d” of Part 1 of Article 104.1 of the Criminal Code of the Russian Federation. Subsequently (at the judicial stages), a civil claim can be satisfied at the expense of this property, so special attention should be paid to the seizure of property for the purpose of its confiscation.

Tools, equipment, or other means of committing a crime belonging to the suspect (accused) can also be arrested, especially since with their direct help, the person was able to achieve the set criminal goal and cause this or that type of harm.

It should also be clarified that in cases where the investigator has established property subject to confiscation, the seizure of property can

be carried out in cases that do not tolerate delay, in accordance with the procedure provided for in Part 5 of Article 165 of the Criminal Procedure Code of the Russian Federation (except for non-cash funds, securities and precious metals held in accounts or deposits with banks and other credit organizations, in respect of which the arrest is made only by a court decision, according to the Federal Law “On Banks and Banking Activities”) (Pushkarev *et al.*, 2020).

Of practical importance is the order of seizure of property, provided for in Part 3 of Article 69, Article 94 of the Federal Law “On Enforcement Proceedings”:

Stage I – cash and other valuables in rubles, including those held in accounts (except for loan, collateral, nominal, trading, and clearing accounts), in deposits or in custody with banks and other credit organizations.

Stage II – funds in foreign currency, including those held in accounts (except for court, collateral, nominal, trading, and clearing accounts), in deposits or in custody with banks and other credit organizations.

Stage III – precious metals (gold, silver, platinum, palladium), including those held in accounts, deposits or in storage in banks and other credit organizations (can be in the form of bullion, commemorative, and investment coins, as well as depersonalized metal accounts).

Stage IV – other movable property (things – objects of the material world).

Stage V – immovable property (for example, residential and non-residential premises, objects of unfinished construction, land plots, aircraft, and sea vessels, including small vessels subject to state registration).

The above-mentioned order of seizure of property is applied only in the case of seizure for the purpose of securing: a civil claim, as well as a court verdict regarding the recovery of fines and other property penalties.

Priority does not apply in the case of confiscation of property obtained as a result of the commission of a crime, as well as funds, equipment, and instruments of the commission of a crime.

It seems appropriate to further clarify that one of the objectives of this study is the need to study the issues of ensuring compensation for damage caused by a crime. At the same time, the procedural order for the cancellation of the seizure of property, due to the termination of a criminal case (criminal prosecution) with voluntary compensation to the suspects (accused) for the damage caused, is also of scientific interest.

It is proved that in the framework of pre-trial proceedings in criminal cases, the investigator, the inquirer must explain to the suspect (accused) the positive consequences associated with compensation for the harm caused to them or other compensation for it.

In cases where if the suspect (accused) voluntarily compensated or otherwise made amends for the harm caused by the crime, then their actions will be evaluated not only personally by the victim, but also within the framework of the current law, namely:

- firstly, the fact of compensation for damage creates grounds for exemption from criminal liability and termination of a criminal case (criminal prosecution) in accordance with Articles 75, 76, 761, 762 of the Criminal Code of the Russian Federation, Articles 25, 251, 28, 281 of the Criminal Code of the Russian Federation (Pushkarev *et al.*, 2021).
- secondly, the fact of compensation or other indemnification for the property damage caused is a circumstance that mitigates the punishment of the suspect (accused).

It should be noted that this type of activity of the investigator, the inquirer has a positive effect on the decision of the suspect (accused) on voluntary compensation for property damage, which is most often expressed in the form of restoration of damaged property, provision of new property to replace the destroyed (stolen), payment of compensation in monetary terms. At the same time, the desire or refusal of the suspect to compensate for the harm caused by him, the investigator, the inquirer must necessarily record in their testimony when drawing up the protocol of the interrogation.

The relevance of the issue under consideration is also confirmed by the experience of practical activity. So, in the Investigative Department at the Department of Internal Affairs of the Pskov region, in order to ensure compensation for property damage caused to the state, the property was seized – a car owned by A., accused of committing a crime under Part 1 of Article 198 of the Criminal Code of the Russian Federation. During the preliminary investigation, the accused partially compensated for the property damage caused by him to the State. By the time of the end of the preliminary investigation, the accused fully compensated for the damage caused, repented of what he had done, and in this regard, the arrest on the property was canceled by the court. The criminal prosecution against the accused was terminated by the investigator in accordance with Article 28 of the Criminal Procedure Code of the Russian Federation in connection with active repentance on the basis of Article 75 of the Criminal Code of the Russian Federation.

The experience of the post-Soviet countries allows us to conclude that the seizure of property is canceled in the event of a decision to terminate a criminal case (Article 254 of the Code of Criminal Procedure of the Republic of Azerbaijan and Article 295 of the Code of Criminal Procedure of the Republic of Uzbekistan). Moreover, such grounds for termination of a criminal case as a reconciliation of the parties in the case of voluntary compensation for harm are also present in the criminal procedure laws of these Republics (Article 39.1.9 of the Criminal Procedure Code of the Republic of Azerbaijan and Article 84 of the Criminal Procedure Code of the Republic of Uzbekistan).

The Russian legislator constructed the rule on the possibility of revoking the seizure of property more broadly, stating in Part 9 of Article 115 of the Criminal Procedure Code of the Russian Federation that the seizure of property is canceled in cases where there is no need to apply this measure of procedural coercion. This interpretation, in our opinion, does not detail specific cases when an investigator or inquirer may decide to cancel the seizure of property. In this connection, the first sentence of part nine of Article 115 of the Criminal Procedure Code of the Russian Federation, should be worded as follows: “The seizure of property is canceled on the basis of a decision, a determination of the person or body in which the criminal case is being conducted, when the application of this measure is no longer necessary, in the event of the expiration of the term of the arrest imposed on the property, or refusal to extend it, as well as in cases of termination of the criminal case and refusal of the plaintiff from the declared civil claim”.

Regarding the cancellation of the seizure of property in cases of refusal of the civil plaintiff from the claim, this clarification seems logical and justified, since the seizure of property is one of the ways to secure a civil claim. In this connection, the fact of refusal of the declared civil claim established during the preliminary investigation automatically eliminates the need for further action of the specified measure of procedural coercion.

Continuing to investigate further the issues of seizure of property, the authors note that another unresolved issue at present is the controversy over the possibility and necessity of applying this measure of procedural coercion in order to compensate for non-pecuniary damage.

In this connection, the historical retrospect presented by V. Sluchevsky (1913) shows that:

Any person whose interests and rights depend on the recognition of the fact of a crime committed, can be allowed to participate in the case as a civil plaintiff and that even moral damage can serve as the basis for this claim... (1913: 135).

Later, in the Soviet criminal process, during the period of the birth of the institution of seizure of property, the opinion also prevailed that its use is possible only to compensate for property damage. This is also evidenced by

some positions of process scientists of that era. In particular, as noted at the time, for the seizure of property, it is required that in a criminal case there is sufficient evidence that as a result of the crime, the victim was caused one or another type of harm (Bozhiev, 1989; Mariupolskiy, 1970).

Today, a similar position is defended by many authors (Belyatskin, 1996; Gritsenko, 2005; Krivoshchekov and Buldakova, 2014; Yutkina and Rostovshchikova, 2012). It seems appropriate to support the position of the authors who advocate the possibility of seizure of property in order to compensate for non-pecuniary damage. As an additional argument, we note that in order to compensate for non-pecuniary damage, as well as other types of it, a statement of a civil claim, its justification and subsequent consideration are required. All this requires the application of interim measures, one of which (almost the most important) is exactly what the seizure of property is.

From a literal understanding of the provisions of the current criminal procedure law, it follows that Part 1 of Article 44 of the Criminal Procedure Code of the Russian Federation allows the inclusion of compensation for non-pecuniary damage in claims since the seizure of property can also be carried out in order to ensure the execution of a sentence in this part. Since the amount of compensation is most often set arbitrarily by the civil plaintiff (for example, an evaluation criterion), when applying this coercive measure, one should focus on the number of penalties based on judicial practice in cases of a similar category.

Moreover, it should be especially noted that we are talking here about causing moral harm, meaning, of course, harm to business reputation, since the arguments about a unified approach to these concepts in the framework of criminal proceedings were formulated by us earlier (Ivanov and Krupenin, 2008; Ivanov, 2015).

Thus, the seizure of property should be imposed not only for the purpose of compensation for property damage but also to create legal guarantees to ensure compensation for non-pecuniary damage caused by a crime.

Conclusions

Knowledge of the procedural conditions of the procedure for seizing property, as well as the timely application of this measure of procedural coercion will create the necessary prerequisites for the real provision of compensation for property damage caused by a crime.

The seizure of property as a measure of procedural coercion is of a preventive and, at the same time, security nature, which consists in suppressing the intent of the suspect (accused) aimed at concealing, selling

or other legal alienation of property, funds, securities, and other valuables in order to avoid seizure the specified objects to ensure compensation for property damage caused by the crime.

In order to increase the efficiency of solving the problems of identifying property, which can be seized by the courts in order to secure a civil claim, other property penalties or possible confiscation in criminal cases, it seems expedient to further improve law enforcement practice and norms of criminal and criminal procedural legislation. In particular, taking into account the emerging investigative and judicial practice, it is possible to introduce into Part 3 of Art. 1041 of the Criminal Code of the Russian Federation, amendments that provide for the possibility of confiscation of property owned by the relatives of the accused (suspect) or other persons who have been seized by the court, if it is proved that it was acquired with funds, the appearance of which is due to criminal activity, regardless of whether they are aware whether they are about the presence of a causal relationship between the acquired property and the fact of the crime.

The actual basis for the seizure of property is a set of evidence indicating that a crime has inflicted certain harm or the possibility of applying property penalties. From the literal understanding of the provisions of the current criminal procedure law, it follows that Part 1 of Art. 44 of the Code of Criminal Procedure of the Russian Federation allows the inclusion of compensation for moral damage in claims, since the seizure of property can be carried out in order to ensure the execution of the sentence in this part. Since the amount of compensation is most often set by the civil plaintiff arbitrarily (for example, an assessment criterion), then when applying this coercive measure, one should focus on the number of penalties based on judicial practice in cases of a similar category.

The conclusion was argued and proved that the seizure of property can be imposed not only in order to compensate for property damage, but also to create legal guarantees for ensuring compensation for moral damage caused by a crime. Based on this, the authors propose to amend Art. 1601 of the Code of Criminal Procedure of the Russian Federation, stating it as follows: "Having established that the committed crime caused property and moral damage, the investigator, the interrogating officer are obliged to take measures to establish the property of the suspect, the accused or persons who, in accordance with the legislation of the Russian Federation, are responsible for the harm caused the suspect, the accused, the cost of which ensures compensation for the property and moral damage caused, and for the seizure of this property".

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