



# Confiscation of Illegal Income from the Perspective of Binary Attribute of Sanctions

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**Abstract:** At present, the reason for the dispute about the nature of confiscation of illegal income in academic circles lies in the differences on the sanction of administrative punishment. The current legislation, which defines confiscation of illegal gains as administrative punishment, ignores the duality of sanctions. Confiscation of illegal gains is not a sanction in both property interests and spiritual interests, and does not belong to the scope of administrative punishment. The confiscation of illegal income should be regarded as an auxiliary administrative act in the administrative penalty system from the perspective of protecting the legal rights and interests of administrative relative parties and controlling the arbitrary risks of administrative organs.

**Keywords:** Administrative Penalty; Illegal Gains; Sanctioning

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## 1. Introduction

On January 22, 2021, the 25th session of the Standing Committee of the 13th National People's Congress revised the Law on Administrative Penalties, defining the concept of "administrative penalties" and providing a basis for identifying administrative penalties. Although this practice is worthy of affirmation, it still cannot avoid all the disadvantages, and the definition alone is not enough to solve the identification and application of administrative punishment. As an important symbol of administrative punishment, sanction is very important in solving the problem of the nature of confiscation of illegal income.

## 2. The dual attribute of administrative punishment and sanction

### 2.1 Teleological analysis of administrative punishment

According to Hong Jiayin, a Scholar in Taiwan, administrative punishment can be divided into broad and narrow senses. In a broad sense, it refers to the state and public organizations, based on the achievement of administrative purposes, ask the people to bear various obligations under administrative law, if the people violate their obligations, and impose sanctions on them, this broad sense of administrative punishment is similar to the concept of administrative sanctions. In the narrow sense, administrative punishment takes order punishment as its main content, which is a sanction other than the punishment imposed by administrative organs for those who have violated the obligations of administrative law in the past in order to maintain administrative order.

It is generally believed that administrative punishment is an administrative act with the attribute of legal sanctions. However, is sanctions the purpose of administrative punishment? For example, referring to the penalty theory, the purpose and function of sanctions have the following three kinds: Equitable (equal) justice: retribution theory (karma rule, answer blows with blows), which belongs to the absolute penalty theory; Distributive justice: special preventive

function (reformed features), which belongs to the relative penalty theory; Legal justice: general preventive function (the example function).

When discussing the legitimacy of administrative punishment, Chen Qingxiu believes that "... The above three purposes should be taken into account, that is, while realizing equitable responsibility, the view of special prevention as well as general prevention of violations was also taken into account." This paper agrees with this view. On this premise, this paper can preliminarily determine the relationship between sanctions and administrative punishment by the following paragraph: sanctions are the purpose that administrative punishment attempts to achieve, and this purpose can be realized by means of implementing specific administrative punishment. In other words, the nature of sanctions has a dual nature. When it appears as a purpose, it can be used to help researchers distinguish administrative punishment from other specific administrative acts, but when it appears as an effect, it can't play a distinguishing role. As for other administrative acts that have an adverse impact on the administrative counterpart, there is only the element of "adverse consequences". Although they are highly similar to the sanctions effect brought by administrative punishment, these administrative acts should not be regarded as administrative punishment.

To distinguish the purpose and effect of administrative punishment is conducive to a more accurate and efficient analysis of the elements and structures of relevant administrative acts. For example, Hong Jiayin believes that "sanction" and "unfavorable punishment" are two different properties. This way of investigation will be more conducive to scientific research and analysis of illegal income sanctions. According to the "purposeful normative structure", the effect of the "purpose of punishment" expressed by the administrative agency to sanction and prevent administrative personnel is another matter to be observed.

## **2.2 The connotation of sanctions**

Some scholars believe that the sanction is to censure the illegal behavior of the counterpart who violates the obligations under administrative law and impose additional adverse effects on him, so as to confirm his illegal behavior and make him bear additional adverse effects and fear to avoid reoffending. Some scholars also argue that the connotation of sanctions should be defined in terms of the applicable objects, and that it is a simple adverse administrative decision for administrative organs to take measures against the parties in order to eliminate the existing harm or prevent the occurrence and expansion of harm. Taking the existing illegal and responsible acts as the elements, and taking adverse measures against the parties by administrative decisions, it is a punitive adverse administrative decision.

First of all, administrative punishment is an unjust interest imposed by the state on the perpetrator. In this way, it criticizes his illegal act and acts as a deterrent to his act. When talking about sanctions, Professor Hong Jiayin believes that the characteristics of sanctions are that they exert additional adverse effects on the opposite party who violates its obligations in administrative law and criticizes its illegal acts. This adverse effect has the function of prevention, that is, to deter it from violating again in the future. Therefore, if the interests of the administrative counterpart are not worse than before they engage in illegal activities because of the attack from the administrative organ, it cannot be considered that the administrative organ's treatment has a preventive effect on them, nor can it be considered that the means adopted by the administrative organ have a sanction. The most striking advantage of the "worse than before" argument is that it conforms to traditional values of criminal law. According to the traditional theory, the purpose of criminal law is to punish crime and protect human rights. At present, the "theory of retribution punishment" is widely recognized in the academic circle. In order to achieve the purpose of retribution, it is necessary to deprive its interests, so that its illegal gains are not enough to cover its losses. In the aspect of sanction, administrative punishment and criminal punishment are both punishments imposed by the state on individuals, which have commonality. The sanctions in the context of administrative law should also adopt "worse than before the illegal act" rather than "adverse effect".

### **3. Confiscation of illegal income does not belong to the analysis path of administrative punishment**

#### **3.1 Confiscation of illegal gains is not a material sanction**

According to the theoretical analysis, the “illegal gains” confiscated in the confiscation of illegal gains is not the legal property of the lawbreaker, and the nature of confiscation is essentially the nature of recovery, rather than the price paid by the lawbreaker for the implementation of illegal acts. On this issue, the legislative practice in Taiwan may be for reference: the recovery of improper interests is based on the fact that the perpetrator has not been subject to administrative punishment. The distinction between this recovery and administrative punishment has been further clarified. In other words, this confiscation of illegal income is not an administrative punishment, but a return to the legal order.

Therefore, the confiscation of illegal income may have an adverse impact on the illegal counterpart to a certain extent, but this adverse impact belongs to the effect rather than the purpose. The purpose of confiscation of illegal income does not include sanctions. Some scholars, such as Zhang Jiansheng, once argued: “If the confiscation of illegal income is not punitive, it will lose its due function of administrative punishment... rather than this, it is more appropriate to regard it as an administrative enforcement method of ‘recovery’.”

#### **3.2 Confiscation of illegal gains is not a sanction in terms of spiritual benefits**

According to the teleological analysis of sanctions, sanctions are the cost of disadvantage. At the same time, in equal axiology, if certain elements can be put into the same set of legal concepts, then they should have equal value. In the Administrative Punishment Law, mental punishment, such as warning, can deter the psychology of administrative counterparts; Qualification punishment, such as cancellation of license, can eliminate the administrative counterpart’s right to a certain operation. These penalties behind the corresponding, is the illegal acts of different types and severity. And the intensity of these penalties and the means of sanctions can be commensurate with the degree of violation of the corresponding illegal behavior. In addition, in the aspect of effect theory, these administrative penalties have certain sanctions effect on administrative counterparts, and have possible and overlapping adverse effects.

This paper holds that compared with other administrative punishment methods, confiscation of illegal gains does not have certain sanction effect, but only has possible and overlapping adverse effects. In addition, in the civil law, motivation is a taboo. While in the criminal law, the inner mind of the actor needs to be judged by his behavior. In the middle of the two major departments of law, the spiritual field of a person can not be judged by the outside world. So, it is puzzling that, on the premise that the measures of confiscating illegal gains do not directly target the spirit of the administrative counterpart, supporters of the theory of “spiritual deterrence” believe that the confiscation of illegal gains will deter the spirit of the doer, which obviously lacks scientific rigor.

But even this kind of behavior can really so-called adverse effects on the actor’s spirit, also is just “may” be deterrence to the administrative relative person spirit, the reason is that compared with the warning the spirit of the traditional penalty, confiscate the illegal income is not directly to the administrative relative person’s spirit or fame, but the illegal gains, The mental deterrent of confiscation of illegal gains to administrative counterparts becomes uncertain because of the barrier of “illegal gains” property. Therefore, it cannot be identified as administrative punishment, the reason is that this strong subjective judgment cannot pass the traditional administrative law theory and equal value test. In addition, if the sanction of confiscation of illegal gains is reflected in the spirit of the administrative counterpart, then the traditional theory of administrative law cannot support this view, because the confiscation of illegal gains belongs to the category of property punishment. If the “spiritual deterrence theory” is correct, the sanction effect of confiscating illegal gains will certainly show the spiritual deterrence to administrative counterparts. However, this paper cannot agree that the sanctions effect of this punishment method, which is classified as the category of property punishment in legislation, is not reflected in the property interests, but in the level of spiritual interests.

## **4. The system orientation of confiscation of illegal income**

### **4.1 The burden of confiscating illegal gains**

There are two manifestations of burdensome administrative acts: it may be manifested that the administrative power makes an order to deprive the rights of the administrative counterpart in accordance with laws and regulations, or it may be manifested that the administrative power adds some obligations to the administrative counterpart in accordance with laws and regulations, etc. On this basis, it can be considered that the confiscation of illegal gains is burdening, and this paper holds that this objective obstruction stems from the increase of obligations. The reason is that, on the one hand, it is acceptable to think that the confiscation of illegal gains imposes an obligation on the administrative and human resources departments to surrender illegal gains. But on the other hand, if the claim that confiscation of illegal gains has caused the reduction of the rights of administrative counterparts, according to the “spiritual deterrence theory”, spiritual interests are also interests, which seems to be reasonable. However, the adverse impact of confiscation of illegal gains on the spirit of administrative counterparts is uncertain, but its obligation to surrender illegal gains is certain, there is no reason to promote the rank of uncertain conjecture. Therefore, this paper believes that the burden of confiscation of illegal gains is reflected in the increase of the administrative counterpart’s obligations.

### **4.2 The purpose and effect of confiscation of illegal income**

The purpose of the system of confiscation of illegal income is to make the doer who violates the duty of administrative law not gain additional benefits in addition to the punishment because of his illegal activities, which can avoid the doer internalizing the administrative punishment as the cost of engaging in illegal activities, so that the legal order can be maintained. This is the expression of the legal principle that “no one can benefit from his own wrongful act”. In other words, violations of administrative law obligations, like criminal acts, should not be “rewarded” in jurisprudence. If the violation of the obligations of administrative law can still create benefits for the violator after being punished or not punished, because the benefits obtained exceed the losses suffered due to administrative punishment and other procedural expenses, the legal order will not allow it. At this time, it is necessary to confiscate the illegal income to fill the loophole of sanctions. Confiscation shall be carried out within the scope of the value of the benefits obtained, so as to avoid illegal and improper benefits. Therefore, confiscation of illegal income is the deprivation of illegal interests. From this perspective, the difference between confiscation of illegal income and administrative punishment is that confiscation of illegal income does not need to achieve the general purpose of prevention, but only needs to be filled when there are loopholes in sanctions. Therefore, it is correct and necessary to distinguish it from administrative punishment.

### **4.3 Legal orientation of confiscation of illegal income**

This paper advocates that the “confiscation of illegal income” should be deleted directly from the second paragraph of Article 9 of the administrative punishment law and taken as an auxiliary specific administrative act supporting the administrative punishment system such as fines. First of all, from the perspective of law revision cost, this design has the smallest change to the whole legal system. On the one hand, confiscation of illegal gains is widely used in various central and local laws and regulations. Confiscation of illegal gains has been closely linked to penalties such as fines, and the deletion of confiscation of illegal gains from the categories of administrative penalties will not lead to the reduction of its application. On the other hand, the separation of confiscation of illegal income from the sequence of administrative punishment will be more conducive to prevent violations of the principle that fault corresponds to punishment, and will also be more conducive to realize the education of administrative counterparts and ease the tension between them and law enforcement agencies.

This article does not agree with the proposition that fine can replace the function of confiscating illegal income. Although both of them are generally manifested as the loss of monetary interests, the control of discretion is not

in place at the present stage, and there is a risk that the fine may be abused by administrative organs to damage the rights and interests of administrative counterpart. Taking confiscation of illegal income as a specific administrative act that is auxiliary to the administrative penalty system can lift the restrictions on some levels of legislative organs and administrative organs in terms of enactment right. By expanding the application of confiscation of illegal gains to reduce the application of fines, the practice of part of the generally recognized harmless behavior from confiscation to confiscation of illegal gains, can significantly reduce the number of unreasonable fines and administrative litigation cases. This legislative design is not only conducive to the administrative counterpart, but also can ease the law enforcement relationship of law enforcement organs and reduce the trial pressure for judicial organs.

## 5. Conclusion

The discussion of confiscation of illegal income system will affect the operation and effect of administrative penalty system. Confiscation of illegal gains does not belong to administrative punishment. Before understanding the sanction nature of administrative punishment, we should make clear the dual nature of sanction, distinguish the adverse effects of sanction as purpose and nature and as effect, and avoid the cognitive error of “spiritual deterrence theory”, which is the inversion of cause and effect. In addition, adhering to the theory of “spiritual deterrence” inevitably leads to the dual contradiction in theory and logic. We should correctly understand the purpose and effect of confiscation of illegal gains, make it clear that it is a specific type of auxiliary administrative act in the administrative penalty system, and build a punishment system that takes profit as the standard, takes fine as the main means and confiscation of illegal gains as the auxiliary means.

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