The Complication of Anti-Money Laundering Measures and Taxation —Sorting out the wandering discussion and future issues—*

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Abstract

Although it is widely recognized that there is a profound relevancy between anti-money laundering and taxation measures, and that cooperation between both authorities is called for, the discussion in this regard has so far been left fragmented and unstructured. This paper attempts to establish a basic perspective and a framework for discussion that would serve as a basis for furthering the consideration on this issue. Specifically, the causes of the fragmentation are considered as follows: (1) the lack of differentiation in the discussion on various phases of co-operation, (2) the existence of an "twisted connectivity" in the discussion towards the desirable form of co-operation, and (3) the confusions of various characters and objectives in information sharing among the authorities. The paper then breaks down the assumed cooperative relationships into the following phases: (1) risk analysis and assessment (ex-ante phase), (2) information sharing (operational phase), and (3) deprivation of criminal proceeds (ex-post phase). It then clarifies that each phase, especially with regard to the phase (2) which is the focal segment of the issue, requires independent consideration based on relevant laws, regulations, judicial precedents, and so on. Finally, as a supplementary topic, the paper attempts to reorganize the discussion on listing tax crimes as "predicate offenses" in money laundering, as well as the issue of confiscation (deprivation of the proceeds of the crime).

Keywords: money laundering, AML, proceeds of crime, organized crime, underground funds, international taxation, information exchange (sharing), confiscation, FATF, OECD

JEL Classification: K14, K22, K33, K34, K42

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* Counsellor, Cabinet Legislation Bureau. I would like to make it clear that the parts of this paper related to legal interpretation, etc. are my own personal views, and do not reflect the views of my current organization, the Ministry of Finance, from which I have been seconded, or the International Monetary Fund (IMF), to which I previously belonged.

I. Introduction

The relationship between anti-money laundering (AML) measures and tax affairs is one of the issues that remains extremely unresolved. Many experts have pointed out the depth of the relationship between these two issues, and in international fora such as the Financial Action Task Force (hereinafter, referred to as the FATF) and the OECD, these two policy issues have been addressed as something that should be considered as a series of connected issues. However, when it comes to the details of each issue, existing research does not provide any clear suggestions regarding the relationship between them.[1]

In addition, combined with the tax authorities' strict adherence to traditional information confidentiality, the actual situation is that detailed consideration of which level of collaboration is possible and where the difficulties lie (and whether these difficulties are legal or practical requirements), and what measures could be taken to overcome these difficulties is largely left behind, and as the consequence, only unfulfilled slogans are continuing to be raised. In light of such a situation, this paper will attempt to restructure the debate on the relationship between these two issues, and will also attempt to make policy recommendations that can be applied not only to Japan, but also to the international community as a whole.

To begin with, this paper would like to provide a broad perspective on why there has been so much confusion in the debate on this point, including the meaning of identifying the causes (Figure 1).

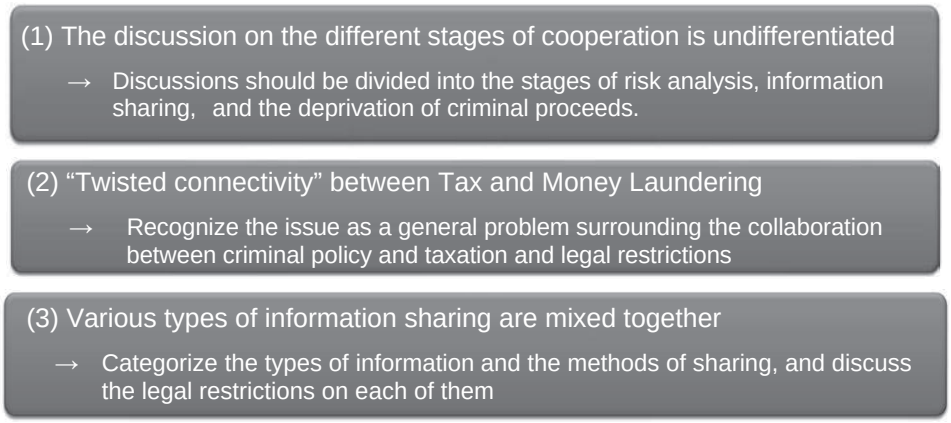
Firstly, there is a problem with the fact that the different stages involved in the collaboration between tax authorities[2] and other organizations are discussed in an undistinguished manner (Figure 2). In particular, the two main roles that tax authorities are said to be able to play in relation to money laundering offenses are information sharing with other organizations and the deprivation of criminal proceeds, but these two are often discussed as if they were on the same stage without any awareness of the difference between them. The former, information sharing, is the core issue in the relationship between the two. On the other hand, the idea behind the latter, that the tax authorities should confiscate criminal proceeds, is that, more precisely, by strengthening taxation, especially for criminal organizations, the government can prevent criminal proceeds from being reinvested in new criminal acts. In this respect, as will be discussed later, the idea of strengthening such mechanism should be supported, given that the criminalization of money laundering is completed from a criminal policy perspective only

[1] As examples, Kemsley et al. (2020), Mathias & Wardzynski (2023).
Also, as stock-taking of cases from various countries and manuals for those in charge of practice, see OECD (2017), APG (2023), EAG (2022), Egmont Group IEWG (2020).

[2] In addition to national tax authorities, public organizations that collect taxes include customs and local governments that are responsible for collecting local taxes, but in this paper, this term will refer to national tax authorities, which are primarily assumed in this them.

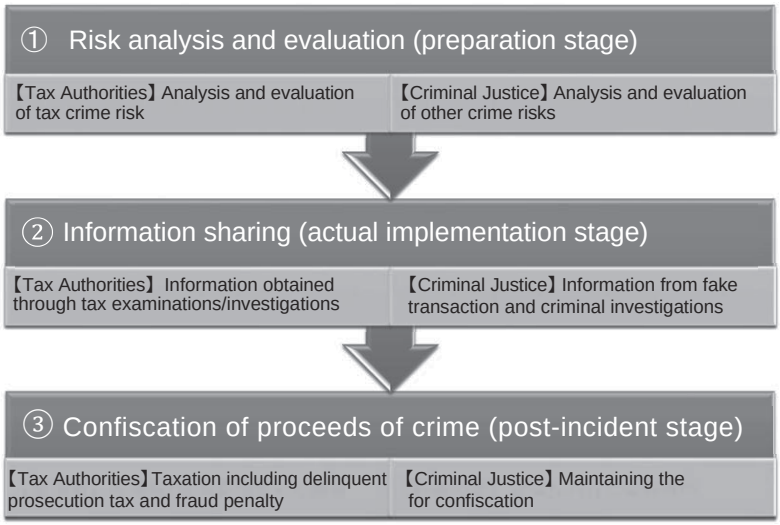
when it is accompanied by the final deprivation of the targeted proceeds. However, when comparing this with information sharing, the situations in question are completely different. The deprivation of earnings is a matter of how to deprive the illegal earnings (or those that are strongly suspected of being illegal) that have already been captured, as a premise, but information sharing is a matter of how to uncover such criminal proceeds in the first place.

Figure 1: Confusion over the relationship between tax affairs and money laundering



Source: Created by the author

Figure 2: Collaboration of Tax authorities and criminal justice



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In addition, from the tax authorities' point of view, information sharing is a matter of how far they can provide information that contributes to policy objectives that are outside their own authority, in this case, in relation to investigations into money laundering, and thus the ultimate actor is conceived of as being external. On the other hand, in the latter case, a story is completed by the tax authorities' own exercise of their authority to levy taxes. Therefore, it is only natural that the development of the argument will be completely different for the two issues, and it is almost meaningless to discuss them on the same plane.

Secondly, there is a phenomenon that could be called "the twist in connectivity" in relation to tax affairs and money laundering. The origins of the crime of money laundering itself can be traced back to financial investigations that began in the United States, and the core of these investigations was originally the investigation of tax evasion. Furthermore, even today, there is considerable overlap between income related to tax evasion and illegal proceeds that are the subject of money laundering, and when an organization has both legal and illegal proceeds, it can be said that tax evasion and money laundering occur in a constant and parallel manner. Therefore, there is a deep relationship between the two issues that should be called inevitable, both historically and theoretically.

On the other hand, whether it is the issue of information sharing or the issue of revenue deprivation, once we get into the specifics of seeking the ideal form, there are actually very few points of view to look at issues specific to money laundering, and in general, they are resolved into a very general and universal question of the limits of the role that tax authorities can play in terms of criminal policy objectives. What is further adding to this "twist" is the phenomenon of "positioning tax crimes as predicate offenses of money laundering" in recent years. Although this kind of criminalization of predicate offense was introduced with a great deal of attention, its significance in terms of the legal system has not been properly understood, and it seems to have even caused confusion in the debate. To put it simply, criminalization of predicate offense does not bring about any kind of change in the issues that need to be addressed in any essential sense. The implications of this are discussed below, but in any case, given the framing of the debate as "tax and money laundering", this fact may be a little bit of a let-down, but the fact that a catchy phrase has appeared that puts the spotlight squarely on the relationship between money laundering and taxation can be positively evaluated, as it has served as a starting point for the debate that had not been explored in depth in the past.

Thirdly, when focusing on the discussion of information sharing between tax authorities and other organizations, which is particularly a core theme, the various types of information, the subjects and the direction of the information have been discussed without any attempts for categorization, which is problematic. In this respect, the main parties involved in information sharing are considered as the tax authorities, the police and other organizations (such as the registry office), and there are two main directions for sharing information: where the tax

authorities are the recipient, and where the tax authorities are the sender. In terms of the nature of the information, it is possible to conceive of two types: information collected for the purpose of criminal investigation, and information that was not collected for such a purpose but which could potentially lead to criminal investigation as a result. Then, the legal restrictions that apply to each of these categories are completely different. Within the framework of the conventional general discussion, if everything is to be included in the gray zone, or if it is not acceptable to make it a gray zone, then it will be necessary to broadly interpret the sharing as prohibited, which could lead to an overly self-restrictive interpretation and application. Based on the above perspective, we will continue with the discussion below. However, in terms of anticipating the conclusion, the policy issues that arise as an extension of the discussion on each point of contention do not necessarily remain within the framework of the current legislation. In particular, the series of discussions surrounding administrative criminal-asset forfeiture (so-called "Non-Conviction-Based Confiscations (NCBC)" and Beneficial Ownership (BO)) are issues that are worthy of further development in legislative discussions in the future.

II. Overview of Money Laundering Offenses

II-1. History and international standards (The FATF)

When it comes to money laundering, the level of public awareness is still low compared to tax affairs, and so we have to assume that some of the readers of this article may not be familiar with the subject. On the other hand, it seems that people who are well-versed in the field of money laundering are not necessarily experts in tax issues. As such, regardless of their proximity as policy issues, the current situation in which expertise in these two fields is divided between the public and private sectors in Japan along with other countries, is in itself one of the major problems. In any case, this paper would like to start from the basics and explain the legal systems and international frameworks for both money laundering and taxation.

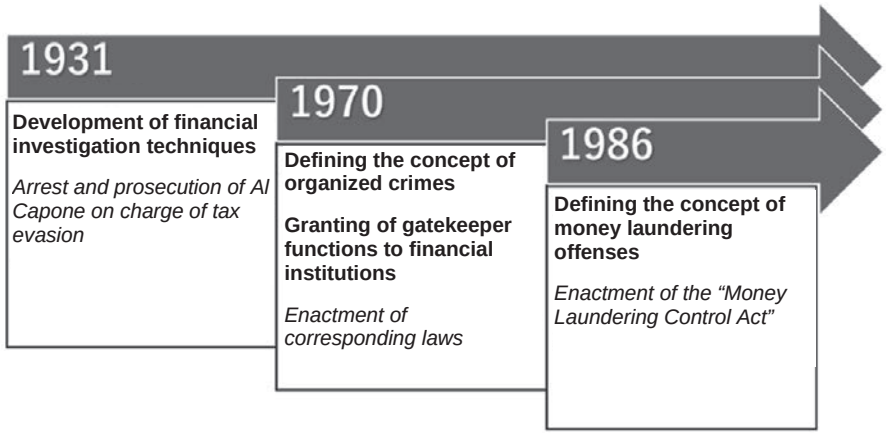
Now, when trying to fully understand a system, it is often useful to look back to its historical formation process. The same is true for the relationship between money laundering and taxation, which is the main topic of this paper. What becomes clear when we look back at history is that it is somewhat inappropriate to point out the "proximity" between the two once again. This is because both of these can be traced back to the same origin in history. To be more precise, the development of financial investigation methods, including the creation of the money laundering crime, originally derived from tax examinations. The beginning of this was the attempt to uncover the mafia led by Al Capone in the United States during the Prohibition Era. Investigations that focus on the members of an organization, or on individuals,

are like "cutting off the tail of a lizard", and it is not possible to ensure their effectiveness as a criminal policy. Therefore, the US Treasury Department at the time focused on the movement of mafia funds themselves from the perspective of tax examinations, and arrested and prosecuted Al Capone on charges of tax evasion, obtaining a guilty verdict and leading to his imprisonment. The prototype of financial investigations that was established there was further strengthened as a countermeasure against the drug crimes caused by the covert activities of the Latin American cartels, and it was established as a money laundering control through the 1970s and 1980s (Figure 3).[3]

Nowadays, the term "money laundering" has become quite widely used, and its criminal nature is often blindly accepted as a matter of course, but unlike other types of crime that are traditionally considered "bad" in human society, such as murder and theft, it is not at all obvious from a theoretical perspective that the handling of criminal proceeds, a secondary act, should be considered a type of punishable illegal act and made a constituent element of criminal law, and historically it is only a matter of the last few decades that such act was made punishable. It is important to remember that this system was established with the extremely criminal policy-oriented aim of dealing with organized crimes, and that its initial results are only achieved when not only a specific person is convicted of the crime, but also the financial structure of the criminal organization is revealed through the investigation process, and the proceeds are confiscated.

The anti-money laundering regulations that began in the United States would later ex-

Figure 3: Formation of a money laundering offense



Source: Noda (2023)

[3] Noda (2023)

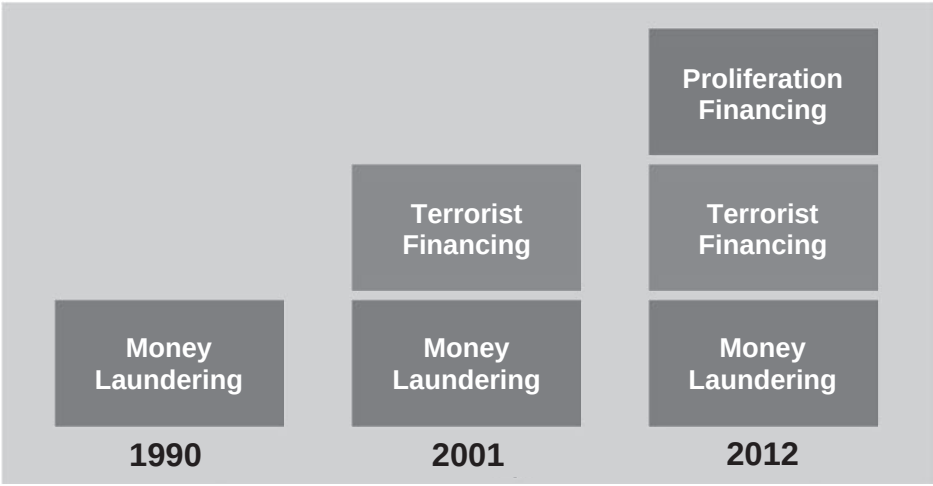
pand to the international community as a whole. After all, money moves across borders in an instant, and even if the people involved in such transactions are not as free to move as the money, it is difficult to punish them if they have fled to a country with inadequate legislation, investigation, or prosecution systems. On the other hand, organized crimes, including drug-related crimes, have become more widespread, and the prevention of such crimes is no longer just a concern for the United States. In this context, the FATF, an international organization was established in 1989 with the aim of promoting global anti-money laundering regulations with the participation of G7 countries. Herein, the legal systems and implementation structures relating to anti-money laundering regulations that each country should comply with are discussed and compiled as standards. A system has also been established to check compliance with these standards through mutual assessments between participating countries, and if the result of the assessment is not satisfactory, various sanctions may be imposed. There are many corresponding measures, and while cases where clear and severe measures are taken are relatively rare, ultimately, there is also the possibility of calls for exclusion from the international financial network (terminating correspondent relationships). For this reason, while the FATF itself is a voluntary organization which does not have legal coercive power in the strict sense, it has come to have power that is close to that in practice.

Although not directly related to the theme of this article, the FATF's mandate has expanded beyond its original focus on anti-money laundering regulations to include the prevention of the provision of funds for terrorism and the development of weapons of mass destruction such as nuclear weapons in violation of the resolutions of the UN Security Council Sanctions Committee. This is also a reflection of the strengthening of US efforts in these areas since the 2001 terrorist attacks to extend these efforts to a global level. Although these funds are of a completely different nature, it is strongly suspected that terrorist organizations use the proceeds of crime to fund their activities, and in the case of certain countries, that the state itself engages in illegal fund-raising activities to develop weapons of mass destruction, etc., and there are also many areas where they overlap, so it is not just a historical product, but there is also a great deal of necessity and significance in treating them as a single entity and making them subject to regulation (Figure 4).

As mentioned above, the FATF formulates standards that the international community should comply with, and the main ones are the 40 Recommendations on legal systems and 11 Immediate Outcomes relating to implementation and operation in each country.[4] These range from basic matters such as risk assessment in each field at the national level, which is the basic premise for each measure, and the criminalization of money laundering, etc., to measures that private sector businesses, including financial institutions, should take (such as identifica-

[4] Ozaki, Noda, Nakazaki (2022)

Figure 4: Expansion of the FATF's mandate



Source: Materials prepared by the Ministry of Finance

tion of customers and reporting of "suspicious transactions", the area that most people think of when they hear the term "anti-money laundering regulations"), the implementation of appropriate investigations and prosecutions, and, as an extension of that, cooperation between countries such as the extradition of criminals (Figs. 5 and 6). In particular, the fact that the mission of monitoring the flow of money on a day-to-day basis, which is far too much for the authorities to handle on their own, is widely shared by private sector businesses, including financial institutions, through their obligation to take multiple measures, is a feature of this framework that is unparalleled, and it can be called a huge burden sharing between the public and private sectors that far surpasses the cliché of "cooperation between the government and the private sector". It is probably this cumbersome obligation to follow that many people recall when they think of anti-money laundering measures, both as part of their daily compliance work and as users of financial institutions, etc.

In Japan as well, the legal system has been developed and its implementation and operation have been improved so that conformity to these standards can be maintained, and the progress of this would be confirmed and evaluated in the aforementioned process of mutual assessment. The most recent assessment results were announced in August 2021, and the author was also involved in the process.[5]

[5] The FATF (2021)

Figure 5: The FATF-40 Recommendations

Rec.	Overview	Rec.	Overview	Rec.	Overview
1	Assessing risks and applying a risk-based approach	18	Internal controls and foreign branches and subsidiaries	35	Sanctions
2	National co-operation and co-ordination	19	Higher risk countries	36	International instruments
3	Money laundering offense	20	Reporting of suspicious transactions	37	Mutual legal assistance
4	Confiscation and provisional measures	21	Tipping-off and confidentiality	38	Mutual legal assistance: freezing and confiscation
5	Terrorist financing offense	22	Designated Non-Financial Businesses and Professions (DNFBPs): customer due diligence	39	Extradition
6	Targeted financial sanctions related to terrorism and terrorist financing	23	DNFBPs: Other measures	40	Other forms of international co-operation
7	Targeted financial sanctions related to proliferation	24	Transparency and beneficial ownership of legal persons		
8	Non-Profit Organizations (NPOs)	25	Transparency and beneficial ownership of legal arrangements		
9	Financial institutions secrecy laws	26	Regulation and supervision of financial institutions		
10	Customer due diligence (PEPs)	27	,Powers of supervisors		
11	Record keeping	28	Regulation and supervision of DNFBPs		
12	Politically exposed persons (PEPs)	29	Financial Intelligence Units (FIU)		
13	Correspondent banking	30	Responsibilities of law enforcement and investigative authorities		
14	Money or value transfer services (MVTS)	31	Powers of law enforcement and investigative authorities		
15	New technologies	32	Cash couriers		
16	Wire transfers	33	Statistics		
17	Reliance on third parties	34	Guidance and feedback		

*1 DNFBP (Designated Non-Financial Businesses and Professions: Designated non-financial businesses and professionals) are (a) casinos, (b) real estate agents, (c) precious metal dealers, and (d) jewelry dealers, (e) lawyers, notaries and other independent legal professionals, and accountants, and (f) trust and company service providers (including those acting as intermediaries for the establishment of corporations, etc., which are not included in other categories).

*2 Financial Intelligence Unit (FIU): A Financial Intelligence Unit (FIU) is a government agency that receives and analyzes information on money laundering and terrorist financing, and provides it to investigative agencies.

Note: Highlighted sections are related to this article.
Source: Materials prepared by the Ministry of Finance, Japan

Figure 6: The FATF-11 Immediate Outcome

Item	Overview
1	Risk, policy and co-ordination
2	International cooperation
3	Supervision
4	Preventive measures
5	Legal persons and arrangements
6	Financial intelligence ML/TF
7	ML investigation and prosecution
8	Confiscation
9	TF investigation and prosecution
10	TF preventive measures and financial sanctions
11	PF financial sanctions

Note: Highlighted sections are related to this article.
Source: Materials prepared by the Ministry of Finance, Japan

II-2. Money Laundering Offenses under Domestic Law

Along with other countries, Japan's domestic legislation has been developed in a way that conforms as much as possible to the FATF standards as above-described. As it was mentioned above, the money laundering offense is something criminalized as the "concealment and receipt" of the proceeds of crime, and the original crime that generated such proceeds is called "Zentei-Hanzai (前提犯罪)", a direct translation from the English term "predicate offense".

Now, regarding this predicate offense, it is mentioned in Japan's domestic law: the Narcotics and Psychotropics Control Act (Act Concerning Special Provisions for the Narcotics and Psychotropics Control Act, etc.) and Other Matters for the Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances through International Cooperation (Act No. 94 of 1991) and the Organized Crime Punishment Act (Act on Punishment of Organized Crimes and Control of Proceeds of Crime (Act No. 136 of 1999)) (Figure 7). From the perspective of comprehensiveness, it is not ideal that the predicate offenses are stipulated in two separate laws, but this originated from historical circumstances. More concretely, in Japan and around the world, the criminalization of money laundering has its origins in efforts to tackle drug-related crimes, so the first step was to criminalize drug-related predicate offenses, and then, in the form of expanding the scope of application, other predicate offenses were also criminalized. As a platform for this, a separate law called the Organized Crime Punishment Act was established, and therefore, if you look at the text of the Organized Crime Punishment Act alone, it seems as if drug-related crimes have been deliberately excluded from its scope, but this is due to technical reasons related to the elimination of systematic legal overlaps.

From the perspective of comparative jurisprudence, there are two major ways to define predicate crimes: (1) the comprehensive method, which sets a certain threshold in terms of punishment and targets all crimes above that threshold, and (2) the list method, which enumerates the types of crimes to be targeted individually. Japan adopts a hybrid approach of the two; while Article 2, Item 1 (a) of the Organized Crime Punishment Act comprehensively defines serious crimes as "crimes punishable by death penalty or imprisonment for life or imprisonment with or without work for a term of four years or more" (the subsequent parenthetical statement indicates the aforementioned duplication exclusion), (b) defines the Appended Tables 1 and 2: Table 1 (Terrorism-Related Crimes, etc.) lists out the category of crimes that is required to be criminalized under the Palermo Convention (United Nations Convention against Transnational Organized Crime) (including the Protocol on Trafficking in Persons and the Protocol on Smuggling of Migrants), while Table 2 (Financial-Related Crimes, etc.) lists out the crimes which are recognized to be the common means to earn funding. In accordance with the amendment of the Penal Code enacted in June 2022, the term "imprisonment with

work or imprisonment without work" here is scheduled to be unified as "custodial sentence" by June 16, 2025 (the same applies below).

Figure 7: Relationship between the FATF Recommendations and domestic laws and regulations

Summary of Recommendations	Corresponding main legislation
Policy and cooperation on AML/CFT (Recommendations 1 and 2)	Act on Prevention of Transfer of Criminal Proceeds (APTCP)
Criminalization of money laundering and confiscation (Recommendations 3, 4)	**Act on Punishment of Organized Crimes and Control of Proceeds (APOC) Narcotics Special Provisions Act**
Anti-Terrorist Financing and Proliferation Finance (Recommendations 5-8)	Act on Punishment of the Provision of Funds for Terrorism Foreign Exchange and Foreign Trade Act Act on Freezing Assets of International Terrorists Laws related to NPOs (Act on Promotion of Specified Non-profit Activities, etc.)
Preventive measures for financial institutions, etc. (Recommendations 9-23)	Act on Prevention of Transfer of Criminal Proceeds (APTCP)
Transparency of corporations, etc. (Recommendations 24, 25)	Act on Prevention of Transfer of Criminal Proceeds Commercial Registration Act Notary Act
Powers of authorities, etc. (Recommendations 26-35)	Act on Prevention of Transfer of Criminal Proceeds (APTCP) Related business laws (Financial Instruments and Exchange Act, Insurance Business Act, etc.) Customs Act
International Cooperation (Recommendations 36-40)	Act on International Assistance in Investigations Act of Extradition

Note: Highlighted sections are related to this article.
Source:Materials prepared by the Ministry of Finance, Japan partially edited by the author

Organized Crime Punishment Act
(Definitions)
Article 2 (Section omitted)
(2) In this Act, "proceeds of crime" means any of the following types of property:
(i) any property produced or obtained through, or obtained in reward for, a criminal act that constitutes any of the crimes set forth in the following sub-items (including acts committed outside the territory of Japan that would, if committed within the territory of Japan, constitute any of those crimes, and that also constitute any crimes under the laws and regulations of the place of the act) and is committed for the purpose of obtaining an unlawful economic benefit:
(a) crimes punishable by the death penalty, life imprisonment with or without work, or imprisonment with or without work for a long term of four years or more (excluding the crimes set forth in item (i), (b) and those set forth in each item of Article 2, paragraph (2) of

the Act Concerning Special Provisions for the Narcotics and Psychotropics Control Act, etc. and Other Matters for the Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances through International Cooperation (Act No. 94 of 1991; hereinafter referred to as the "Anti-Drug Special Provisions Act"), or
(b) the crimes set forth in Appended Table 1 (excluding those in item (iii)) or Appended Table 2; [6] [7]

In terms of the FATF standards, as mentioned above, this part is the cornerstone of the criminalization of money laundering. As noted repeatedly, the criminalization of money laundering as a criminal act with the aim of preventing and suppressing drug-related crime (and, in the extended meaning, serious crime in general) is a relatively recent development in history, and the fact that it is a crime is not given or self-evident. Without the criminalization of money laundering, there can be no preventive measures, investigation and prosecution, and cooperation between authorities across borders. Therefore, if the criminalization of money laundering, specifically Recommendation 3, is not fulfilled in the criteria, the necessary conditions for fulfilling the other criteria are lacking. Assuming that money laundering is a crime type in the criminal law system of a certain country, the next important factor is the range of the scope of predicate offense.

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[6] Appended Table 1 lists crimes that must be criminalized under the United Nations Convention against prevention of International Organized Crime (commonly known as the "Palermo Convention" or "TOC Convention"), and Appended Table 2 lists crimes that have been considered to be predicate offenses before the amendment of this Law in 2017 even if the statutory penalty is imprisonment or imprisonment for a term of less than four years.

[7] The same provision continues as follows:
(ii) any funds provided through a criminal act that constitutes any of the crimes set forth in the following sub-items (including acts committed outside the territory of Japan that would, if committed within the territory of Japan, constitute the crime set forth in (a), (b), or (d) below, and that also constitute any crimes under the laws and regulations of the place of the act):
(a) the crimes prescribed in Article 41-10 (Provision, etc. of Funds or Other Materials for the Import, etc. of Stimulants' Raw Materials) of the Stimulants Control Act (Act No. 252 of 1951),
(b) the crimes prescribed in Article 13 (Provision of Funds or Other Materials) of the Anti-Prostitution Act (Act No. 118 of 1956),
(c) the crimes prescribed in Article 31-13 (Provision of Funds or Other Materials) of the Act for Controlling the Possession of Firearms or Swords and Other Such Weapons (Act No. 6 of 1958), or
(d) the crimes prescribed in Article 7 (Provision of Funds or Other Materials) of the Act on Prevention of Bodily Harm by Sarin and Similar Substances (Act No. 78 of 1995);
(iii) any property given through a criminal act that constitutes any of the crimes set forth in the following sub-items (including acts committed outside the territory of Japan that would, if committed within the territory of Japan, constitute any of those crimes, and that also constitute any crimes under the laws and regulations of the place of the act,
(a) the crimes prescribed in Article 7-2 (Bribery of Witnesses) of this Act, or
(b) the crime prescribed in Article 21, paragraph (2), item (vii) (Provision of Wrongful Gains to Foreign Public Officials) of the Unfair Competition Prevention Act (Act No. 47 of 1993) in relation to violation of Article 18, paragraph (1) of the same Act;
(iv) any property provided, or intended to be provided, through a criminal act that constitutes any of the crimes prescribed in Article 3, paragraph (1), the first sentence of paragraph (2) of the same Article, Article 4, paragraph (1), and Article 5, paragraph (1) (Provision of Funds or Other Benefits) of the Act on Punishment of Financing to Offenses of Public Intimidation (Act No. 67 of 2002) or constitutes an attempt to commit any of those crimes (including acts committed outside Japan that would, if committed in Japan, constitute any of those crimes, and that also constitute any crimes under the laws and regulations of the place of the act); or
(v) any property that a person who has planned a criminal act that constitutes the crime prescribed in Article 6-2, paragraph (1) or (2) (Planning to Commit a Serious Crime That Entails an Act of Preparation by a Terrorist Group or Other Organized Criminal Group) of this Act (including acts committed outside the territory of Japan that would, if committed within the territory of Japan, constitute that crime, and that also constitute any crimes under the laws and regulations of the place of the act) obtains for the purpose of using it as a fund to bring the planned crime to fruition.

If the range is too narrow, then the application of the crime of money laundering will be limited as a practical matter. For this reason, the FATF standard requires that the scope of the predicate offense be sufficiently broad. Specifically, Recommendation 3 provides as follows:

Countries should criminalize money laundering in accordance with the Vienna Convention and the Palermo Convention. All countries should apply the same rules/laws for the crime of money laundering to all serious crimes, from the perspective of targeting the widest range of underlying crimes.

In the Methodology used as a benchmark for the review of each country, the following is also stated:

3.1 Money Laundering (ML) should be criminalized on the basis of the Vienna Convention and the Palermo Convention (see Article 3(1)(b)&(c) Vienna Convention and Article 6(1) Palermo Convention).

3.2 The predicate offenses for ML should cover all serious offenses, with a view to including the widest range of predicate offenses. At a minimum, predicate offenses should include a range of offenses in each of the designated categories of offenses.

3.3 Where countries apply a threshold approach or a combined approach that includes a threshold approach, predicate offenses should, at a minimum, comprise all offenses that:

(a) fall within the category of serious offenses under their national law; or
(b) are punishable by a maximum penalty of more than one year's imprisonment; or
(c) are punished by a minimum penalty of more than six months' imprisonment (for countries that have a minimum threshold for offenses in their legal system).

In light of these criteria, it can be said that Japan's legal system is basically broad enough to ensure the criminalization of money laundering. However, in reality, the evaluation of Recommendation 3 in the Fourth Mutual Examination with Japan was "LC: Largely Compliant", which is only the second to the best rating.

The core of the types of predicate offenses stipulated in the Organized Crime Punishment Act is, needless to say, "crimes punishable by death or life imprisonment or imprisonment for a period of four years or more" (underlined portion above). The tax offenses, which are the subject of this paper's interest, are also included here, which means that they fall within the scope of the predicate offenses of money laundering. Specifically, Article 238, the most basic penalty provision in the Income Tax Act, provides as follows, as a consequence of which such offenses would be included as predicate offenses for money laundering under the inclusion scheme based on the above penalty threshold.

Income Tax Act
Article 238 (1) Any person who, through deception or other wrongful act... (omitted) ... shall be punished by imprisonment with work for not more than 10 years or a fine of not more than ten million yen, or both.
(2) (Omitted)
(3) Beyond what is provided in paragraph (1), ... (omitted) ... a person who has evaded income tax, ... (omitted) ... by failing to file a return by its due date shall be punished by imprisonment with work for not more than five years or a fine of not more than five million yen, or both.
(4) (Omitted)

Similarly, in the Corporation Tax Act, the relevant provisions are as follows:

Corporation Tax Act
Article 159 (1) In a case where a representative, agent, employee or other worker of a corporation, through deception or other wrongful act, ... (omitted) ... avoided corporation tax or ... (omitted) ...received a refund of corporation tax, the representative ... (omitted)..., agent, employee or other worker of the corporation ... (omitted) ... shall be punished by imprisonment with work for not more than ten years or a fine of not more than ten million yen, or both.
(2) (Omitted)
(3) Beyond what is provided in paragraph (1), ... (omitted) ... a representative, agent, employee or other worker of a corporation in a case where the person has evaded corporation tax, ... (omitted) ... by failing to file a return by its due date, shall be punished by imprisonment with work for not more than five years or a fine of not more than five million yen, or both.
(4) (Omitted)

It should be noted here that the fact that tax crimes have been read into the comprehensive provisions as described above seems to be one of the reasons why the tax crimes have been accepted for granted as a predicate offense of money laundering and the examination of their substantive significance has been neglected. In this regard, it is true that tax crimes have become a predicate offense for money laundering as a result of international discussions, and this has been reflected in domestic laws, while I have the impression that this is precisely what causes the lack of anchor to the practical examination. In fact, in the first place, it is doubtful whether there has been any thorough discussion in the international arena on how the criminalization of tax crimes as predicate offenses should be understood in legal and practical perspectives, and what effects it would have. It seems that the introduction of criminalization of the predicate offenses took place in many countries in a haphazard manner

amidst the global slogan and that in Japan, and for better or for worse, it has been quietly settled in the existing legislation without any clarification of its significance. This topic will be addressed later in this paper.

III. Risk Analysis and Assessment (Preparation Stage)

The first step in the cooperation between the tax authorities and the criminal justice system, as indicated at the beginning of this paper, is the analysis and assessment of risks. In the context of this paper, it is required that the tax authorities analyze and evaluate the risk of tax crimes and a police force, etc. analyze and evaluate the risk of other crimes, respectively, and that they share their analysis and assessment with each other. To preempt the conclusion, there is no particular legal difficulty in this stage, and therefore, it is a "practice makes perfect" world in which the authorities should work together more closely. It should be noted, however, that although the term "risk" is a common one that appears in everyday language, it is noteworthily difficult to understand it correctly. It is often used in the context of anti-money laundering, where it is lumped together with the "Risk-Based Approach". This is a concept that is opposed to the "Rule-Based Approach", and in the extreme, it could even be said that it only makes sense when paired with the latter.

The latter, if translated as a demand for compliance with laws and regulations, only resonates with the obvious principle, but it also has a somewhat negative connotation in that it is enough to follow the rules or the established norms. In contrast, the former is a concept that encompasses the idea of taking spontaneous approach to understand the risks involved in anti-money laundering measures surrounding itself, and taking well-balanced measures based on the appropriate allocation of human and financial resources. This should be the starting point of international anti-money laundering measures, and it is not an exaggeration to say that all the pieces are built on this premise. This is a concept that applies to the various layers of anti-money laundering measures. Specifically, the FATF standards require that each national government first properly assess the risks surrounding their own country, and this is listed literally as the top priority in the 40 Recommendations as well as in the 11 Immediate Outcomes, and as an inseparable element to this, it is also stated that the relevant domestic

agencies should work closely together for the risk assessment (Figs. 5 and 6).[8] The subsequent standards also indicate the process by which such risk analysis and assessment should be widely shared to each industry sector and individual business owners through a chain of embodiment and elaboration. Naturally, such a structure has been reflected in Japan's domestic laws, which require appropriate understanding of risks in each industry and firm, including the financial sector. In this context, the cooperation between the relevant organizations would be the starting point for anti-money laundering measures in Japan, and in recent years, it can be assessed that this cooperation has been rapidly increasing in Japan, partly with the need for preparation and response before and after the FATF assessment against Japan. Due to historical circumstances, the Ministry of Finance has been in charge of coordinating the review of Japan, and accordingly, the author was also in charge of coordinating the fourth review at the working level. In addition to the Financial Services Agency (FSA) and other government agencies with jurisdiction over the respective industry sectors, there are also a large number of related organizations, including the Ministry of Justice, the National Police Agency, the Public Security Intelligence Agency, and other organizations with judicial functions in Japan, and since there is no inherent hierarchical relationship between them, the overall command and supervisory function is placed in the Cabinet Secretariat. However, it can be said that whether and to what extent this whole setup will function in the future would depend on the efforts of each organization from now on. As mentioned at the beginning of this paper, there should be no inherent legal restrictions on collaboration in this phase, and if there are any inadequacies, we would have to look for the causes in the negligence of the relevant organizations or potential red-tape issues. Since there are few legal issues, this topic is not suitable for this article, but it cannot be overemphasized that collaboration in terms of risk analysis and assessment will be the basis for all other collaborations in the following stages.

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[8] The main parts of Recommendation 1 are as follows:

1. Assessing risks and applying a risk-based approach

Countries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should take action, including designating an authority or mechanism to coordinate actions to assess risks, and apply resources, aimed at ensuring the risks are mitigated effectively. Based on that assessment, countries should apply a risk-based approach (RBA) to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified. This approach should be an essential foundation to efficient allocation of resources across the anti-money laundering and countering the financing of terrorism (AML/CFT) regime and the implementation of risk-based measures throughout the FATF Recommendations. Where countries identify higher risks, they should ensure that their AML/CFT regime adequately addresses such risks. Where countries identify lower risks, they may decide to allow simplified measures for some of the FATF Recommendations under certain conditions. (omitted)

2. National cooperation and coordination

Countries should have national AML/CFT/CPF policies, informed by the risks identified, which should be regularly reviewed, and should designate an authority or have a coordination or other mechanism that is responsible for such policies. Countries should ensure that policy-makers, the financial intelligence unit (FIU), law enforcement authorities, supervisors and other relevant competent authorities, at the policymaking and operational levels, have effective mechanisms in place which enable them to cooperate, and, where appropriate, coordinate and exchange information domestically with each other concerning the development and implementation of policies and activities to combat money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. This should include cooperation and coordination between relevant authorities to ensure the compatibility of AML/CFT/CPF requirements with Data Protection and Privacy rules and other similar provisions (e.g. data security/localization).

IV. Information Sharing (Actual Implementation Stage)

IV-1. Subjects and Direction of Information Provision

With the above-described as a premise, we will now proceed to the discussion of information sharing among the organizations concerned. Information sharing among agencies cannot be discussed in a generalized manner, and the premise of the discussion depends critically on which agency provides the information and in which direction. Sensitivity of information held by tax authorities is not a matter unique to Japan but is the same obstacle faced by many countries in the international community. If we simply continue to use the slogan of strengthening cooperative relations between the tax authorities without addressing this point head on, we will not be able to reach the root of the problem.

In addition to the tax authorities, the police, which bears the primary responsibility for investigating crimes including money laundering, and other agencies also possess information which is expected to be shared with other organizations. Traditionally, the tax authorities and the police have been the focal point of discussions. In this case, there can be two flows of information; one from the police to the tax authorities and the other from the tax authorities to the police, and information provision from the police to the tax authorities has always been conducted under the name of "notification for taxation". In other words, when the police discover income in the course of criminal investigation, they report it to the tax authorities to encourage taxation. As will be discussed later, it has been accepted without dispute in academic literature that income is subject to taxation regardless of whether it is legal or illegal. On the other hand, it has been said that information sharing with the tax authorities as the source agency is accompanied by legal difficulties.

What kind of information should be shared among the tax authorities and in what direction? Leaving the actual situation aside for the moment, let us first consider the "ideal theory" from scratch. Prior to this discussion, it is necessary to understand the relationship between money laundering and tax evasion as a preparatory work, while it would be possible to give a relatively straightforward answer to this question: the act of money laundering is completely encompassed by the act of tax evasion. More precisely, while all acts that constitute money laundering also constitute tax evasion, the reverse is not necessarily true, and there will be tax evasions that do not fall under the category of money laundering. The conclusion is quite simple, but it seems that even this point has not been clearly mentioned in the past.

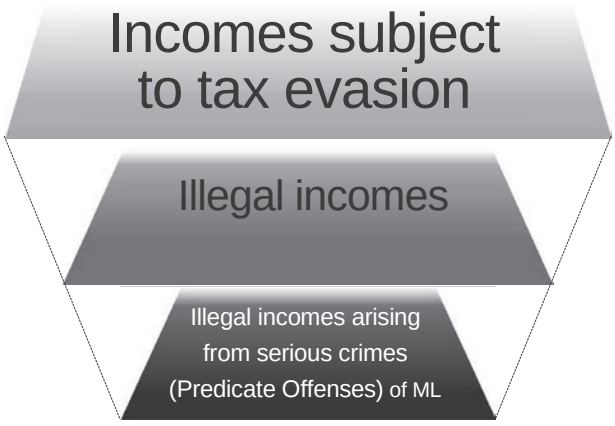
Here, we will consider the relationship between tax crimes and money laundering crimes based on the current legislation. In doing so, it is necessary to delineate the outlines of both tax crimes and money laundering crimes in terms of (1) the legality of the money involved and (2) actus reus of money laundering. First, regarding (1), the premise is that all proceeds subject

to money laundering are, by definition, illegal proceeds. In terms of the constituting elements, money laundering cannot be committed against legitimate funds. On the other hand, a tax crime can be committed regardless of whether the income is legal or illegal. This fact that tax evasion can be committed even for illegal income may come as a surprise, but there is absolutely no disagreement on this point either in theory or practice.[9] If so, tax crimes are naturally broader than money laundering crimes in terms of the target of the crimes. Next, assuming for the moment that the illegal proceeds/income is at stake, (2) actus reus are considered as the crime of money laundering. In this case, there is no way that a criminal would auspiciously volunteer to pay taxes on illegal income subject to money laundering, and after all, all illegal income that is within the scope of money laundering is subject to tax evasion as a whole.

In summary, while it can be said that the (illegal) income subject to money laundering is in effect automatically subject to tax crimes, the reverse is not necessarily true, and income related to tax evasion is not necessarily also subject to money laundering (Figure 8). What can be said when this fact is projected to the practice, i.e., how would the sharing of information among the agencies concerned work in concrete terms?

In a case where a money laundering crime is committed, the policy significance of the police providing this information to the tax authorities is relatively low. It goes without saying that it would be far better to do so than not, but even if the police investigate both money laundering offense and tax crimes with respect to the same proceeds, the suspect could be prosecuted and thus be deprived of the proceeds only once, not twice. More precisely, in the context of money laundering offenses, the illegal proceeds themselves can be subject to con-

Figure 8: Scope of incomes to be covered by tax evasion and money laundering (conceptual diagram)



Source: Created by the author

[9] Kaneko (2023)

fiscation, while in the context of tax crimes, theoretically only a portion of the income can be deprived, which is to be calculated by respective tax rates, including the penalty tax. It is somewhat analogous to a "conversion kick" in rugby, where the team which scored a "try" is entitled to aim for some extra points. When the proceeds of crime as the source of funds (the principal, if you will) are subject to confiscation as money laundering, the tax evasion portion can also be collected as a concomitant part of the proceeds. In this case, it goes without saying that the confiscation of the principle part is more important from a criminal policy standpoint, and the main objective should be to pursue a prosecution after investigating money laundering offenses as well as the its predicate offenses, thus ultimately reaching out to the criminals.

On the other hand, if the tax authorities, in the course of their examinations, detect income that is suspected of being illegal and charge tax evasion on it as a tax crime, while at the same time providing information to the police authorities and encouraging them to investigate the source of the funds in the first place, greater effects can be expected in terms of criminal policy. At present, there is no entity other than the tax authorities that has the authority to question and inspect the financial status of citizens, whether individuals or corporations, and to conduct such inspections on a regular basis. As such the information that police authorities may obtain from tax authorities could be extremely useful for the purpose of money laundering investigations. Then, the next discussion will be mainly regarding what the nature of such information possessed by the tax authorities shall be.

IV-2. Limitations on provision of information held by tax authorities

In providing information held by the tax authorities, the types of legal restrictions on the provision of such information will vary depending on the subjective purpose of the tax authorities (at the time of collection) and the use of the information as an objective element by other organizations to which the information is provided (here, not limited to the police). Hereafter, each "quadrant" for the types of legal restrictions will be examined, accordingly (Figure 9).

IV-2-1. Article 74-8 of the Act on General Rules for National Taxes

First, it should be clarified that it is not permissible to exercise the right to inquire and investigate during a tax examination for the purpose of gathering information for criminal investigation (Fig. 9 [I]). In the Act on General Rules for National Taxes, after the Articles 74-2 through 74-7-2 which set forth a group of general rules on questioning and examinations among others, it is stated that the collection of information for the purpose of criminal investigation is not permitted as follows;

Act on General Rules for National Taxes
(Interpretation of authority)
Article 74-8. The authority of the relevant official or the regional commissioner of a Regional Taxation Bureau, under Articles 74-2 to 74-7 (authority of the relevant official to ask questions, etc.) or the preceding Article shall not be construed as being granted for criminal investigation.

This provision is a consolidation of the provisions that had been stipulated separately in various tax laws prior to the enactment of the Act on General Rules for National Taxes, and is interpreted as a confirmatory provision that is naturally derived from the purpose of the right of questioning and examination of national tax. This is because, unlike criminal investigations conducted with a warrant from the court, ordinary tax examination is not construed as a warrant search, but is a unique instrument in that they are attributed to the indirect obligation under the administrative penalties. The use of such information in criminal investigations would infringe upon the fundamental human rights guaranteed in criminal judicial proceedings, such as the warrant principle and the guarantee of the right to remain silent (Article 35 and 38 of the Constitution, respectively).[10]

Therefore, no matter how strong the public interest in crime control may be, exercising the authority of questioning and inspection for the purpose of criminal investigation, or in other words, on the premise of sharing information with the police, would be in direct conflict with Article 74-8 of the Act on General Rules for National Taxes, and therefore shall not be allowed. In other words, if the tax authorities have such a subjective intention at the stage of exercising the authority of questioning and examination, such an exercise itself is illegal, and the story ends there. This point is related to the human rights provisions in the criminal procedure set forth in the Constitution, and since the exercise of the authority of questioning and examination by the authorities with a clear intention to circumvent such provisions directly conflicts with norms, it would be difficult even to discuss the possibility of making exceptions to this provision by amending the relevant provisions of the law. On the other hand, in the case where information collected in the course of a tax examination merely as a consequence results in a criminal investigation, the problem is whether the information can be used for criminal investigation purposes, i.e., in the context of money laundering, whether the information can be shared with the police for their investigation (Fig. 9 [II]). As a conclusion, such a case will not conflict with Article 74-8 of the Act on General Rules for National Taxes, but rather be a question of balancing the interests between the tax authorities' duty of confidentiality and their duty to prosecute crimes.

[10] Shiba, Arai, Yamashita, and Mogushi (2019)

Figure 9: Information to be shared and relevant legal restrictions

		Subjective purpose at the time of collection	
		Criminal Investigation	The inherent purpose of taxation
Objective use of the recipient	Criminal Investigation	[I] ・ Not possible according to Article 74-8 of the Act on General Rules ・ Difficult even by a legislative measure	[II] ・ Balancing the confidentiality and the obligation to prosecute ・ Potential window for interpretation for allowing such use only in the case of serious crimes
	Other (Identification of BOs, etc.)		[III] ・ Confidentiality must be lifted on the basis of the law ・ The issue of “privacy of corporations, etc.” as a basic premise

Source: Created by the author

The decision of the Second Petty Bench of the Supreme Court on January 20, 2004 was the turning point in this regard. The outline of the case is as follows: [11]

<Outline of the case>

- In this case, defendant C, who is the effective manager of defendant A maritime transportation corp. (“defendant A”) and representative director of defendant B maritime transportation corp. (“defendant B”), in conspiracy with defendant D, an accountant of the two defendant companies, concealed the income of the two defendant companies: defendant company A evaded a total of JPY 176,416,200 in corporate tax for the period from the fiscal year ended July 1990 to the fiscal year ended July 1992, and defendant company B evaded a total of JPY 116,325,300 in corporate tax for the period from the fiscal year ended January 1991 to the fiscal year ended January 1992, in violation of the Corporation Tax Law.
- The respondents admitted the factual situation of the aforementioned corporate tax evasion from the investigation stage, but since the first trial, they argued that the evidence to prove the fact of the prosecution lacked evidentiary capacity because it was illegally collected

[11] Supreme Court Investigator Commentary, Kawade (2005)

by exercising the authority of questioning and examination for tax purposes as a means of criminal investigation.

In this case, the Supreme Court held that "even if it is possible to assume that the evidence to be obtained and collected could later be used as evidence in a criminal case, this does not immediately make the above-mentioned authority to ask questions or conduct examinations considered to be exercised inconsistent with Article 156 of the said Act (*Author's note: Article 74-8 of the current Act on General Rules for National Taxes). In other words, the fact that information obtained in the course of an investigation later becomes evidence in a criminal case "as a result" does not make the exercise of the authorities of questioning and examination illegal.[12]

Although this decision is directly related to information sharing between examination and criminal investigations branches within the tax authority, it can be assumed that the essence of this decision is also valid with other government agencies. In other words, even if the information is shared with the police, as long as the information is not obtained by the tax authorities in the exercise of their authority for questioning and examination with the intention of using it for criminal purposes from the beginning, it is reasonable to assume that Article 74-8 of the Act on General Rules for National Taxes would not be relevant. In this regard, there is a view that the scope of the Supreme Court's decision extends only to the cases within the tax authorities since even different branches share the same objective of proper enforcement of taxation so long as they belong to the same institution, but such argument lack consistency with the fact that there is a strict firewall between tax examinations and criminal investigations branches, and thus is considered to be an overly self-constricting interpretation of the case.

IV-2-2. Double Confidentiality and Obligation of Public Officials to Prosecute

(1) Relevant laws and regulations

Nevertheless, it is, of course, not acceptable to provide the collected information to other organizations without limitation. What must be considered here is the so-called "double confidentiality" imposed on national tax officials.

In general, national public officials are subject to the following confidentiality obligations;

National Public Service Act
(Obligation to Preserve Secrecy)
Article 100(1) An official must not divulge any secret which may have come to the official's

[12] Sato (2022)

knowledge in the course of duties. This also applies after the official has left the position.
(2)In order for an official to make a statement concerning any secret in the course of duties as a witness, an expert witness or in other capacities provided for by laws and regulations, the official is to require the permission of the head of the competent authority (in the case of a person who has retired, the head of the government agency having jurisdiction over the government position the official held at the time of the retirement or any government position equivalent thereto).
(Omitted)
Article 109. Any person who falls under any of the following items shall be punished by imprisonment with work for not more than one year or a fine of not more than 500,000 yen:
(Omitted)
(xii) any person who has divulged secrets in violation of the provisions of Article 100, paragraph (1) or (2) or Article 106-12, paragraph (1);

This is because, although it is a basic principle that public administration in a democracy should be conducted openly to the public, there are cases in which certain secrets must be kept strictly confidential in order for the administration to properly achieve its objectives, and this Article imposes a duty of confidentiality on officials among other obligations based on such a perspective.[13] Furthermore, a specific duty of confidentiality is imposed on national tax officials under the National Tax Agency Act as follows, and the penalty for breaching this duty is doubled.

Act on General Rules for National Taxes
Article 127 Investigation concerning national tax (including investigation for the purpose of hearing cases pertaining to appeals and investigation of criminal cases prescribed in Article 131(1) (questioning, inspection or retention, etc.)) or the Act on the Non-Taxation of Income Tax, etc. for Foreign Residents, etc. Based on the Principle of Reciprocity (Act No. 144 of 1962) or the Act on Special Provisions, etc. of the Income Tax Act, Corporation Tax Act and Local Tax Act in conjunction with the implementation of tax conventions, etc., or the collection of national tax or a person who was engaged in the collection of taxes in the counterparty country, etc. based on the provisions of the same Act, if he/she divulges or misappropriates any secret that he/she has come to know in the course of performing these duties, he/she shall be punished by imprisonment with work for not more than two years or a fine of not more than one million yen.

[13] Morizono, Yoshida, and Onishi (2015)

The reason why such a heavy duty of confidentiality is imposed on national tax officials is that in the course of their duties they are in a position to obtain highly confidential information of taxpayers such as their financial status, and that under the tax return system the trust between taxpayers and the authorities is extremely important. If this relationship is lost, it becomes impossible to receive appropriate information with the cooperation from taxpayers. This requirement of confidentiality is fundamental, and not only in Japan but also in other countries, tax information is given a special confidentiality in one way or the other. In discussing the sharing of information from tax authorities, we cannot fail to fully recognize the weight of this legal restriction.

On the other hand, it is another matter whether such a heavy obligation of confidentiality should be interpreted as absolute. In fact, under the Code of Criminal Procedure, public officials are obligated to report crimes.

Code of Criminal Procedure
Article 239(1) Any person who believes that an offense has been committed may file an accusation.
(2) A government official or local government official must file an accusation when they believe an offense has been committed.

This provision was established "to impose on various administrative organizations the obligation to cooperate in the operation of criminal justice in order to ensure its proper administration, with the expectation that their functions be more effectively performed through administrative practices backed by accusations"[14], and "since it is important that various administrative organizations work together to demonstrate their administrative functions as a single unit, and it is essential for various administrative organizations to cooperate closely in the proper conduct of administrative actions related to criminal matters, such as the investigation of crimes and the exercise of prosecutorial authority".[15] Historically, this provision was regarded merely as an advisory provision, with the view that violations of this provision would not directly constitute grounds for disciplinary action. However, such interpretation is now of a minority view. In fact, the purpose of this provision is deeply rooted in a strong public interest, and its functions should be fully ensured.

Here, national tax officials, as public servants, are legally required to discharge conflicting obligations, namely the aggravated duty of confidentiality and a duty to file an accusation on potential crimes, depending on the circumstances. The law does not clearly specify which

[14] Kawakami, Nakayama, Yoshida, Harada, Kawamura, and Watanabe (2012)
[15] Matsumoto, Tsuchimoto, Ikeda, Kawamura, and Sakamaki (2022)

obligation should be prioritized in any given situation. Therefore, at least at this point in time, this issue is left open to interpretation.

(2) Review of Existing Literatures

Traditionally, the common view on this point has been interpreting the requirement of confidentiality outweigh the obligation to file an accusation.[16] However, there seems room for debate as to whether this view is still valid in light of the intent of the Supreme Court decision in 2004, and whether it is appropriate, even in general terms, to interpret the decision as automatically giving priority to one over the other when there are mutually-conflicting legal obligations, without having to go through the categorization of the subject matter and the resulting balance of interests.[17]

Furthermore, from a practical standpoint, at least with respect to serious crimes, taxpayers who may be engaged in such crimes are not likely to be collaborative taxpayers in the first place. There may be room for reconsideration as to how much weight should be given to such a "relationship of trust" with taxpayers, as it is fundamentally a policy judgment.

In fact, more recently, several studies have examined this point, and in many cases, the conclusion has not been drawn that confidentiality should be given the priority, at least in a uniform manner.

Specifically, as an approach from the administrative law, Ohashi (2019), although in a more general context of duty of confidentiality not limited to the tax laws, states that "a possible criticism against putting priority on the obligation to file accusations is that the administrative investigation may be used for criminal investigation purposes. However, an interpretation that would refrain tax officials from filing accusations on criminal cases on the grounds of a public official's duty of confidentiality, even in cases where evidence of a crime has been discovered, seems to lack a rationale." Similarly, Sakurai and Hashimoto (2019) state that "it cannot be excluded that prima facie evidence of crime could be found in the course of ad-

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[16] "In addition, since the secrets of taxpayers, etc. may be scattered throughout tax returns and investigations, it is consistent with the purpose of the law to interpret that these documents, in principle, should not be leaked from the tax administration to which the official belongs, in relation to their duty of confidentiality. Therefore, it should be understood that tax administration should not respond to requests from other administrative agencies or national organizations for submission, disclosure, or inspection of these documents. This can be called the "principle of prohibition of disclosure of tax information". The exception to this is when disclosure is required or inspection is permitted by law. In such cases, the obligation of confidentiality is lifted, but even in such cases, due care must be taken to ensure that the taxpayer's secrets are not divulged to a greater extent than necessary. When a para-judicial request for review is filed against the finalization or collection of a tax, the original taxing authority may submit these documents to the judge in charge (see Article 96(2) of the Tax Code)." (Kaneko, 2021) Note that the concrete examples of "the cases ... permitted by law" are depicted as "Article 58-4 of the Benefit, Article 29 of the Public Assistance Act, Article 28 of the Child Allowance, etc.", and it is considered that general provisions such as Article 239 of the Code of Criminal Procedure are outside of the assumption.

[17] "It must be said that these views are not consistent with the precedents to be discussed later, and that the excessive emphasis on the distinction between the two may result in an inability to use materials obtained through tax examinations and to initiate criminal investigations on the side of the investigation department, which would be problematic from the perspective of the proper exercise of penal authority over tax offenses, and therefore, such views may not be supported from a practical viewpoint." (Yamada, 2006)

ministrative examinations, and in practice, it is not always desirable to completely eliminate the possibility of benefiting from such findings", and Sowa (2011) also states that the conflict between the two obligations "...is an issue that cannot be concluded in a uniform manner. However, as a matter of principle, it should be understood that if a public official discovers a potential criminal offense in the course of an administrative investigation and then files an accusation, it generally does not constitute a breach of the duty of confidentiality, but rather it should be recognized as a legitimate act".

In a discussion from the standpoint of tax laws, Yoshimura (2010) states, "Even if we accept the element of taxpayers' trust as an essential policy interest worthy enough to be taken into consideration, it is difficult to believe that this interest uniformly leads to a prohibition on the provision of information. As seen in the Internal Revenue Code (*Author's note: U.S. tax law), it would be desirable to identify the appropriate point of equilibrium through legislation, considering factors such as whether the use of the information provided is related to tax administration or not, and whether the information is derived from the taxpayer's declaration." Sasakura (2007) also states, "there seems to be no general principle that prohibits the use of information and materials obtained through administrative examinations in criminal proceedings. …There are certainly cases in which such use shall be prohibited or restricted on individual and specific grounds. However, when considering the existence of such restrictions, it is not enough to simply focus on the differences in legal procedures that dictate administrative examinations and criminal proceedings; it is necessary to be clearly aware that, depending on from what principles those differences stem from, such differences may or may not be the basis for restrictions on use. It is also stated in Sasakura (2017), that "For example, there may be a view that corporate crimes and crimes such as bribery, which are to some extent naturally expected to be discovered in the course of tax examinations, may be subject to information sharing. Likewise, due consideration should be given as to whether confidentiality should be given priority even to accusation of serious crimes that may cause harm to human life or body. In such cases, as mentioned above, it would not be appropriate to leave the judgment to the taxing authority, and with the view to clearly delineating the limit of provision of information, an appropriate legal provision should be set forth".

In light of the above, it is now considered to be a natural interpretation of the law that, at least in certain cases, the obligation to file accusations under the Code of Criminal Procedure shall be prioritized over the duty of confidentiality of tax officials, and that it is therefore possible to provide information related to the police function of the state to other agencies. In this regard, it should be noted that, as mentioned above, some scholars point out the necessity of legislation. However, such claims cannot be interpreted to call for such legislation as an absolute precondition for the provision of information, but rather, it is only to clarify the criteria for balancing the two policy interests. In any case, this paper is not intended to draw

firm conclusions on this sensitive issue from a general and universal perspective – it is only an attempt to determine, on the assumption that the provision of such information is permitted to a certain extent in accordance with the current trend of academic theory (even if it is accompanied by a request for clarification of requirements through legislation), the extent to which such information provision should be permitted, and how this relates to the other policy areas, namely, money laundering regulation.

In this regard, Nishizumi (2019), in discussing the relationship between taxation and money laundering regulations, states that the duty of confidentiality under the Act on General Rules for National Taxes basically takes precedence over the duty to prosecute under the Code of Criminal Procedure and that "However, in cases where there is a serious risk on public safety if taxpayers' secrets are not disclosed, there is a very strong public demand to file an accusation on the matter and seek punishment for the culprit. Therefore, the duty of confidentiality is considered not to be violated by the filing of the accusation. Thus, whether or not the duty of confidentiality takes precedence over the duty to file a complaint is to be determined by comprehensively and carefully examining the seriousness of the crime, the reasonableness of the belief that a crime be committed, and the impact on future administrative operations, etc., in each individual case". While this discussion is generally sensible, it is still necessary to rearrange and reconstruct the purpose of this statement.

(3) Predicate Offense for Money Laundering and Provision of Information

As a premise, it should be recognized that the Organized Crime Punishment Act (and the Narcotics Special Provisions Act) has already delineated the outer boundaries of what types of crimes are "serious crimes" that seriously undermine the public interest of the society, in the form of the types of crimes that are defined to be the predicate offenses for the crime of money laundering. As mentioned above, although the money laundering regulation is attributed to, in its origin, a system designed to prevent organized crimes, the "organizational aspect" of the predicate offense is not required in the strict sense of the word at present. On the other hand, the purpose of the money laundering regulation is to strengthen the control of organized crimes by defining the types of crimes that are highly necessary to be suppressed from the viewpoint of public interest in criminal policy within the scope of the predicate offenses and by making full use of both financial investigation and confiscation. The list of predicate offenses is nothing but a list of "serious crimes" as a result of selecting targets from such a viewpoint. If so, it would be more difficult to find a necessity for a different interpretation of the term "serious crimes" within a single domestic legal system.

To summarize the above discussion, on the premise that the tax authorities are allowed to provide a certain range of information to other organizations after a test of balance of interests, the information obtained by tax officials in the course of their examinations would be

scrutinized by the tax authorities, if the tax authorities suspect that the information obtained in the process of examinations by the national tax authorities may be connected to a crime that falls under any of the serious crimes listed in the Organized Crime Punishment Act (other than tax crimes), the obligation to file a complaint under the Code of Criminal Procedure may be given priority, and the confidentiality obligation may be lifted to that extent. The same may be applied to information obtained through criminal investigations. Also, whether or not the police are clearly aware of it, the information actually provided by the police to the tax authorities should be considered, at least conceptually, to have been provided to the tax authorities after passing the above-mentioned test of balancing the interests of the duty of confidentiality and the duty to accuse. As mentioned above, the "double duty of confidentiality" is unique to national tax officials, but since police officials are also national public officials, they must at least be subject to a general duty of confidentiality, and if they provide their information to tax authorities, which are by definition other organizations, the duty of confidentiality must have been partially lifted (due to a superior public interest demand). The tax crimes enumerated in the list of predicate offenses can be evaluated here as accusations of serious crimes in the sense that the tax authorities are the recipients of the information and the police, as the sender of information, are urged to act on their behalf.

However, one of the possible refutations of the above argument is whether it is possible to maintain the legality of the subjective purpose of the tax authorities at the time of collection, i.e., even if they have a hidden purpose of criminal investigation, it may be difficult to recognize it in reality. The context in which this point shall be set forth is not limited to information provision to other organizations such as the police, but it could potentially be an issue even in situations where the information collected in the course of tax examinations is to be used as judicial evidence by the criminal investigation department, which is already considered to be permissible under the law as mentioned above. In this regard, it goes without saying that if such subjective intent is revealed in the course of judicial proceedings, the information provided will lose its evidentiary capacity, and in terms of its operation and execution, adequate safeguard measures should be established.

As a side note, one common argument for resolving the difficulty of information sharing is to propose the establishment of a new organization to take on the mandate of information sharing or the creation of a coordinating body ("hub center") among existing organizations. However, such an idea is somewhat shortsighted and lacks a firm rationale. This is because the issue at stake here is the constitutional norm of due process for the guarantee of human rights and the restrictions on the handling of information by state organizations based on such norm, and it is not possible to circumvent the essential question of how far information obtained by state organizations can be used in criminal investigations, regardless of what form the organizations may superficially take on such task. In other words, if this point can be le-

gally sorted out, there is no need to change the organizational setup at a great administrative cost.

IV-2-3. Other Information Gathering (BO: Beneficial Owner)

(1) Problem of verification of BO

Up to this point, we have discussed the issue of tax authorities providing information that contributes to the detection of criminal offenses, typically when there is an entry in the books of accounts submitted at the place of examination that should be regarded as the proceeds of criminal funds, with the aim of facilitating a specific investigation. However, this is a rather special case of information exchange between administrative agencies, in which the information is assumed to contribute to a specific criminal investigation. As a more common form of information sharing, it is necessary to consider general information that do not assume a specific criminal investigation (Fig. 9 [III]). Because of their nature, they are not necessarily provided or shared with the police.

Although theoretically such provision could include a wide variety of information, one type of information that could be duly considered for the National Tax Agency (NTA) to collect and provide continuously to the relevant authorities is information related to beneficial ownership (BO) of corporations.

BO is a control structure that is considered to be substantially exerted over the legal arrangement of a corporation, trust, partnership, etc., through multilayered capital holdings and the exercise of influence over decision-making in a manner that is not limited to such holdings. For a long time, mainly in the field of taxation, a company without substance for the purpose of tax avoidance has been called a “paper company,” and this can be seen as a type of BO problem. In the area of anti-money laundering, this issue also occupies a very significant position. This is because, even if a wide range of countermeasures are carefully prepared as described above, if the ultimate controlling party of a corporation cannot be identified, the countermeasures as a whole are tantamount to a bottomless pit.

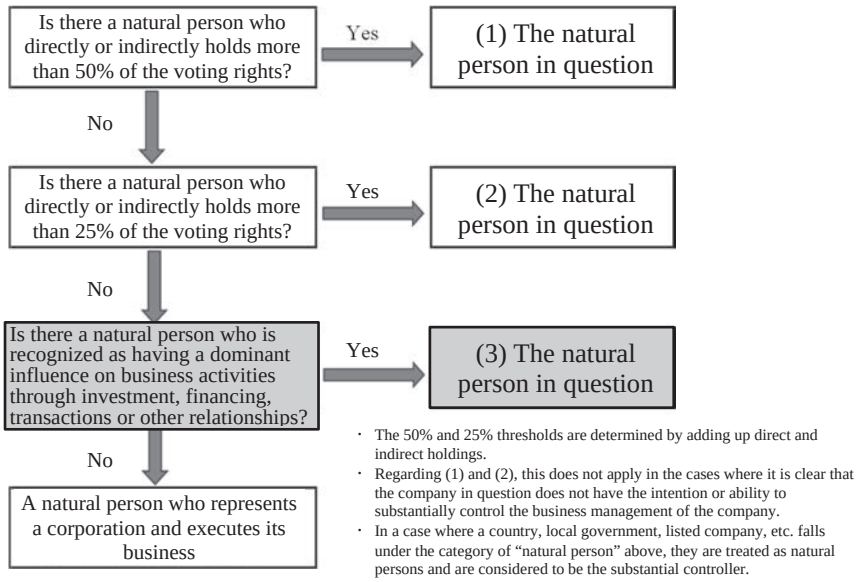
On the other hand, it is not so difficult for a person who intends to use a corporation as a platform for tax avoidance or money laundering to intentionally construct a complicated capital relationship and make the control structure difficult to see. Furthermore, even if there is no capital relationship at all, in reality, a corporation can be easily controlled by an individual or another entity while remaining hidden in the background, and in such cases, it is extremely difficult for the authorities to detect it. It is no exaggeration to say that the problem of BO is an area where little progress has been made, not only in Japan but also in the international community as a whole, in terms of countermeasures in an essential sense. It may be an overstatement to say so, but as long as human beings have developed markets through the generous recognition of legal entities and legal arrangements, the problem of opaqueness of BOs

as a negative aspect of such recognition is what our society is chronically haunted by.

In the FATF standards, BOs are also positioned as one of the core issues. Specifically, Recommendation 24 and Recommendation 25 state that the transparency of legal entities and legal arrangements, respectively, should be improved.[18]

Furthermore, one of the 11 Immediate Outcomes is entirely devoted to the problem of BO issue,[19] which clearly demonstrates the importance to address this problem in the context of anti-money laundering measures.

Figure 10: Flow chart for determining the BO under the Act on Prevention of Transfer of Criminal Proceeds



Source: Shirai, Haga, Watanabe (2022)

[18] 24. Transparency and beneficial ownership of legal persons
Countries should assess the risks of misuse of legal persons for money laundering or terrorist financing, and take measures to prevent their misuse. Countries should ensure that there is adequate, accurate and up-to-date information on the beneficial ownership and control of legal persons that can be obtained or accessed rapidly and efficiently by competent authorities, through either a register of beneficial ownership or an alternative mechanism. Countries should not permit legal persons to issue new bearer shares or bearer share warrants, and take measures to prevent the misuse of existing bearer shares and bearer share warrants. Countries should take effective measures to ensure that nominee shareholders and directors are not misused for money laundering or terrorist financing. Countries should consider facilitating access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.
25. Transparency and beneficial ownership of legal arrangements
Countries should assess the risks of the misuse of legal arrangements for money laundering or terrorist financing and take measures to prevent their misuse. In particular, countries should ensure that there is adequate, accurate and up-to-date information on express trusts and other similar legal arrangements including information on the settlor(s), trustee(s)and beneficiary(ies), that can be obtained or accessed efficiently and in a timely manner by competent authorities. Countries should consider facilitating access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

[19] Immediate Outcome 5
Legal persons and arrangements are prevented from misuse for money laundering or terrorist financing, and information on their beneficial ownership is available to competent authorities without impediments.

In Japan, the Act on Prevention of Transfer of Criminal Proceeds ("the Criminal Proceeds Act" or "APTCP") defines the concept of "such person to have substantial control of the business" (Figure 10). However, in the practical situation, business operators are required to try to identify the natural person who is actually in charge of conducting specified transaction by using information services provided by private vendors, etc., and it is extremely difficult to identify the relationship of substantial control that does not involve a capital relationship (shaded area in the Figure).

(2) Policy responses in Japan and their limitations

Under these circumstances, the Ministry of Justice launched the BO declaration system at the time of incorporation of corporations at the registry office at the end of January 2022, following the discussions in the "The Independent Experts' Group on the New Measures to Record and Verify Information Regarding Beneficial Owners of Legal Persons at the Commercial Registries" in which the author was also involved as the represent of the Ministry of Finance. This system is based on the principle that "upon the request of a joint-stock company (including a special limited liability company), the registrar of the commercial registry office will keep the list of BO (a document containing information on the holding of voting rights, which constitutes the definition of BO) prepared by the company, after verifying its contents with the prescribed attached document and will issue a copy with a certification statement from the registrar". The system is "free of charge and can be requested by postal mail".[20] This is undoubtedly a big step forward as a measure to identify BOs.

However, the scope of this system is limited to control through voting rights, and does not cover "substantial control" in the true sense of the word, i.e., "natural persons who have a controlling influence on business activities through investments, loans, transactions, and other relationships," as mentioned above. This is based on a voluntary application on the part of the legal person (corporation), and is neither enforceable nor guaranteed as to its continued validity. In other words, at present, no organization has the authority to verify the actual business status of a corporation beyond its capital relationship, and there is no mechanism for renewing a BO once filed or for verifying the BO of an existing corporation. The major concern in this situation is the possibility that this system be abused as a bad "endorsement" by a malicious corporation to cover up the actual substantial control relationship. Understanding BOs is extremely difficult, and it is not possible to fill the gap all at once. In this sense, it is necessary to gradually "fill in the outer moat", as we express it in the Japanese language, but at the same time, it is necessary to be fully aware of its limitations and the negative aspects it may have.

[20] Ministry of Justice website https://www.moj.go.jp/MINJI/minji06_00116.html#anchor1

Then, as a future policy issue, what methods can be considered to promote BO transparency, including non-voting control relationships and not relying on self-declaration? Consolidating BO information solely at the registry office would be, even building upon the basis of the above ongoing efforts, an unrealistic option considering the administrative costs, given the limited capacity of the organization and personnel of the registry office. On the other hand, if the tax authorities are able share with registry office the BO information which they collected on a constant basis as part of their routine examination process, the above approach may have a more effective meaning. As such information is not directly related to a crime, the aforementioned obligation to file a complaint on the ground of the Code of Criminal Procedure is not relevant in this context. Therefore, it is considered that the obligation of confidentiality should be lifted by the clear text of the law with regard to the sharing of information for such general purposes.

(3) Unexplored realm of "privacy of corporations"

Meanwhile, it is a separate issue whether any information can be subject to provision in such a permanent manner so long as a formal provision for termination of confidentiality obligation is established under the law. In this regard, it is considered a precondition that BO information be basically positioned as public information in addition to the statutory lifting of confidentiality obligation. In other words, BO information, like corporate registration information, can be subject to information sharing among authorities only on the premise that it is or should be open to all, and if it is based on the premise that such information is subject to strict protection, like personal information that is related to privacy, then it is not possible in the first place for such information to be shared on a permanent basis. This means that, as a necessary condition for developing this issue, it is essential to consider the extent to which the "privacy of corporations" including BO information (it may be more accurate to refer to it as the privacy of individuals who own and manage them, however, we call it as such for the sake of convenience) is subject to disclosure and to what extent it should be protected. Nonetheless, although this is a very general and universal question concerning the main actors of the economy, such as corporations, I have the impression that this is a vast unexplored area that has not been discussed very much, not only in Japan but also elsewhere in the world.

Unfortunately, it is far beyond the scope of this paper to delve into such discussion, but the few studies that exist point out the issue of "privacy" of corporations and other types of legal entities being used as a cover for criminal activities. These studies point out the advantage of such privacy protection in the sense that it protects the owner/manager from undue social pressure and promotes economic activities.[21] In fact, as mentioned above, the BO prob-

[21] Moon (2022)

lem is a fundamental problem from the viewpoint of anti-money laundering, but as a matter of course, there are far more corporations engaged in legitimate economic activities than those used for illegal purposes such as tax evasion and money laundering, and the treatment of such information should be discussed in a fair and equitable manner. This requires consideration from many aspects, such as the state of governance over corporations and their position in the economy and society.[22]

The EU has been making the most advanced efforts in the world to ensure the transparency of BOs. The EU has been revising the Anti-Money Laundering Directive (AMLD), the norm that the member states in the region are obliged to transpose into their domestic laws, and the fifth revision in 2018 stipulates that each country should collect BO information and make it available to the public. In accordance with this, several countries in the region have actually implemented such policy. The fundamental idea is that such extensive disclosure will enable civil society to monitor and ensure the appropriateness of the information. I have already mentioned that the anti-money laundering framework is an unprecedented system of burden sharing between the public and private sectors. In this case, the word "private" implies businesses that are expected to perform gatekeeper functions, such as financial institutions, and the types of businesses included in the framework are expanding. However, the EU is trying to expand the scope of sharing not only to gatekeeper operators but also to civil society in general in response to the need of identifying BOs, which is the most challenging aspect of all anti-money laundering measures.

However, a major event occurred that hampered their efforts. The European Court of Justice (ECJ) ruled that this form of disclosure was not strictly necessary in light of the policy objectives and was invalid because it violated the fundamental right to protect information as stipulated in the Charter.[23] As is well known, Europe is at the forefront of efforts against money laundering, and at the same time, Europe is a region whose historical history of taking a very strict stance on the protection of human rights, especially privacy, which in itself is part of its identity of integration. The ongoing conflict between these two policy imperatives in the EU is of great interest to Japan, and it will be necessary to closely monitor the outcome of it and to deepen the debate within Japan. Therefore, it seems a bit jumpy to discuss information sharing among authorities in this quadrant at this point, even from the author's point of view.

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[22] Masui (2018) discusses the release of corporate BO information from the perspective of taxpayer information.

[23] ECJ (2022)

IV-3. Addendum: The Significance of Making Criminalization of Tax Crimes as a Money Laundering Predicate Offense

The discussion up to this point has referred several times to the "criminalization of tax crimes as a money laundering predicate offense," but it seems that there has not been much in-depth discussion, either internationally or domestically, as to what exactly such criminalization would mean. In addition, there are no studies that have elaborated what changes in law enforcement would be brought about by making tax crimes a predicate offense for money laundering in Japan.

Theoretically, the proceeds of the crime of "tax evasion" are the tax liabilities evaded. Since the fraud penalty is an administrative penalty imposed by the tax authorities based on the tax evasion, and is a result of the tax evasion, it is not appropriate to include it as criminal proceeds, since it cannot be said that the proceeds were earned from the beginning.

Let us assume that the income is the result of a legitimate economic activity. If tax evasion is committed with respect to such income, as mentioned above, concealment of such income in the crime of money laundering is considered to be a "deception or other wrongful act" under the tax-related laws and regulations.

In this case, however, there is no problem for the tax authorities to handle the case, and there is no need for the police to treat it as a money laundering crime. In fact, since it is difficult to treat the portion of taxable income that is subject to fraud penalty as criminal proceeds, the tax authorities should handle the case. Moreover, it is difficult to assume that the police, rather than the tax authorities, would seize the initial clue to a tax evasion crime in the first place.

Next, let us assume that the subject income is illegal income. In most cases, the police will basically detect potential crimes other than tax crimes, such as drug crimes. Naturally, if it is possible to investigate and establish a case for money laundering on the proceeds of the drug offense as a predicate offense, it should be conducted on the side of the police. In that case, should the police also confiscate the portion of the proceeds from the drug offense that is generating income and thus evading tax liabilities? Also, in this case, it would be difficult to confiscate the portion of tax evasion as illegal earnings, and since the fact of tax evasion must be proven in light of tax-related laws and regulations, the handling of such cases should be left to the tax authorities. In concrete terms, it is appropriate for the police to provide information in the form of a "report" to the tax authorities.

In this light, it is safe to say that, at least based on Japan's institutional structure, the criminalization of tax crimes as predicate offenses has little substantive significance in legal context. If the criminalization of tax crimes as predicate offenses has any significance, it is in ensuring flexibility in procedural law, namely, the fact that tax crimes, along with other

types of crimes, are positioned as "serious crimes" under the Organized Crime Punishment Act, which makes it easier for the police to provide information to the tax authorities. In other words, the above-mentioned conflict between the duty of confidentiality and the duty to prosecute crimes occurs conceptually every day even for the police, but the positioning of tax crimes as "serious crimes" reinforces the argument that the police can provide relevant information to the tax authorities in cases where taxpayers are suspected of committing tax crimes, in terms of the balance of interests. However, it is doubtful whether this is a prerequisite for the provision of information from the police to the tax authorities in light of the discussion in the previous section. In particular, with regard to the former, the balance of interests is only a matter of substantive interpretation, and it is hard to believe that criminalization of predicate offense is essential.

After all, at least in Japan, since the tax authorities are uniquely responsible for investigating tax crimes and the police are uniquely responsible for investigating other crimes, there is no practical benefit in creating a superimposed concept that crosses over each other. If we can put it in a very conceptual way, it is possible that the "fruits" of the proceeds of a tax crime (i.e., the reinvestment of money obtained through tax evasion from which secondary proceeds are obtained) could be subject to confiscation as criminal proceeds only if the tax crime is made a predicate offense. However, such a financial linkage would be practically impossible to be construed. In light of the above, although it was politically meaningful for tax crimes to fall within the scope of money laundering crimes in responding to the banner for "making tax crimes a predicate offense," which emerged as a kind of slogan from international discussions, it is almost a formalistic response, at least under the legal system and practice in Japan. As we have seen in detail, the extent to which the tax authorities, the police, and other agencies can exercise their authority and exchange information in the relationship between tax crimes and money laundering crimes ultimately depends on the interpretation of the relevant organization and action laws to outline the limits.

However, it is not clear to what extent the above argument is applicable internationally. There are many variations in the scope of auspices of both the police and the tax authorities and in the division of roles between them, and it is assumed that in some countries it may be appropriate for the police to handle even tax crimes as money laundering crimes in order to meet criminal policy requirements. In addition, depending on the legal system of each country, tax crimes may be positioned as a prerequisite crime, which facilitates information sharing between the two authorities. However, a detailed comparative study of the legal systems, including the practical handling of tax crimes which is not necessarily codified in law, would be necessary to clarify the true nature of the tax crimes, and is far beyond the scope of this paper.

V. Deprivation of Criminal Proceeds (Ex Post Stage)

Finally, I would like to briefly touch on the last stage of co-operation, the deprivation of the proceeds of crime. This point is not so complicated in terms of organization of discussions, but it may be no exaggeration to say that it is the subject of the greatest interest in society in general. To put it simply, the main issue is whether the deprivation of the proceeds of crime should be realized through more aggressive taxation by the tax authorities.

In this regard, the Japan Federation of Bar Associations issued a statement in February 2017[24] calling for stronger taxation of gang top-ups, the purpose of which is summarized in the opening paragraph below:

"The Federation urges the relevant authorities concerning taxation to strengthen the taxation of top-up payments to representatives (the head of a gang, such as a group leader, boss, chairman, or director, etc.) (hereinafter referred to simply as "representative (head of the gang)" or simply "head") of organized crime groups as defined in Article 2, Item 2 of the Act on Prevention of Unjust Acts by Organized Crime Group Members (Act No. 77 of 1991). For this purpose, the relevant authorities are required to exercise the right of inquiry and inspection, etc., based on the law, to ascertain the actual situation and to take appropriate taxation measures based on their results."

In fact, Satoru Nomura, the fifth president of Kudo-kai, a specifically-designated organized crime group, was sentenced to death by the Fukuoka District Court in 2021, and was found to have violated the Murder and Firearms Act, as well as the Income Tax Act, since part of the money paid was recognized as personal income. Therefore, it is a fact that taxation plays a certain role in depriving Criminal Proceeds in the real world, and this point is in line with the history of the fight against organized crime in the United States mentioned above. In the Interpretive Note of the FATF Recommendation, it is also stated that in the recent amendment, the tax authorities are required to recover assets from the proceeds of crime (with a view to restitution to the victims).[25]

Whether or not this can function as a substitute for deprivation of the proceeds of crime is a separate issue. First, as a basic premise, I would have to reiterate that even illegal proceeds are taxable income, and there is no difference in the treatment of such income from legal proceeds. Therefore, it is only natural that proper taxation should be implemented even

[24] Japan Federation of Bar Associations (2017)

[25] INTERPRETIVE NOTE TO RECOMMENDATION 4 (CONFISCATION AND PROVISIONAL MEASURES)
E. Asset recovery and tax authorities
13. Countries should enable their competent authorities and tax authorities to cooperate and, where appropriate, coordinate and share information domestically with a view to enhancing asset recovery efforts and supporting the identification of criminal property. This could, in appropriate cases, where there is a tax liability, support the recovery of such liabilities by the tax authorities.

for illegal profits. Needless to say, however, taxation is not aimed at deprivation of criminal proceeds, and its monetary scope is also limited. Therefore, it is difficult for taxation by itself to play a role in fulfilling the policy objective of deprivation of criminal proceeds, and neither should it be expected to do so.[26]

However, it is a major problem that there is no system that addresses squarely the deprivation of the proceeds of crime. In this regard, there exists forfeiture as an additional criminal penalty.

Penal Code
(Confiscation)
Article 19 (1) The following objects may be confiscated:
(i) an object which is used as a key component of a criminal act;
(ii) an object used or intended for use in the commission of a criminal act;
(iii) an object produced or acquired by means of a criminal act or an object acquired as reward for a criminal act;
(iv) an object received in exchange for the object set forth in the preceding item.
(2) An object set forth in the preceding paragraph may only be confiscated if it does not belong to a person other than the criminal; provided, however, that it may be confiscated if a person other than the criminal acquires the object after the crime with knowledge of the applicability of the preceding items.

However, this is only a type of criminal punishment, and therefore, by definition, it is a "disposition against the person" on the assumption that the offender will be convicted. Conversely, if the offender is not indicted or convicted for lack of culpability, confiscation naturally lacks its basis and cannot be invoked. This is a serious problem in Japan, where prosecutors have a great deal of discretion in bringing cases to trial under the principle of "convenience in prosecution" doctrine, and a large percentage of cases referred to prosecutors are actually dropped. The original idea of creating the money laundering crime, which is to shift the focus of control from individual actors to the flow of money and thereby prevent organized crime, is fundamentally incompatible with confiscation in our domestic legal

[26] On the other hand, the measure which imposes a corporate tax amount equal to 40% of the amount of such expenditures (in addition to the regular corporate tax amount) on expenditures for corporate unrestricted funds (Article 62 of the Act on Special Measures Concerning Taxation), which is not a deprivation of illegal profits itself but was introduced for expenditures from 1994 to the end of fiscal year 2014 and subsequently abolished, was a response to criticism that unrestricted corporate funds have become a breeding ground for illicit funds such as illegal contributions and bribes in connection with so-called general contractor corruption, etc. (Kaneko, 2023), and it is explained that such expenditures "are likely to lead to illegal or unjustified expenditures, which in turn may impede fair trade, and therefore were established to curb such expenditures as much as possible" (House of Representatives Questionnaire, 2016), and in this respect, it is considered as a step forward in responding to a similar policy objective.

system, which is a punishment for a person by default. Therefore, the confiscation system, which gives the impression that it has a relative affinity with deprivation of criminal proceeds compared to taxation, is not much different from taxation in that it is essentially a tool with a completely different purpose and objective, and it may not fundamentally fulfill the policy objective of the suppression of organized crime.

The above discussion is a problem that not only Japan but also other countries are aware of although to varying degrees, and for this reason, the introduction and expansion of administrative deprivation of proceeds of crime is currently being discussed by the international community as a whole. Another element added in the recent revision of the above-mentioned FATF Recommendation Interpretive Note is a reference to the effect that each country should introduce such a deprivation system, albeit with the reservation that "as long as it is consistent with the basic principles of domestic law".[27]

This is conventionally referred to as Non-Conviction Based Confiscations (NCBC). In Japan, the word "confiscation" tends to be directly associated with the abovementioned criminal punishment, and if the word "non-conviction based confiscation" is used, it gives the impression that it is an overly draconian approach. However, the implication of this argument is that the most important measure in the fight against organized crime, which is deprivation of criminal proceeds, needs to be reinforced but not so much by relying on ready-made tools – rather, a means to address the issue more squarely should be developed.

On the other hand, it is a matter of course that such a system is a serious restriction on the property rights of the people, and if it is integrated as part of administrative procedures, issues such as ensuring due process and transparency will emerge as human rights issues related to the Constitutional Law. Therefore, it is most important to take time to design the system and to foster public understanding. The growing debate on the role of taxation in the deprivation of the proceeds of crime is a reflection of the fact that Japan has come to a stage where it should consider the introduction of an institutional framework like the one described above in line with the international community.[28]

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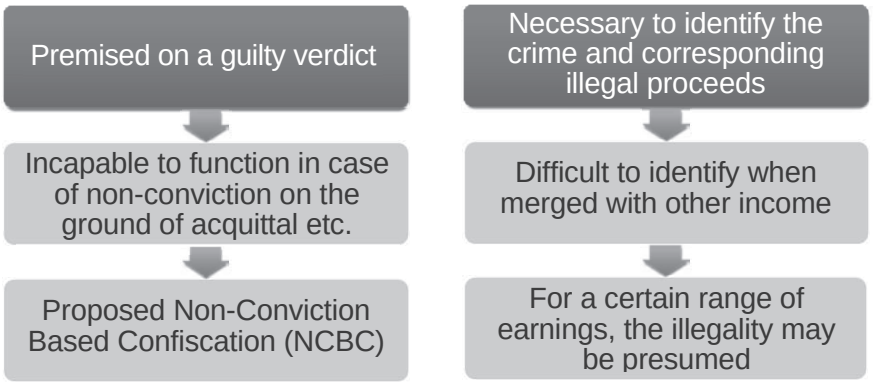
[27] INTERPRETIVE NOTE TO RECOMMENDATION 4 (CONFISCATION AND PROVISIONAL MEASURES)
D. Confiscation
11. Countries should have measures, including legislative measures, to enable the confiscation of criminal property without requiring a criminal conviction (non-conviction-based confiscation) in relation to a case involving money laundering, predicate offenses or terrorism financing, to the extent that such a requirement is consistent with fundamental principles of domestic law. Countries have flexibility in how they implement non-conviction-based confiscation.

[28] Recently, there have been very active studies on this area by both domestic and international comparative law approaches. For example, Sato, Kubo, Yokohama, Kawasaki, and Kimura (2022), and Shibuya (2023).

Figure 11: Issues surrounding Criminal Confiscation



Source: Noda (2023)

VI. Conclusion

The above discussion of the relationship between taxation and money laundering is only a bird's-eye view and framework to serve as a basis for discussion, and is not intended to lead to any definitive conclusions. Due to lack of space, time, and above all, the knowledge of the author, it is difficult to say that this paper had elaborated each of the issues to a satisfactory depth, and would like to leave them for further discussion and examination. In any case, it is indisputable that it is of utmost importance to first sort out and clarify the issues involved in each of the policy demands in order to achieve a system design that ensures balance of rights through sufficient amount of discussion. I hope that this article would serve as a milestone in such process.

References

Hiroshi Ozaki, Kohei Noda and Takashi Nakazaki (eds.) (2022), "Commentary on the FATF Recommendations: Japan's Measures against Financial Crimes from the Perspective of International Standards", Chuokeizai-sha, Inc.

Kaneko, Hiroshi (2021), "Tax Law (24th Edition)," Kobundo

Kawade, Toshihiro (2005), "Tax Law Examination Authority and Evidence in Criminal Cases", Juristo, No.1291, Yuhikaku, pp.199-201

Kawakami, K., Nakayama, Y., Furuta, Y., Harada, K., Kawamura, H., and Watanabe, S. (2012), Grand Commentary on the Code of Criminal Procedure (2nd Edition) Vol. 4, Seirin Shobo

Masato Shirai, Tsuneto Haga, Masayuki Watanabe (2022), "Money Laundering: Guidebook for Anti-Social Forces (Revised Edition) - Practical Response to the 2021 FSA Guidelines",

Daiichi Hoki

Masui, Yoshihiro (2017), “Tax Investigation and National Tax Criminal Investigation”, Gyosei hanrei hyakusen (7th edition), Yuhikaku, pp.206-207

Masui, Yoshihiro (2017), “‘Global Tax Transparency’ and Trusts”, in Yoshihisa Nomi, Norio Higuchi and Hideki Kanda (eds.), The New Era of Trust Legislation: Contemporary Development and Future Prospects of Trusts, Kobundo, pp.363-378

Masui, Yoshihiro (2018), “Disclosure of Taxpayer Information”, in Hiroshi Kaneko and Minoru Nakazato (eds.), Tax Law and Civil Law, Yuhikaku, pp. 581-599

Nishizumi, Norihiro (2019), “Money Laundering Measures by Tax Authorities”, The Review of the Taxation College, No. 95, Taxation College, pp.105-227

Noda, Kohei (2023), “Refluxing Underground Funds: Fighting Crime, Terrorism Funds, and Nuclear Development Money”, Chuokeizai-sha, Inc.

Ohashi, Yoichi (2019), “Administrative Law I: Modern Administrative Processes (4th Edition)”, Yuhikaku

Sakurai, Keiko and Hiroyuki Hashimoto (2019), Administrative Law (6th Edition), Kobundo

Sasakura, H. (2007), “Administrative Examination and Criminal Procedure: A Study on the Availability of Administrative Information in Criminal Proceedings”, Japanese Journal of Criminal Law, Vol. 46, No.2, Yuhikaku, pp.204-221

Sasakura, H. (2017), “Inter-procedural Information Exchange,” Hiroshi Kaneko, Minoru Nakazato, Takashi Yoneda and Tadao Okamura (eds.), Modern Tax Law Lecture (Vol. 4) International Taxation, Nippon Hyoronsha, pp. 325-362

Sato, H. (2022) “Standard Income Tax Law (3rd Edition)”, Kobundo

Shiba, K., Isamu Arai, M. Yamashita, and T. Mogushi (2019) Yohei Shibuya (2023), “Criminal Confiscation of Criminal Proceeds in the United Kingdom”, Kumamoto Law Review, No. 157 and 158, Kumamoto University Law Association.

Sowa, Toshifumi (2002), “Interaction between Administrative and Criminal Procedures on Anti-Social Activities of Corporations: The Role of Sanctions in a Deregulated Society”, Juristo, No. 1228, Yuhikaku, pp. 116-124

Sowa, Toshifumi (2011), “Legal Theory of the Administrative Law Enforcement System: Kwansei Gakuin University Research Series, vol.144, Yuhikaku

Takuma Sato, Eijiro Kubo, Kazuya Yokohama, Tomomi Kawasaki, Keijiro Kimura (2022), “Special Feature: Current Situation and Issues of Forfeiture and Additional Collection System”, Criminal Law Journal, No. 74, Seibundo

Tokio Matsumoto, Takeshi Tsuchimoto, Osamu Ikeda, Hiroshi Kawamura, Tadashi Sakamaki (2022) “Commentary on the Code of Criminal Procedure (5th Edition)”, Koubundo

Yamada, K. (2006), “Whether it is permissible to use evidentiary materials acquired and collected through tax examinations in subsequent criminal investigations: the relationship

between tax examinations and criminal investigations: a study of criminal practice (Nagoya Criminal Practice Study Group)", Hanrei Times, No. 1221, Hanrei Times, pp. 15-27

Yoshimura, Masaho (2010), "The Significance of Information in Tax Law: on the Subject of Sharing of Information Obtained through the Exercise of the Right to Question and Inspection", in Hiroshi Kaneko (ed.), The Development of Tax Law, Yuhikaku, pp. 161-173

Yukio Morizono, Kozo Yoshida, Masahiro Onishi (eds.) (2015) "Commentary on the National Public Service Act (Complete Revised Edition)", Gakuyo Shobo

190th National Diet Session 181 Questionnaire on the use of secret funds (House of Representatives, Mr. Nobuhiko Isaka) (2016), <https://www.shugiin.go.jp/internet/itdb_shitsumon.nsf/html/shitsumon/190181.htm>

Japan Federation of Bar Associations (2017) "Opinion Calling for Appropriate Implementation of Taxation on Top-up Payments by Gangs." <https://www.nichibenren.or.jp/document/opinion/year/2017/170216_3.html>

Asia Pacific Group on Money Laundering (2023), "Money Laundering Associated with Tax Crimes in the Asia Pacific."

Egmont Group & Information Exchange Working Group (2020), "Money Laundering of Serious Tax Crimes – Enhancing Financial Intelligence Units' Detection Capacities and Fostering Information Exchange (Public Bulletin)."

Eurasian Group on Combatting Money Laundering and Financing of Terrorism (2022), "Laundering of the Proceeds from Tax and Economic Crimes – EAG Typologies Project."

Financial Action Task Force & Asia Pacific Group (2021), "Anti-Money Laundering and Counter-Terrorist Financing Measures, Japan, Fourth Round Mutual Evaluation Report," Paris.

Kemsley, D., Kemsley, Sean A. & Morgan, Frank T. (2020), "Tax Evasion and Money Laundering: A Complete Framework," *Forth- coming: Journal of Financial Crime*

Mathias, Emmanuel & Wardzynski, Adrian (2023), "Leveraging Anti-Money Laundering Measures to Improve Tax Compliance and Help Mobilize Domestic Revenues," *Working Paper*, International Monetary Fund.

Moon, Willian J. (2022), "Anonymous Companies," *Duke Law Journal*, Vol.71, pp.1425-1489.

Organization for Economic Co-operation and Development (2017), "Effective Inter-Agency Co-Operation in Fighting Tax Crimes and Other Financial Crimes (3rd Edition)."

European Court of Justice (2022),"Judgment of the Court (Grand Chamber)," <https://curia.europa.eu/juris/document/document.jsf;jsessionid=4340C540399C5692912C7DA2925F-80FD?text=&docid=268059&pageIndex=0&doclang=en&mode=req&dir=&occ=-first&part=1&cid=686740>