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Unexplained Wealth

**Fiji Institute of Accountants
Seminar**

**T11 Conference Room, Reserve Bank of Fiji, Suva
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Financial Intelligence Unit**

Background: FIU

The FIU

- Intelligence agency of the Fijian Government;
- Role of FIU during pre-investigative and intelligence gathering stage.
- Acts as an interface between:
 - Private sector financial institutions; and
 - Law enforcement authorities.
- assists with the flow of relevant financial information and intelligence & asset tracing.



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Background: Money Laundering

Money Laundering

- Simply, *the way* a person/entity would receive, possess, convert, transfer, conceal, use or dispose their ill-gotten proceeds.
- ML offence also includes a person who:
 - provides/renders assistance;
 - engages in a transaction that involves suspected tainted proceeds.
- To convict: Actual knowledge or ought to have reasonable known that the money was derived or realized from some form of unlawful activity.
- Not predicated on proof of the commission of a serious offence.



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Money Laundering Offence

- Money laundering is criminalized under the Proceeds of Crime Act.
- 20 years maximum imprisonment or \$120,000 maximum fine or both if the offender is a natural person.
- A maximum fine of \$600,000 for a body corporate.



Unexplained wealth

- There is nothing wrong in acquiring wealth and improving the material wellbeing by people.
- However, this must be done legally and lawfully.



Unexplained wealth

- If a person fails to provide a satisfactory explanation to the Court as to how he or she was able to acquire properties and maintain a standard of living beyond his or her means and lawful emoluments, will be ordered to pay the value of his or her unexplained wealth to the State.



Unexplained wealth law - Objective

- The key objective of UEW provision? **To deprive persons of wealth and benefit acquired from unlawful activities;**
- First prove a criminal charge? **Not required;**
- First prove that property is the instrument or proceed of a crime? **Not required;**
- Burden of proof? **Shifted to the owner of property, who must prove a legitimate source for the wealth;**
- UEW proceeding is instituted against the property? **No, it is against a person and not against the property.**



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Unexplained wealth law - Objective

- The Draft Constitution of Fiji (Section 12) provides for the protection of persons from unreasonable seizure of his or her property;
- However, this protection does not include property acquired by illicit enrichment (as provided under the POC, PBP and UEW provisions);
- UEW forfeiture is decided by the Court;
- UEW forfeiture is independent of criminal proceedings;
- UEW is a civil law proceeding (regardless on any determination of a person's guilt or innocence);
- Therefore, our laws only protects the rights of persons who acquire property by licit means.
- Protection is NOT provided to persons who acquire property unlawfully;



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Unexplained Wealth – International Standards

- 1988 Vienna UN Convention: Article 5 – the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation.
- Identify, trace, and freeze, seize and confiscate proceeds, property or instrumentalities.
- If proceeds are transformed/converted into other property, such property is also liable for confiscation.
- If proceeds are intermingled with property acquired from legitimate sources = confiscation up to the assessed value of the intermingled proceeds.
- Income or other benefits derived from above also subject to confiscation.



**UNITED NATIONS
CONVENTION
AGAINST ILLICIT TRAFFIC
IN
NARCOTIC DRUGS AND
PSYCHOTROPIC
SUBSTANCES,
1988**
The Vienna Convention



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Unexplained Wealth – International Standards

United Nations Convention against Transnational Organized Crime (UNTOC). Article 12(7): –

- Offenders to demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation



UNITED NATIONS
Office on Drugs and Crime

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO



UNITED NATIONS



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Unexplained Wealth – International Standards

- FATF Recommendation 4: Confiscation and provisional measures (all persons/legal entities).
- to confiscate proceeds without requiring a criminal conviction (non-conviction based confiscation), or
- to require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation;

FATF

INTERNATIONAL STANDARDS
ON COMBATING MONEY LAUNDERING
AND THE FINANCING OF
TERRORISM & PROLIFERATION

The FATF Recommendations

February 2012



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Unexplained Wealth – International Standards

- Article 20 of UNCAC: to criminalise illicit enrichment (Public Sector).
- **illicit enrichment**, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.



UNITED NATIONS
Office on Drugs and Crime

UNITED NATIONS CONVENTION
AGAINST CORRUPTION



UNITED NATIONS



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Unexplained Wealth - PBP

- Section 10 of the Prevention of Bribery Promulgation (2007) creates possession of unexplained wealth a criminal offence for public officials.
- Penalty for illicit enrichment offence: is to a fine of \$1million and to imprisonment for 10 years.
- Section 12AA provides that the value of unexplained wealth can be forfeited to the State.



Unexplained Wealth – POC Act

- The Proceeds of Crime (Amendment) Decree (No. 61 of 2012) in September 2012.
- Take a person to Court to explain his or her wealth.
- **Unexplained wealth = person's total wealth – his or her lawfully acquired wealth.**
- A person to show that wealth was obtained lawfully in order to keep it, rather than the law enforcement agencies to show that the wealth was obtained unlawfully in order to forfeit it.



Unexplained Wealth – POC Act

- Includes both public sector as well as private sector officials;

Tax Returns:

- income in excess of declared income in annual tax returns;
- Assets and lifestyle inconsistent with tax declared income or no tax returns filed;



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Possession of Unexplained Wealth

71F. Any person who—

(a) maintains a standard of living above that which is commensurate with his or her present or past lawful emoluments, shall be required to pay the amount of wealth that is declared as unexplained

UNLESS

he or she provides a satisfactory explanation to the Court as to how he or she was able to maintain such a standard of living.



Possession of Unexplained Wealth

71F. Any person who—

(b) is in control of pecuniary resources or property disproportionate to his or her present or past lawful emoluments, shall be required to pay the amount of wealth that is declared as unexplained

UNLESS

unless he or she provides a satisfactory explanation to the Court as to how such pecuniary resources or property came under his or her control.



Application for Unexplained Wealth Declaration

71G.

- The DPP has powers to make an application in Court for an unexplained wealth declaration against a person.
- Application for a restraining order may be made at the same time or at any other time.
- The DPP also has powers to make an application that the unexplained wealth is forfeitable.



Calculation of Unexplained Wealth

71H.

A person has unexplained wealth if:

- the value of the person's total wealth is greater than the value of the person's lawfully acquired wealth.

What is value of the person's total wealth?

- It is the total value of all the items of property and all the services, advantages and benefits that together constitute the person's wealth.

What is value of the person's lawfully acquired wealth?

- It is that person's total wealth that was lawfully acquired.



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Assessing Calculation of Unexplained Wealth

71I. The following will be considered by the Court:

(a) the value of any property, service, advantage or benefit is to be taken as its greater value —

- (i) at the time that it was acquired; and
- (ii) on the day that the application for the unexplained wealth declaration was made;

Continued on next slide



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Assessing Calculation of Unexplained Wealth

71I. The following will be considered by the Court:

(b) the value of any property, service, advantage or benefit that was a constituent of the

- person's wealth BUT was given away, used, consumed or discarded, or no longer available, is taken to be an outgoing at the greater of its value—
 - (i) at the time that it was acquired; and
 - (ii) immediately before it was given away, or was used, consumed or discarded, or is unavailable;



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Assessing Calculation of Unexplained Wealth

71I. The following property will NOT be considered by the Court for an UEW declaration and forfeiture:

- Property already forfeited;
- Service, advantage or benefit subject to an earlier UEW declaration;



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The Constituents of a Person's Wealth

71J.

The following 7 things (property, services, advantages and benefits) constitute a person's wealth—

1. All property that the person **owns** (acquired either before or after the commencement of the Decree);
2. All property that the person **effectively controls**;
3. All property that the person has **given away**;
4. Other property, including **consumer goods**/durables that have been consumed or discarded (excluding necessary food, clothing and other items reasonably necessary for ordinary daily requirements of life);



The Constituents of a Person's Wealth

71J.

The following 7 things (property, services, advantages and benefits) constitute a person's wealth—

5. All services, advantages and benefits;
6. All property, services, advantages and benefits acquired by another person, at the request or direction of the person, (including items in (4) above);



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The Constituents of a Person's Wealth

71J.

The following 7 things (property, services, advantages and benefits) constitute a person's wealth—

7. Anything of monetary value acquired by the person or another person, in Fiji or elsewhere, from the **commercial exploitation** of any product or any broadcast, telecast or other publication, where the commercial value of the product, broadcast, telecast or other publication depends on or is derived from the person's **involvement in** the commission of **a serious offence**, whether or not the thing was lawfully acquired and whether or not the person has been charged with or convicted of the offence.



The Court Process

71K.

- DPP makes application for an unexplained wealth declaration against a person;
- DPP makes application for a restraining order;
- DPP makes application that the unexplained wealth is forfeitable;
- The Court to declare that a person has unexplained wealth (if it is more likely than not that the person's total wealth is greater than his or her lawfully acquired wealth);
- **Any property, service, advantage or benefit that is a constituent of the respondent's total wealth is presumed not to have been lawfully acquired unless the person establishes the contrary.**



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The Court Process

71K.

- When deciding whether the person has unexplained wealth, the Court will have regard to the amount of the person's lawful income and outgoings at any time or at all times;
- When the Court makes an unexplained wealth declaration, the Court shall:
 1. Assess the person's total unexplained wealth in accordance with the Decree and
 2. Specify the assessed value of the unexplained wealth in the declaration; and
 3. Order the respondent to pay to the State the amount specified in the declaration as the value of his or her unexplained wealth.
- The Court may make any necessary or convenient ancillary orders and declarations, including awarding costs as the court sees fit.



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Other Provisions

- The Court cannot stay or adjourn an UEW proceeding to await outcome of any criminal proceeding;

New criminal offences under the UEW law for a person

who:

- ✓ willfully delays or obstructs a Police Officer;
- ✓ willfully fails to produce any property;
- ✓ willfully conceals or attempts to conceal any property;
- ✓ fails to deliver up the forfeited property;
- ✓ fails to permit the State to take possession of the forfeited property;



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Other Provisions

Definition of Property:

- ✓ includes money or any other property, whether located in Fiji or elsewhere;
- ✓ also includes a legal or equitable interest in a property;

Definition of "Unlawful Activity":

- ✓ an act or omission that constitutes an offence against a law in force in Fiji or a foreign country;



How to Calculate UEW

- **Net Worth Method (Asset Betterment Calculation)**
- **Net Worth = Assets – Liabilities**
- Calculate increase or decrease in net worth by subtracting Net worth at beginning of year from Net worth at the End of Year.
- Include all other income/expenditure (including gifts, inheritance) for non-criminal activities.



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How to Calculate UEW

Net Worth Method (Asset Betterment Calculation)

Assets
Bank Account
Cash on Hand
Boat
Residence
Motor Vehicle
Total
Liabilities
Mortgage
Personal Loan
Total
Calculation of Net Worth
Total Assets
Less Total Liabilities
Net Worth

Calculation of Change in Net Worth
Net Worth
Less Prior Years Net Worth
Change in Net Worth (CNW)
Calculation of Total Income
Increase in Change in Net Worth
add: Personal Living expenses
add: Mortgage Interest
add: Apartment Rent (G. Friend)
add: Lease Payments (G. Friend)
add: Diamond Ring
add: Fur Coat
add: Vacation
Total Income
Calculation of Concealed Income
Total Income
Less Legitimate Income
Concealed Income (CI)



How to Calculate UEW

- **Bank Transaction Analysis**
- Total cash deposits in bank accounts (business, personal and loan accounts) including accounts controlled by the person + purchases of capital items and loan repayments by cash – non-income receipts (gifts, inheritances);
- Personal expenses paid with cash and not paid out of bank accounts?
- Other capital items purchased with cash (land/building, motor vehicles, etc.) and not from bank accounts?



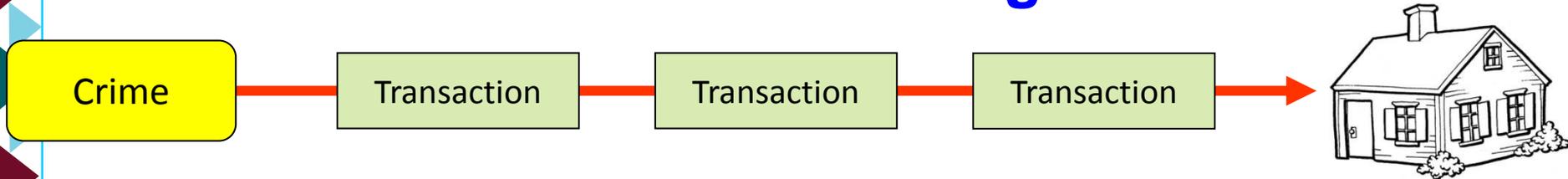
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How to Calculate UEW Bank Transaction Analysis

Funds Tracing



Assets Tracing



Slide provided by AFP



How to Calculate UEW

- **Expenditure Analysis**
- Expenditure is in excess of declared income = UEW;

Application of Funds



**Increases in assets,
purchases, expenses,
personal living expenses
and decreases in
liabilities**

**Source of Funds
(Total Known Income)**



**Declared income,
which the person
can substantiate**

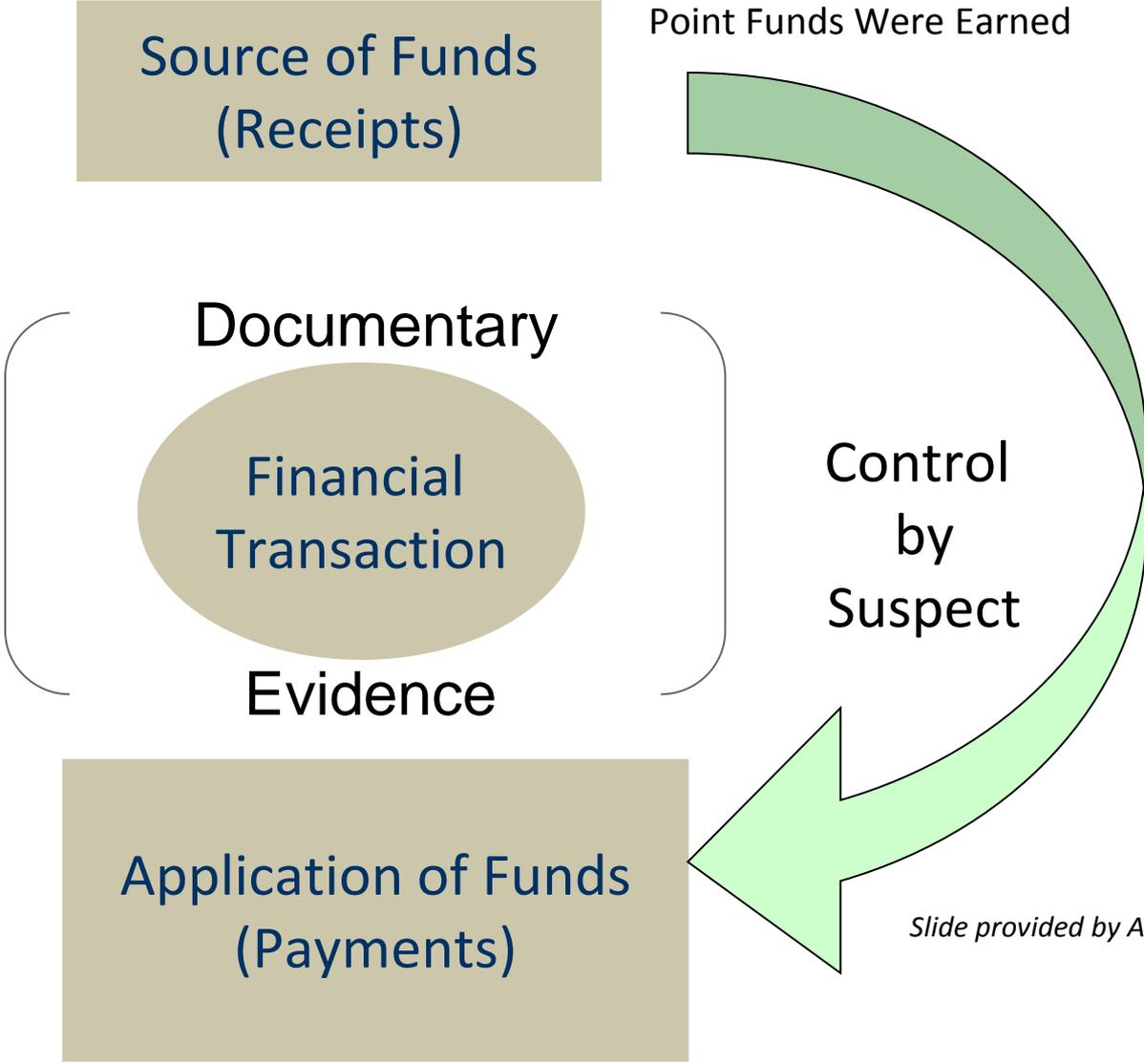


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Funds Tracing – “Follow the Money”



Slide provided by AFP

STEP 1: Reporting of UEW Cases

STEP 2: Investigate person for possession of UEW

STEP 3: Court proceedings against the person who has the UEW

STEP 4: No need to show predicate offence/crime

STEP 5: The person to show that the wealth is lawful

STEP 6: Court makes a declaration – the person has UEW

STEP 7: Court to assess total UEW

STEP 8: Court to specify assessed value

STEP 9: Court to order person to pay the specified amount of his or her UEW

STEP 10: Payment to Forfeited Assets Fund



Reporting of UEW Cases

Wealth / Luxurious Lifestyle



Public



Financial Institution

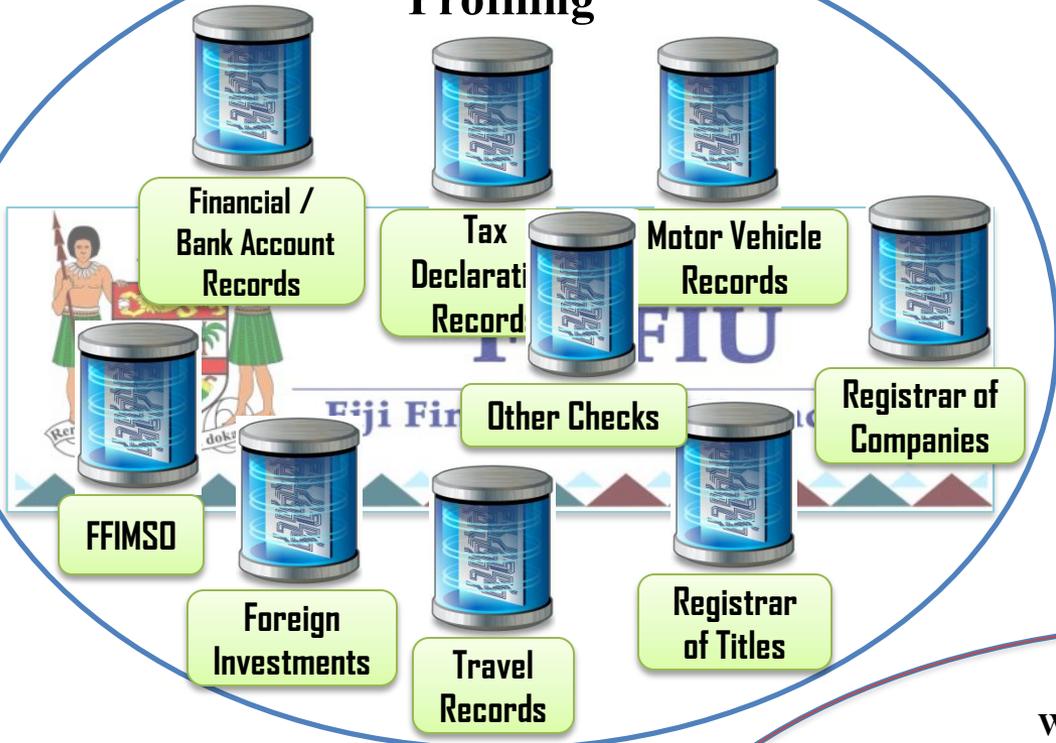


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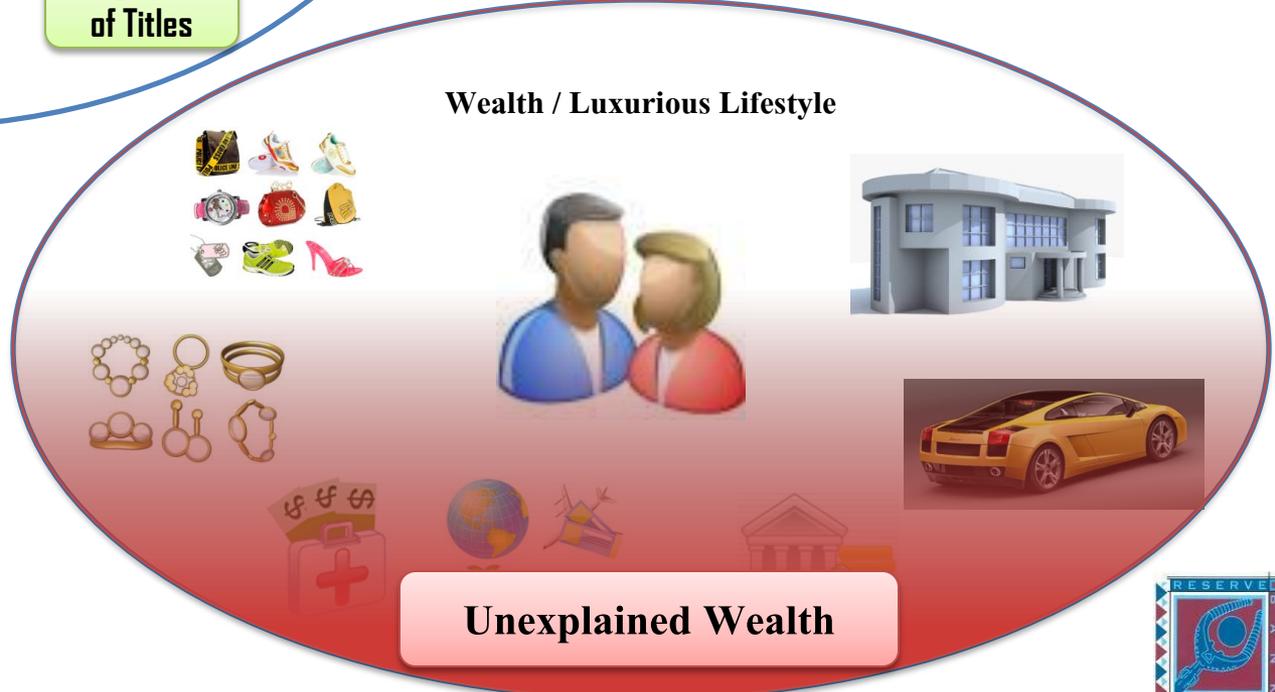


Profiling



FIU Profiling

Wealth / Luxurious Lifestyle



Unexplained Wealth



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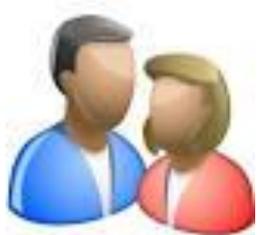
Investigation



File Documents



Makes Application for Unexplained Wealth Declaration and Forfeiture Order



Order to Pay the value of UEW in the declaration



Formal Investigation / Court Declaration / Order

Forfeited Assets Fund

Challenges

- Reporting of UEW cases to the FIU and other relevant authorities;
- Threshold based investigations (large value cases only);
- Combatting crimes indirectly (taking the benefit away from the crime);
- UEW investigations would be highly complex and will require the right type of resources, training and skills (financial investigators, forensic accountants, intelligence analysts);



Conclusion

- New Law - Includes Public Sector & Private Sector Individuals;
- Wealth to be acquired lawfully;
- Reverse burden of proof;
- No need to show/prove predicate offence/crime;
- Law enforcement agencies no longer have to show that the wealth was obtained unlawfully in order to forfeit it;
- A person has to show that wealth was obtained lawfully in order to keep it.



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Thank you and Vinaka Vakalevu



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