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MEMORANDUM FOR ASSISTANT COMMISSIONER
(CRIMINAL INVESTIGATION)

FROM: /s/ Barry J. Finkelstein
Assistant Chief Counsel (Criminal Tax)

SUBJECT: Forfeiture Notice Requirements When Owner is Incarcerated

The purpose of this memorandum is to address the evolving state of the law with respect to forfeiture notice requirements of incarcerated individuals. Our office recently had an opportunity to look into this issue during the evaluation of a petition for remission filed by an incarcerated claimant. Several recent cases have held that the government agency seeking forfeiture did not provide or seek to provide adequate notice of the forfeiture proceeding to the incarcerated owners of the seized property. In this regard, the Second Circuit recently adopted the rule imposed by the First and Eighth Circuits that actual receipt is required to satisfy the due process rights of an incarcerated owner.

Petition for Remission

The recent petition for remission case our office reviewed involved a situation whereby the notice of forfeiture proceedings was published in the [redacted] newspaper for three consecutive weeks. Notice of the forfeiture proceeding was also personally mailed to the claimant as well as the subject vehicle's two registered owners. The two registered owners personally signed for the deliveries of their notices. The notice to the claimant, the true purchaser of the seized vehicle, was addressed to the [redacted] where he was incarcerated. This notice was returned undelivered to CID. CID then investigated and learned that the claimant had been transferred to another correctional facility ([redacted]). CID then mailed a second notice to the claimant at the [redacted] facility where it was signed, as received, by a prison official. The recent holdings of the First, Second, and Eighth Circuits suggest that CID's delivery of notice to the claimant was inadequate.

Statutory Notice Requirements

When it is determined that the administrative forfeiture process should commence, the controlling statutory authority provides that notice shall be published, once a week for three consecutive weeks, in a newspaper in the judicial district where the property was seized, describing the property and stating the time, place, and cause of the seizure, and requiring any claims for such property to be made within 30 days of the date notice was first published for Title 26 forfeitures and 20 days for 18 U.S.C. § 981 forfeitures. I.R.C. § 7325(2); 26 C.F.R. § 403.26(a)(3); 19 U.S.C. § 1607(a). See also, IRM 9457.2 et seq., 9781-(11)(34)0

In addition to publication, notice and information on applicable procedures must be sent to each party appearing to have an interest in the seized property. 19 U.S.C. § 1607(a); IRM 9457.5; 9781-(11)(37)0. See United States v. Elias, 921 F.2d 870, 873 (9th Cir. 1990).

Failure to follow these statutory notice requirements may provide a basis to avoid any subsequent declaration of forfeiture. In the past few years, a growing number of cases involving § 981 and § 881 forfeitures have scrutinized the adequacy of the government's efforts to provide notice, and have indicated a willingness to undo perfected forfeitures where the notice was deemed inadequate. Especially where the government is charged with knowledge of an interested parties location, such as when the party is incarcerated, the courts appear increasingly willing to reject notices that do not get to the party.

Fifth Amendment - Due Process Clause

The Supreme Court addressed the impact of the Due Precess Clause on notice requirements in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950). The Court held that "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The Court made clear that the Due Process Clause does not demand actual, successful notice, but it does require a reasonable effort to give notice. The Court went on to hold that "process which is mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Courts have subsequently used this standard in determining what is a reasonable effort in terms of giving notice in forfeiture cases.

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United States v. Small:

In United States v. Small, 136 F.3d 1334 (D.C. Cir. 1998), the D.C. Circuit held that when the owner of property that an agency seeks to forfeit is incarcerated, the agency must make an effort to locate the owner's place of incarceration if an initial notice is returned undelivered. In Small, cash was seized from the claimant at the time of his arrest on drug charges. The DEA published a notice of forfeiture in USA TODAY newspaper and mailed notices of administrative forfeiture proceedings against the cash by certified mail to Mr. Small at his previous home and the D.C. jail, where he was being held. It appeared someone signed for the letter sent to Mr. Small's previous home address, but that letter apparently was not forwarded to Mr. Small at the D.C. jail. The letter mailed directly to the jail was returned to the DEA stamped "return to sender" along with a return receipt indicating that at some point the jail had received the letter. The DEA took no further steps to contact the claimant personally, proceeding instead to complete the administrative forfeiture process.

Following a grant of summary judgement for the government, Mr. Small argued on appeal that the DEA's efforts to give him actual notice were inadequate to meet fundamental due process. The court noted that while the Due Process Clause did not require actual, successful notice, it does require a reasonable effort to give notice. The court determined that the DEA's means were not reasonably designed to inform Small of the pending forfeiture. The court focused on the obligation of a government agency to further pursue written notice to a potential claimant, particularly an incarcerated potential claimant, when it was aware that an initial mailed notice had not reached its intended recipient.

The court rejected the government's position, based on Sarit v. DEA, 987 F.2d 10, 14 (1st Cir. 1993), that the adequacy of mailed notice is measured from the moment at which the notice was sent and that a second notice would be required only in exceptional circumstances. Rejecting the Sarit rule, the court noted this standard seemed inconsistent with the Supreme Court's standard set forth in Mullane. The court pointed out that a reasonable person presented with a letter that has been stamped, "returned to sender," would ordinarily attempt to resend it if it was practicable to do so.

The court acknowledged that in determining when the government must resend notice, timing was one element to consider. If a forfeiture had reached a point of no return and the United States had made adequate efforts to give notice before then, the forfeiture would be accorded finality and would not be reopened even in light of after-acquired information that the claimant had not been properly notified. The court

also noted that if the government had an additional piece of information that a reasonable person would use to locate the claimant, it was obliged under Mullane to try again unless it would be unduly burdensome to do so.

Based on this analysis, the court had no difficulty concluding that the government had not made adequate efforts to place Mr. Small on notice of the administrative forfeiture. Because the government failed to take basic steps in ascertaining Mr. Small's whereabouts and in ascertaining whether some problem at the prison prevented delivery, the court concluded that the government was required to try again when the notice sent to a jail was returned undelivered. Accordingly, the court reversed the district court's order granting summary judgement and remanded the case for a hearing on the merits of the forfeiture. See Armendariz-Mata, 82 F.3d 679, 683 (5th Cir. 1996)(finding, on facts indistinguishable from those in Small, that the government must try to give notice again when a notice sent to a jail is returned undelivered); Torres v. $36,256.80 United States Currency, 25 F.3d 1154, 1161 (2d Cir. 1994)(finding that, after a notice was returned with the notation "Not at Chester County Prison," the government was obliged to call the Bureau of Prisons and inquire about the inmate's whereabouts).

United States v. Weng:

In United States v. Weng, 137 F.3d 709 (2d Cir. 1998), the Second Circuit held that actual notice is required when the owner of property is incarcerated on charges related to the forfeiture. In so holding, the Second Circuit adopted an even stricter standard for agencies seeking to give constitutionally adequate notice of administrative forfeitures to incarcerated claimants. The FBI seized cash and jewelry from Weng at the time of his arrest on drug charges. Following the seizure, the FBI sent two written notices of intent to forfeit the property (one for the jewelry and one for the cash) to Mr. Weng's last known address and to the Metropolitan Correctional Center (MCC). In addition, the FBI published the notices over three successive weeks in a newspaper of general circulation. The copies mailed to his last known address were returned undelivered.

While both notices mailed to the MCC were received there, as confirmed by certified mail receipts, the FBI furnished no evidence in support of its assertion that Mr. Weng was incarcerated at the MCC when the notices were sent there. It appeared that Mr. Weng was apparently not at the MCC when the jewelry notice was sent, although his whereabouts at the time of receipt of the currency notice were in dispute. In analyzing Mr. Weng's argument that he did not receive constitutionally adequate notice of administrative forfeiture proceedings, the Second Circuit cited to existing precedent which held that when the government seeks forfeiture of the property of a person who is in custody, the agency that initiates the forfeiture must find out the

proper facility and send notice to the correct place. Robinson v. Hanrahan, 409 U.S. 38, 40 (1972); Torres v. $36,256.80 United States Currency, 25 F.3d 1154 (2d Cir. 1994); Boero v. Drug Enforcement Administration, 111 F.3d 301, 304 (2d Cir. 1997). The court reiterated its recent position that it was mystified as to why an agency of the Department of Justice seeking to give constitutionally adequate notice could not determine the current whereabouts of a person who was in custody of another agency of the Department. Bye v. United States, 105 F.3d 856, 857 (2d Cir. 1997).

The Second Circuit's analysis raised further questions with respect to the FBI's position that the mere mailing of notice, even if it was to the appropriate place, sufficed to meet basic due process requirements. The court concluded that it did not agree that a federal agency's mailing of a notice of forfeiture to a federal correctional institution where the property owner was detained constituted adequate notification of the forfeiture if the notice was not in fact delivered to the prisoner-owner. The Supreme Court made clear in Mullane that the type of notification required varies with a number of factors including the nature of the interests involved, the likelihood that others similarly situated will protect a property owner's interests, and the reasonableness of imposing more onerous requirements on the entity obligated to give notice. The Second Circuit emphasized that, "without the owner even being made aware of, or having a practical opportunity to challenge, the forfeiture, its lawfulness is difficult to justify."

The Second Circuit ultimately concluded that the mere mailing of notice, even with a required return receipt signed not by the addressee but by the institution, did not satisfy the requirement of Mullane that the means of giving notice "be such as one desirous of actually informing the owner might adopt." Mullane at 315. Where a federal agency is pursuing administrative forfeiture and the owner is a prisoner in federal custody on the charges that gave rise to the forfeiture, the Second Circuit held that such mailing of a notice to the custodial institution was not adequate unless the notice was in fact delivered to the intended recipient. Thus, the Second Circuit joined the First and Eighth Circuits in holding that actual receipt is required to satisfy the due process rights of an incarcerated owner. United States v. Giraldo, 45 F.3d 509, 511 (1st Cir. 1995); United States v. Woodall, 12 F.3d 791, 794-95 (8th Cir. 1993)(holding that if the government is incarcerating or prosecuting the property owner when it elects to impose the additional burden of defending a forfeiture proceeding, fundamental fairness surely requires that either the defendant or his counsel receive actual notice of the agency's intent to forfeit in time to decide whether to compel the agency to proceed by judicial condemnation). The second Circuit, however, limited its notice requirement to those owners who where incarcerated on charges specifically related to the forfeiture.

Notice to Counsel

While the aforementioned cases indicate that some circuits are skeptical of the sufficiency of forfeiture notices mailed to prisons where claimants are incarcerated, notice that is mailed to a potential claimant's attorney of record remains constitutionally sufficient. In United States v. Gonzalez, No 97-35342, 1998 U.S. App. LEXIS 2942 (9th Cir. Feb. 20, 1998), the Ninth Circuit ruled that notice to an attorney of record suffices to meet constitutional due process requirements. In Gonzalez, the notice was sent to his home address but not to his prison address. Attorney notice satisfies due process concerns even where adequate notice was not given directly to the claimant.

Conclusion

Recent decisions in three of the circuits have raised a new skepticism with respect to government efforts to notify incarcerated owners of pending administrative forfeiture of seized property. Adding to cases in the First and Eighth Circuits, the Second Circuit most recently concluded in Weng that where a federal agency is seeking administrative forfeiture and the owner is a prisoner in federal custody on charges that gave rise to the forfeiture, the mailing of a notice to the custodial institution was not adequate unless the notice was in fact delivered to the intended recipient. Merely mailing a notice of forfeiture by certified mail to the custodial institution is not adequate unless the notice is in fact delivered to the intended recipient. These courts reasoned that the owner was entirely dependant on the institution to deliver the mail, and the institution could easily reduce the chance of error by creating a reliable record of delivery to the owner.

While the decisions in the First and Eighth Circuits don't restrict the actual notice requirement to solely those cases where the owner is incarcerated on charges related to the forfeiture, the Second Circuit clearly draws this distinction. [redacted] DP

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Should our assistance be required, please feel free to contact Martin Needle of the Criminal Tax Division on (202) 622-4470.

cc: Assistant Regional Counsel (Criminal Tax)

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