MANUAL TRANSMITTAL

9.7.3

Department of the Treasury
Internal Revenue Service

MARCH 2, 2015

EFFECTIVE DATE

(03-02-2015)

PURPOSE

(1) This transmits revised IRM 9.7.3, Criminal Forfeiture.

MATERIAL CHANGES

(1) Subsection 9.7.3.5.2(1) has been updated to include a cross reference to IRM subsection 9.7.1.3.1(6) and (7) regarding criminal seizure warrants pursuing criminal forfeiture related to Title 31 §5324 involving “legal source” structuring

EFFECT ON OTHER DOCUMENTS

This IRM supersedes IRM 9.7.3 dated May 14, 2012. This IRM also incorporates procedure(s) implemented by the Director, Operations Policy and Support memorandum dated October 17, 2014, [Subject: IRS Structuring Investigation Policy Changes.]

AUDIENCE

CI

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9.7.3
Criminal Forfeiture

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9.7.3.1
(05-15-2008)
Background

(1) Criminal forfeitures are *in personam* actions that are limited to the property interests of the defendant. They are imposed as part of the defendant's sentence and are distinguished from civil forfeiture that may be pursued as an action against the property *in rem* without regard to who the owner may be. A criminal forfeiture may only be sought as part of a criminal prosecution, and may not be ordered unless and until the defendant is convicted of the crime(s) for which forfeiture is to be imposed.

9.7.3.2
(11-21-2001)
Criminally Forfeitable Property

(1) Prior to the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), a money laundering violation was a requirement to forfeit proceeds of a specified unlawful activity without statutory criminal forfeiture provisions for forfeiture of proceeds. Most statutes authorize only civil forfeiture for numerous crimes. Under CAFRA, it is possible to criminally forfeit the proceeds of any specified unlawful activity without a specific statutory forfeiture provision.

(2) In a criminal forfeiture, the government may only forfeit property in which the defendant has an interest.

9.7.3.2.1
(11-21-2001)
Traceable Property, Money Judgments, and Substitute Assets

(1) It is important to distinguish between the concepts of traceable property, money judgments, and substitute assets as they relate to criminal forfeiture.

(2) To forfeit traceable property, the government must directly trace the forfeited property to other property that was involved in the offense giving rise to the forfeiture.

(3) Once it has been proven in a criminal trial that certain amount of property is forfeitable as proceeds illegally garnered by the defendant, the government is entitled to a money judgment for the amount, without tracing those proceeds to specific assets owned by the defendant at the time of the verdict. The fact that a defendant has dissipated or transferred the profits or proceeds before conviction will not prevent the government from reaching and forfeiting the full amount of the ill-gotten gains, because presumably the government can collect this money judgment against any of the assets the defendant still owns.

(4) A similar remedy to the dissipation or transfer of otherwise forfeitable assets is provided by the statutory provision allowing forfeiture of substitute assets. The court will order the forfeiture of any other property of a defendant up to the value of any property forfeited, as a result of any act or omission of the defendant, if the forfeitable property:

a. cannot be located upon the exercise of due diligence
b. has been transferred, sold to, or deposited with a third party
c. has been placed beyond the jurisdiction of the court
d. has been substantially diminished in value
e. has been commingled with other property which cannot be divided without difficulty

9.7.3.2.2
(05-14-2012)
Property Criminally Forfeitable

(1) The statutory provisions in Title 31 USC §5317(c)(1) and Title 18 USC §982(a)(1) provide that the court, in imposing sentence on a person convicted of an offense in violation of 31 USC §5313(a), §5316, or §5324, or of 18 USC §1956, §1957, or §1960, shall order the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

(2) Use the procedures for forfeiture set forth in the drug forfeiture statute, Title 21 USC §853, for forfeitures under 18 USC §982(a)(1) and 31 USC §5317(c)(1).

9.7.3.3
(05-15-2008)
Statute of Limitations

(1) The statute of limitations for criminal forfeiture under 18 USC §982(a)(1) and 31 USC §5317(c)(1) is the statute of limitations for the underlying crime, which is usually 5 years.

9.7.3.4
(11-21-2001)
Pre-Indictment Planning/Pre-Seizure Planning

(1) Prior to seeking an indictment that will include a forfeiture count or allegation, the same pre-seizure planning applicable in a civil forfeiture should be conducted in a criminal forfeiture, see IRM 9.7.4, Pre-Seizure Planning.

9.7.3.5
(11-21-2001)
Methods of Seizure for Criminal Forfeiture

(1) Unless a restraining order or seizure warrant for the assets subject to forfeiture in a criminal case is obtained, the government cannot take possession of the assets until the defendant has been convicted and a preliminary order of forfeiture has been entered.

9.7.3.5.1
(05-14-2012)
Restraining Orders and Protective Orders

(1) The government may obtain either pre/post-indictment restraining orders to secure property subject to criminal forfeiture pursuant to 21 USC §853.

(2) Upon application by the United States, the court may enter a restraining order or take any other action necessary to preserve the availability of property subject to forfeiture upon the filing of an indictment or information.

(3) Upon application by the United States, the court may also enter a restraining order or take any other action necessary to preserve the availability of property subject to forfeiture prior to the filing of an indictment or information. If, after notice to persons with an interest in the property and opportunity for a hearing, the court determines that:

a. There is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and
b. The need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.
c. Provided, however, an order entered prior to the filing of an indictment or information is effective for not more than 90 days, unless extended by the court for good cause or unless an indictment or information has been filed.

(4) A temporary restraining order may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed, subject to the determination that the conditions listed above are present.

(5) A temporary restraining order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning this order shall be held prior to the expiration of the temporary order.

9.7.3.5.2
(03-02-2015)
Criminal Seizure Warrants

(1) The government may seek a warrant to seize assets subject to criminal forfeiture under 18 USC §982(b)(1) pursuant to 21 USC §853(f). Criminal seizure warrants pursuing criminal forfeiture related to Title 31 §5324, involving "legal source" structuring, refer to IRM 9.7.1.3.1(6) and (7).

(2) The inclusion of property subject to a forfeiture count or allegation in an indictment returned by a grand jury is not a sufficient basis by itself for the issuance of a criminal seizure warrant.

(3) The procedure for obtaining a criminal seizure warrant mirrors that for obtaining a search warrant under Rule 41 of the Federal Rules of Criminal Procedure. In order to obtain a criminal seizure warrant, probable cause must be established to believe that:

a. The property is subject to forfeiture.
b. The issuance of a restraining order under 21 USC §853(e) would be insufficient to ensure the availability of the property for forfeiture.

(4) Criminal seizure warrants are obtained from the court in the district where the indictment will be sought or has been returned without regard to the location of the property subject to forfeiture or ordered forfeited.

(5) If the asset to be seized is located on private property, a search warrant must be obtained to legally enter the property and seize the asset.

9.7.3.5.3
(05-14-2012)
Real Property

(1) Absent exigent circumstances, real property cannot be seized without providing its owner notice and opportunity for a pre-seizure hearing. When real property is named in a forfeiture count or allegation, a notice of *lis pendens* should be prepared by the US Attorney's Office and filed with the local official who is responsible for recording deeds.

(2) A *lis pendens* is a notice that describes the real property and states that the United States has an interest in it as a result of the pending criminal litigation. The purpose of a *lis pendens* is to provide notice "to the world " that anyone who takes an interest in the property takes that interest subordinate to the interest of the United States. The effect of a *lis pendens* is to prevent a bona fide sale of the property or its refinancing pending the outcome of the criminal forfeiture litigation.

(3) State law governs when a *lis pendens* may be filed. Most states require a pending court action involving the property. In these jurisdictions, either a civil forfeiture complaint must be filed, or an indictment, information, or criminal complaint obtained listing the property as subject to forfeiture, in order to properly file a *lis pendens*.

9.7.3.5.4
(11-21-2001)
Seizure of Substitute Assets

(1) The local Assistant US Attorney (AUSA) should be consulted regarding the pretrial restraint or seizure of substitute assets since most circuits have held that pretrial restraint of substitute assets is not permissible, which logically extends to the pretrial seizure of such assets.

9.7.3.5.5
(05-14-2012)
Property Already Seized

(1) If property was seized as evidence or was turned over by the defendant voluntarily, there is probably no reason to obtain a restraining order or seizure warrant. However, the Criminal Tax (CT) attorney or the local forfeiture AUSA should be consulted.

9.7.3.6
(11-21-2001)
Criminal Forfeiture Proceedings

(1) Criminal prosecutions that seek forfeiture are brought in the district in which the predicate offense was committed.

9.7.3.6.1
(11-21-2001)
Indictment

(1) In order to criminally forfeit a defendant 's property, the indictment or information must contain a forfeiture count or allegation that alleges the extent of the defendant 's interest in the property. The primary purpose of this requirement is to put the defendant on notice that his/her property is subject to forfeiture. In addition, the insertion of a forfeiture count or allegation in the indictment provides a basis for the issuance of pretrial restraining orders and criminal seizure warrants, puts third parties on notice that the government has an interest in the defendant's assets that are subject to forfeiture, and may establish a factual basis for the forfeiture of the defendant's assets in connection with a guilty plea.

(2) An indictment may include an itemized list of the property to be forfeited, or a general statement, which includes a list of each asset subject to forfeiture in a bill of particulars, that the government will seek to forfeit everything subject to forfeiture under the applicable statute.

9.7.3.6.2
(03-29-2005)
Burden of Proof

(1) The burden of proof in a forfeiture under the statutory provisions (18 USC §982(a)(1)) is preponderance of the evidence. This is because criminal forfeiture is not a criminal offense but rather constitutes part of the defendant's sentence. The preponderance standard applies to criminal forfeiture.

9.7.3.6.3
(11-21-2001)
Plea Bargaining/Voluntary Forfeiture

(1) To forfeit a defendant's assets as part of a plea agreement, the indictment or information must include a forfeiture count or allegation, and the defendant must plead to a statutory violation that provides for forfeiture upon conviction. Otherwise, the forfeiture will be invalid even though the defendant may have been willing to agree to forfeiture in the plea agreement.

9.7.3.6.4
(03-29-2005)
Preliminary Order of Forfeiture

(1) As soon as practicable after a defendant is found guilty by a jury or enters a plea of guilty to any count in an indictment or information where criminal forfeiture is sought, the court will determine what property is subject to forfeiture.

(2) If forfeiture of specific property is sought, the court, or upon the defendant's request in a case in which a jury returns a verdict of guilty, the jury, will determine whether the government has established the required connection between the property and the offense committed by the defendant. If the government seeks a money judgment against the defendant, the court or the jury will determine the amount of money the defendant will be ordered to pay.

(3) The court's or the jury's determination may be based on evidence already in the record or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

(4) Once it is determined that property is subject to forfeiture, the court will promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property.

(5) The entry of a preliminary order of forfeiture authorizes the seizure of the specific property subject to forfeiture.

(6) At sentencing—or at any time before sentencing if the defendant consents—the preliminary order of forfeiture becomes final as to the defendant's interest. However, a final order of forfeiture cannot be entered until all potential third party claims have been settled.

9.7.3.6.5
(11-21-2001)
Ancillary Proceeding

(1) Third party interests in criminally forfeited property are litigated by the court in an ancillary (supplementary) proceeding following the conclusion of the criminal trial and the entry of a preliminary order of forfeiture.

(2) The notice provisions regarding the ancillary proceeding are equivalent to the notice provisions that govern civil forfeitures. Notice is published and sent to third parties that have a potential interest. If no one files a claim, or if all claims are denied following a hearing, the forfeiture becomes final and the United States is deemed to have clear title to the property.

9.7.3.6.6
(11-21-2001)
Petitions for Remission or Mitigation

(1) The Attorney General has discretion to remit forfeited property to third parties after the conclusion of the ancillary hearing proceedings and the entry of the final order of forfeiture. Petitions for remission or mitigation are covered in IRM 9.7.7, Claims and Petitions.

9.7.3.6.7
(11-21-2001)
Final Order of Forfeiture

(1) When the ancillary proceeding ends, the court will enter a Final Order of Forfeiture by amending the preliminary order as necessary to account for any third party interests. If no third party files a timely claim, then a Final Order of Forfeiture can be entered by the court. The property may then be disposed of according to law, see IRM 9.7.8, Disposition of Seized and Forfeited Property.

(2) If a defendant appeals the conviction or order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review.