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MEMORANDUM FOR ASSISTANT COMMISSIONER (CRIMINAL INVESTIGATION)

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

SUBJECT: *United States v. \$359,500 in U.S. Currency*, No. 84-CV-661C
(W.D.N.Y. September 28, 1998)

This memorandum brings to your attention a recent decision which revisits the issue of whether a claimant of a forfeiture action must possess either actual or constructive knowledge of the currency reporting requirements before the government may institute forfeiture. In *United States v. 359,500 in U.S. Currency*, No. 84-CV-661C (W.D.N.Y. September 28, 1998) the United States District Court for the Western District of New York held that in the absence of sufficient evidence to show that an individual transporting currency had any actual or constructive knowledge of the currency reporting requirements, the government's petition for forfeiture of the seized funds must be denied. The government brought a civil action pursuant to 31 U.S.C. §§ 5316(a) and 5317(b) seeking the forfeiture of the subject currency because Romano, the claimant, failed to file a CMIR in violation of 31 U.S.C. § 5311 when he crossed a bridge heading from Buffalo, New York to Ontario, Canada, on November 17, 1983.

This case originally went to trial on May 10, 1985. On September 29, 1986, the district court denied the government's petition for forfeiture, finding that actual knowledge of the currency reporting requirements is required for a civil forfeiture, and that there was insufficient evidence to support such a finding. On September 8, 1987, the Second Circuit held that although actual knowledge of the reporting requirements is not required for civil forfeiture, under the Fifth Amendment's Due Process Clause, a claimant must have constructive knowledge of the requirements. *United States v. 359,500 in U.S. Currency*, 828 F.2d 930 (2d Cir. 1987). The Second Circuit remanded the case for a determination of whether Romano had constructive knowledge.

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Before being deposed, both Romano's counsel and the government learned that Romano was being investigated for income tax evasion by a grand jury. At the deposition, Romano invoked the Fifth Amendment privilege against self-incrimination when asked about the currency. The government filed for a stay until the multiple civil and criminal actions against Romano were concluded. The district court granted the stay. Finally, nearly 10 years later, in May 1997, the district court held a trial as to whether Romano had constructive notice of the currency reporting requirements.

The district court held that the record did not support a finding that Romano should reasonably have been aware of the likelihood of having to report the currency he was carrying when leaving the U.S. to Canada. The district court's decision was based on several factors. Romano was not a sophisticated man. He did not move to the United States until he was 24 years old. He had difficulty speaking English, and he could not read or write in English. The three previous times he left the U.S., he was not required to provide any information with respect to currency. In addition, there were no signs or other notices on either side of the border indicating currency reporting requirements for travelers leaving the country.

The court distinguished this case from other Second Circuit cases because those cases all involved travelers who went by airplane and who were asked before leaving the U.S. about their currency amounts. In this case, Romano was not asked about the currency until he left the U.S. and was told to turn around by Canadian officials. The fact that Romano obtained the currency through illegal gambling and that he had experienced gambling at legal casinos did not support a finding that he should have had reason to believe that he had to report the currency he was carrying out of the country. The court failed to acknowledge a connection between gambling declarations required by federal law at casinos and the currency reporting declarations required by Customs for people leaving the county transporting currency.

The court also concluded that Romano did not have constructive notice of the reporting requirement. The government argued unsuccessfully that publication of the currency reporting requirement statute in the Federal Register itself constituted constructive notice of the contents so as to satisfy due process. Given the circumstances of the case and the complete failure of the Customs Service to take any affirmative steps to inform the casual traveler of the currency reporting requirements, it would be unfair to deprive Romano of his property based on publication of the statute. As the Second Circuit acknowledged, carrying currency across the border is not a prohibited act or a regulated activity. The reporting requirements are merely informational in nature.

Finally, the district court concluded the Supreme Court's recent decision in *United*

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States v. Bajakajian, No. 96-1487, 1998 U.S. LEXIS 4172 (June 22, 1998), was instructive. In *Bajakajian* the Supreme Court affirmed the Ninth Circuit's holding that the criminal forfeiture of \$357,144 was in violation of the Excessive Fines Clause, where the currency was not associated with any other crime, but rather was intended as a repayment of a lawful debt. The Supreme Court adopted a new standard that makes punitive forfeitures excessive if they are "grossly disproportional" to the gravity of the defendant's offense. The district court here rejected the government's contention that *Bajakajian* only relates to punitive criminal forfeitures and held that the forfeiture of Romano's \$359,500 to the government was improper.

This decision is important for several reasons. First, the government must be able to show a claimant's actual or constructive knowledge of the currency reporting requirements before instituting forfeiture. Second, constructive notice cannot be inferred from the mere fact the currency reporting statute is published in the Federal Register. Third, the district court extended the Supreme Court's decision in *Bajakajian* to civil forfeitures, thus rejecting the government's argument that *Bajakajian* only relates to punitive forfeitures.

cc: Assistant Regional Counsel (Criminal Tax)