

**DEPARTMENT OF JUSTICE  
TAX DIVISION DIRECTIVE NO. 137**

**TAX CLAIMS AGAINST EMBEZZLERS, SWINDLERS, ETC.**

**v.**

**RECOVERY BY INVESTORS, DUPES, AND VICTIMS, ETC.**

Often the Government's tax claim against an embezzler or perpetrator of a swindle can be collected only by reducing possible recovery by the investor, dupe or victim.\* Where there is no statutory lien for either the federal tax claim or the claim of the investor or victim, the Tax Division will examine both the origin of the claim and whether the investor or victim can trace the lost property to the fund at issue. When both the tax claim and the claim of the investor or victim arise from the same transaction and the investor or victim can trace its property to the fund in issue, the Tax Division will recognize the priority of the claim of the investor or victim.

When the tax claim and the claim of the investor or victim do not arise from the same transaction, the Tax Division will recognize the priority of the claim of the investor or victim when the investor or victim can trace his claim to the property at issue and either (a) title never passed to the wrongdoer, such as in the case of theft, or (b) when a constructive trust, including all tracing requirements, has been imposed prior to assessment of the tax, or would be imposed and the tax has not been assessed.

If a federal court has ordered restitution as part of a criminal case, the Division will evaluate the priority of the federal tax liens against the claims of investors and victims in accordance with federal law, including the *Mandatory Victims Restitution Act*, 18 U.S.C. § 3613, which creates a federal restitution lien for the benefit of the victims of wrongdoing (which includes both defrauded investors and victims of theft), and the *Federal Tax Lien Act*, 26 U.S.C. §§ 6321-6323. In general, the Tax Division will follow the principle of "first in time is first in right."

Claims for taxes arising from administration of a receivership or from disposition of property in constructive trust should be paid as an expense of administration, "on or before the due date of the tax." 28 U.S.C. § 960; *see also*, 26 U.S.C. § 6012(b)(3). Such administration expenses are generally paid ahead of

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\* As used here, "investor" denotes a willing participant or customer who was misled or defrauded by the perpetrator, and includes "dupes" (see *Cunningham v. Brown*, 265 U.S. 1, 7 (1924)). "Victim" denotes a person who did not willingly participate or willingly part with money or property, such as when there is theft, including embezzlement.

other claims against the assets of the receivership. When a receivership is insolvent, the administrative tax claims may be entitled to priority pursuant to 31 U.S.C. § 3713.

A mere showing by opposing counsel that allowing the Government's tax claim would prejudice the investor or victim in some way is not sufficient grounds for concession. While there is room for negotiation, the above principles should guide your analysis and negotiation. These cases are particularly susceptible to resolution by compromise. Even when our position is legally correct, a court may nevertheless seek to uphold a constructive trust wherever possible, by relaxing tracing requirements or employing other means to hold in favor of a sympathetic investor or victim. Accordingly, consistent with a realistic evaluation of litigating hazards, we should endeavor to reach reasonable settlement in these cases, rather than presenting unsympathetic claims to the court.

Although Tax Division civil attorneys, paralegals and support staff are not "Employees of the Department of Justice" for purposes of the *Justice For All Act of 2004*, 18 U.S.C. § 3771 and regulations, 45 C.F.R. § 45.10(a), Tax Division civil attorneys, paralegals and support staff act in accordance with and uphold the spirit of the *Justice For All Act of 2004* when they act in accordance with this Directive (including any update or revision), and analyze a case under these principles.

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/s/ Nathan J. Hochman

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