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3-22-2006

\$254.00 in U.S. Currency, Seized From: Terri L.  
Duncan, Seizure Date: July 20, 2005, Claimant:  
Terri L. Duncan

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**BEFORE THE COMMISSIONER OF  
THE TENNESSEE DEPARTMENT OF SAFETY**

**IN THE MATTER OF:**

**\$254.00 in U.S. Currency  
Seized From: Terri L. Duncan  
Seizure Date: July 20, 2005  
Claimant: Terri L. Duncan**

**DOCKET NO. 19.01-090228J  
DOS NO. E4157**

**INITIAL DEFAULT ORDER**

This matter was heard in Chattanooga, Tennessee before Ann M. Johnson, Administrative Judge assigned by the Secretary of State, Administrative Procedures Division, sitting for the Commissioner of the Tennessee Department of Safety. Mr. Will Lundy, Staff Attorney for the Tennessee Department of Safety, represented the State. The Claimant was not present and was not represented by legal counsel.

The subject of this hearing was the proposed forfeiture of U.S. currency based on allegations that its possession and/or receipt by the Claimant was in violation of the Tennessee Drug Control Act. Upon the Claimant's failure to appear at the hearing, counsel for the State made an oral motion for an order finding the Claimant to be in default, pursuant to TCA § 4-5-309. Upon full consideration of the evidence received at the hearing and the entire record in this case, the State's motion was granted. The Claimant was found to be in default, and the claim filed in this matter was stricken, as supported by the following Findings of Fact and Conclusions of Law.

## **FINDINGS OF FACT**

1. The Claimant's property was seized pursuant to law, resulting in the issuance of a Property Forfeiture Warrant. The Claimant filed a claim seeking the return of the currency, and requesting that a hearing be scheduled to consider that claim.

2. The claim was scheduled for hearing on March 22, 2006, and the Claimant was notified of the hearing time and location by certified mail. EXHIBIT 1. The notice was sent to the address provided by the Claimant. That notice was undeliverable because the address provided by the Claimant was returned as "Address Not Known." Claimant failed to notify the Department of her correct mailing address.

3. The Claimant did not appear at the hearing, the second or subsequent setting of the case. Based on the Claimant's failure to appear, the State made an oral motion for the entry of an Order of Default.

## **CONCLUSIONS OF LAW and ANALYSIS**

1. Tennessee Code Annotated § 4-5-309(a) provides that "if a party fails to attend or participate in a pre-hearing conference, hearing or other stage of a contested case, the administrative judge . . . may hold the party in default . . . ." An order holding an absent party in default at the second or subsequent setting of a forfeiture hearing is authorized by Rule 1340-2-2-.17(1)(a), TENN. COMP. R. & REGS., *Rules of Procedure for Asset Forfeiture Hearings*.

2. A claim must include "[t]he address where claimant will accept mail." Rule 1340-2-2-.07(4)(a)1(ii).

3. According to Rule 1340-2-2-.11(2), the Department of Safety is entitled to rely upon the address of record in providing notice to a claimant:

**In serving a “Notice of Hearing,” the Legal Division shall rely upon the addresses of record as given by a claimant or by claimant’s counsel. Proof of service per Rule 1340-2-2-.03(4) to the addresses of record shall establish a rebuttable presumption that claimant or claimant’s counsel received notice of the hearing date.**

(Emphasis added.)

4. Rule 1340-2-2-.11(3) provides as follows:

Notice of hearing for a second or subsequent setting of the hearing will be by certified mail, return receipt requested. **The return receipt card may be filed with the Legal Division and serve as a record of notification.**

(Emphasis added.)

5. Rule 1340-2-2-.17(1) contains the following provision:

(d) No default shall be entered against a claimant for failure to attend [the hearing] except upon proof by the filing of the return receipt card, that the legal division has given notice of the hearing per Rule 1340-2-2-.11(3).

(e) Upon default by a party, an administrative judge may enter either an initial default order or an order for an uncontested proceeding . . .

6. Rule 1340-2-2-.17(2)(b) specifies possible results when a claimant is held in default:

Upon a default by a claimant, a **claimant’s claim shall be stricken by initial default order**, or, if the agency requests, the agency may proceed uncontested.

(Emphasis added.)

7. The legal impact of striking a claim is to render the claim void *ab initio*, as though it had never been filed.<sup>1</sup> Failure to file a claim results in the forfeiture of the property for disposition as provided by law. *See*, Tennessee Code Annotated § 40-33-206(c).

8. In accordance with the law, as set forth above, it is determined that the State’s motion is well-taken. The Department attempted to notify the Claimant according to the rules

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<sup>1</sup> The effect of striking a pleading “is to posture the action as if [that pleading] had never been made.” *See*, *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 404 (6th Cir. 1987).

cited above, as shown by the certified return receipt. The Claimant failed to appear at the hearing to pursue her claim. Pursuant to the cited authority, the Claimant is hereby found to be in default.


Accordingly, it is hereby ORDERED that the Claimant's claim is stricken from the record, and dismissed. The Claimant's interest in the subject property is Ordered forfeited to the seizing agency for disposition as specified by law.

This INITIAL DEFAULT ORDER entered and effective this 27<sup>th</sup> day of April 2006.

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Ann M. Johnson  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 27<sup>th</sup> day of April 2006.

  
Charles C. Sullivan, II, Director  
Administrative Procedures Division