Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

November 13, 1964

United States

DEPARTMENT OF JUSTICE

Vol. 12 No. 23

UNITED STATES ATTORNEYS

BULLETIN

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Vol. 12 November 13, 1964 No. 23

RETURN TO DUTY

Mr. William J. Brady, Head of the Executive Office for United States Attorneys, has returned to duty after a brief absence.

IMPORTANT NOTICE

All entries on the post-judgment inventory form should be typed. If the form is too long to fit into the typewriter, it may be folded over along the "Activity History" column, and entries under this heading may be made in pen and ink. It is emphasized, however, that only entries under the "Activity History" heading may be made in pen and ink - all others must be typed. Typed entries will not only insure greater accuracy in the subsequent card-punching operation, but will also reduce the cost of the card-punching operation.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Oil Company Charged With Violation Of The Clayton Act. United States v. Standard Oil Company (New Jersey), et al., (D. N.J.). DJ No. 60-0-37-809. On October 22, 1964, a complaint was filed under Section 7 of the Clayton Act in the United States District Court at Newark alleging that the proposed acquisition by Standard Oil of the assets of Potash Company of America may substantially lessen competition in the sale of potash in the United States in that the acquisition would eliminate the potential competition between the two firms in the sale of potash, deprive independent suppliers of the substantial market represented by Standard's purchases and give the merged entity competitive advantages over rivals. The acquisition was to be consummated on October 28, 1964.

Potash Company of America is one of the world's leading companies engaged domestically in the production and sale of potash. Starting early in 1965, it will extend its production in Canada. Through Humble Oil & Refining Co., Standard Oil has leases to potash lands in Utah and through a subsidiary, Imperial Oil, Ltd., Standard Oil has been exploring the idea of producing potash in Canada for some time. Standard Oil is a purchaser of potash for its overseas fertilizer plants.

In exchange for Standard Oil's undertaking to postpone the closing for one week, the government agreed to notify counsel when it made application for a temporary restraining order. Such application was made before Judge Shaw on October 23 in the presence of defense counsel who submitted affidavits and argument in opposition to the application.

At the end of the arguments Judge Shaw granted a temporary restraining order and questioned the need to have a preliminary injunction hearing as such. He suggested that the parties devote their efforts to preparation for speedy trial and offered a definite trial date if the parties wished to stipulate to entry of an order extending the restraining order to then. Agreement was reached to the above procedure and trial is scheduled for January 25, 1965.

Staff: Nicolaus Bruns, Jr., Richard Colman & Richard Duke (Antitrust Division)

Two Count Indictment Filed For Violation Of Section 1 Of Sherman Act And Section 371 Of Title 18 Of The United States Code. United States v. The Bridge Construction Corporation, et al., (D. Maine). DJ No. 60-12-115. On October 23, 1964, a federal grand jury in Portland, Maine returned a two count indictment against the Bridge Construction Corp., of Augusta, Maine, and its President, Chester G. Bridge. The corporate defendant is one of the five largest highway construction companies in Maine.

Count one of the indictment charges that the defendants combined and conspired with various co-conspirator highway construction companies and individuals to fix, raise and stabilize prices for highway construction in Aroostook County, Maine; to allocate the highway construction business in that county

among themselves and to submit non-competitive, rigged bids for such business in violation of Section 1 of the Sherman Act.

Count two charges a conspiracy to defraud the United States in violation of Section 371 of title 18 of The United States Code. It is alleged in that count that the defendants conspired with co-conspirators to allocate federal-aid highway business in Aroostook County among themselves and to submit collusive non-competitive, rigged bids for such business. The highway projects involved in the conspiracy charged in count two were all supported by 50% federal funds under the Federal Aid Highway Act of 1958. The indictment charges that the defendants and co-conspirators conspired with knowledge that the federal government was paying a substantial part of the costs and that under federal laws the government had the right to receive competitive bids.

The indictment alleges that the effects of the charged offenses included: the suppression and elimination of competitive bidding for highway construction contracts in Aroostook County, Maine; the fixing, raising and stabilizing of prices for such construction; the increased cost of highway construction in Aroostook County; and the impeding of new highway construction elsewhere in Maine as well as in Aroostook County.

Staff: John J. Galgay, Bernard Mindich, Lionel E. Bolin and Raymond W. Philipps (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

ADMIRALTY

Failure of United States to Provide Safety Rails on Vessel on Which Libellant Was Working Neither Constitutes Negligence, Nor Renders Ship Unseaworthy. Joseph Denaro v. United States et al. (No. 28836, C.A. 2, October 16, 1964) D.J. No. 61-52-427. Libellant, a marine carpenter, was in the process of chocking (securing) deck cargo on a vessel owned by the United States when he slipped or lost his footing and fell to the deck. He sought recovery, for the injuries sustained, from the United States under the theory that the Government had been negligent and had breached the warranty of seaworthiness by failing to provide him with a reasonably safe place to work. He alleged that weatherproofing paper, covering the surface on which he was standing, had breaks in it from which a tacky and slippery pitch oozed, and that there had been an appreciable accumulation of dirt or debris on the surface. The district court, in denying relief, found that libellant had failed to establish his allegations.

The Court of Appeals affirmed, holding that the lower court's findings were not clearly erroneous. The Court stated that the trial court was entitled to conclude that the failure of the United States to provide safety rails or guard lines in the area where libellant worked did not amount to negligence or render the ship unseaworthy, since it was not customary to provide marine carpenters such railings when they were chocking. The Court also stated that Section 9.32(b) of the Department of Labor's Safety and Health Regulations for Longshoremen, 29 C.F.R. 1504.32(b), which required the existence of safety nets or railings in certain instances on board vessels, was not a ground for reversal since (1) the regulation was promulgated one year after the accident, (2) the district court was not apprised of the regulation, and (3) it was unclear whether the regulation applied to the instant case. The Court of Appeals also affirmed the lower court's holding that the United States was not entitled to be indemnified for its legal expenses from libellant's employer since there was no breach of the workmanlike service warranty.

Staff: Harry L. Hall (Civil Division)

FEDERAL TRADE COMMISSION

District Court Erred in Enjoining FTC and Its Staff From Proceeding With Case Remanded to FTC Hearing Examiner From Commission. Federal Trade Commission v. J. Weingarten, Inc. (No. 20732, C.A. 5, Sept. 14, 1964). D.J. No. 102-1142. In 1955, the Federal Trade Commission commenced an investigation of a possible violation by Weingarten of Section 5 of the Federal Trade Commission Act. A complaint was filed on January 5, 1960, alleging that Weingarten had violated Section 5 of the Act. After the usual administrative preliminaries, hearings began on June 30, 1960, and were terminated in the Spring of 1961. The examiner issued his initial decision on May 1, 1962, from which Weingarten took an appeal to the Commission. Both parties obtained briefing extensions and, after oral argument before the Commission, the matter was submitted for

decision on October 23, 1962. On March 25, 1963, the Commission entered an order, remanding the case for further, limited hearing before the examiner. Weingarten then instituted proceedings in the district court seeking to enjoin further proceedings before the agency.

The district court held that, by virtue of the remand, the Commission had violated Section 6(a) of the Administrative Procedure Act, 5 U.S.C. 1005(a), which requires an agency to "proceed with reasonable dispatch to conclude any matter presented to it." The court then enjoined the Commission and the hearing examiner from proceeding with the remand and directed a final disposition of the case by the Commission within 30 days.

The Court of Appeals, without passing on the Government's contention that the district court was without jurisdiction to interfere with the orderly course of administrative proceedings, held that the lower court erred in enjoining the Commission and its staff and, in reversing, ordered the district court to dissolve the injunction. The Court stated that the case had proceeded at a satisfactory rate within the Commission. The Court further stated that there was no substance to Weingarten's argument that the remand was purely and simply an attempt of a biased Commission to effectuate the prejudgment of Weingarten's guilt. Moreover, the Court was of the view that "it would be a strange thing for courts to censure administrative agencies for doing what Courts often do" and that the district court's "prohibition on the use of an examiner is an unwarranted intrusion into the administrative process by a Judge."

Weingarten has taken steps preliminary to the filing of a petition for a writ of certiorari in the United States Supreme Court.

Staff: Sherman L. Cohn and J. F. Bishop (Civil Division)

SOCIAL SECURITY ACT

Social Security Administration Regulation Creates Inference, Which Is Not Conclusive and May Be Rebutted by Evidence to Contrary, That Earnings of More Than $100 Per Month Demonstrates Disability Claimant's Ability to Engage in Substantial Gainful Activity. William E. Hanes v. Celebrezze (No. 9275, C.A. 4, October 23, 1964). D.J. No. 137-79-127. On May 1, 1959, claimant was struck from behind by an automobile as he was directing traffic in the performance of his duty as a police officer. He sustained serious injuries over various parts of his body and internally, necessitating his hospitalization for almost three months. In October 1959, he was retired from the police force and in November he applied for disability benefits. At the administrative hearing, claimant testified that he was employed as superintendent of a building in which various organizations held meetings. The job required very little of his time and it involved no physical labor. He was paid $125. per month for this work. The Secretary, in denying benefits to claimant, found that he was able to engage in light sedentary work, citing several industrial and governmental publications which listed the types of jobs held by physically handicapped persons. The district court ruled for the Secretary, relying upon a Social Security Administration Regulation (20 C.F.R. 404.1534(b)) which provides that "an individual's earnings from work activities in excess of $100 a month shall be deemed to demonstrate his ability to engage in substantial gainful activities in the

absence of evidence to the contrary." The court found "no evidence to the contrary which removes this case from the application of the regulation."

On appeal, the Fourth Circuit stated that it would have no difficulty holding for the claimant "were it not for the fact that [he] is receiving $125. per month" from his employer. The Court, noting that there was no prior cases construing 20 C.F.R. 404.1534(b), held that the regulation creates an "inference", which is not conclusive and may be rebutted by evidence to the contrary. The Court conceded that earnings from employment, whether or not the work itself is deemed substantial gainful activity, constitutes "some evidence tending to negate disability." But, it concluded that the Secretary's decision in the instant case was not supported by substantial evidence. The Court, accordingly, remanded the cause to the district court with directions to remand to the Secretary with directions to determine whether "claimant's job constituted substantial gainful activity" and, if it does not, "what, if any, employment opportunities consistent with his ability, education, background and experience are available to claimant." The Fourth Circuit then reaffirmed its holding in Thomas v. Celebrezze, 331 F. 2d 541, 546, by stating that "[c]iting catalogues which list or contain capsule descriptions of thousands of jobs is unpersuasive."

Staff: Peter B. Edelman (Civil Division)

Income Derived From Management and Operation of Office Building Constitutes "Rentals From Real Estate" and Thus Is Not Includable in Computation of Net Earnings From Self-Employment for Purposes of Determining Eligibility for Old-age Insurance. Maloney v. Celebrezze (No. 14595, C.A. 6, October 9, 1964), D.J. No. 137-30-138. In 1912, claimant's wife inherited an eight story warehouse which was converted subsequently into a modern office building. Claimant thereafter assumed full responsibility for the management and operation of the building. From 1921 to 1958, he reported the gross rental income from the building as his own for income tax purposes and, from 1954 through 1957, reported the net income as subject to the self-employment tax. Later, he filed an application for old age insurance benefits under the Social Security Act, alleging that he had been self-employed during the critical period prior to 1958.

Section 211 of the Act provides that, in order for an individual to be eligible for benefits, the claimant's net earnings from self-employment must be a specific amount for at least six quarters. That section also provides that "rentals from real estate" may not be included in computation of the claimant's earnings from self-employment. The Secretary found that claimant's sole income during the pertinent period was derived from his operation and management of the office building and that as this income constituted rentals from real estate, it was not includable in the computation of his net earnings. Upon review, the district court granted the Secretary's motion for summary judgment.

The Court of Appeals affirmed. The Court held, despite claimant's contention to the contrary, that the services he rendered to his individual tenants, i.e., the daily removal of trash, repairing light fixtures, and night elevator service, were not such as to change the essential character of claimant's income from being "rentals from real estate" within the meaning of

Section 211 of the Act. In addition, the Court held that a claimant's eligibility for old age benefits must be determined under the pertinent provisions of the Act and not by resorting to local (Pennsylvania) statutes, as claimant urged.

Staff: Marilyn S. Talcott (Civil Division).

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

United States Held to Be "Person or Organization" and Thus Covered by Insurance Policy Issued to Government Employee, Notwithstanding Provisions of Government Driver's Act of 1961. Gahagan v. State Farm Mutual Automobile Insurance Co. and United States, 233 F. Supp. 171 (W.D. La., July 31, 1964). D.J. No. 145-8-606. Plaintiff was injured when the car which she was driving collided with an automobile owned by a Government employee and operated in the course of his employment. A tort action was instituted against the United States under the Tort Claims Act and against the employee's insurer. The Government filed a third party complaint against the insurer alleging that the omnibus clause in the insurance policy issued by the insurer to the Government employee provided both the United States and its employee with coverage. The policy defined "persons insured" as including "any other person or organization legally responsible for the use of (1) an owned automobile, or (2) a non-owned automobile, if such automobile is not owned or hired by such person or organization." State Farm moved to dismiss plaintiff's claim and the Government's party complaint on two grounds: (1) that, by virtue of the so-called Government Driver's Act, 28 U.S.C. 2679(b)-(e), which in effect substitutes the United States as defendant in suits instituted against its employees arising out of their operation of automobiles within the scope of their employment, plaintiff's sole remedy was against the United States; and (2) that its policy did not intend to extend coverage to the United States.

The District Court denied the insurer's motions, holding that the United States was a "person or organization legally responsible for the use of" the insured automobile and therefore covered by the terms of the policy. The Court followed the leading case of Irvin v. United States, 148 F. Supp. 25 (D.S.D.) wherein the Government had been deemed to be an insured under the terms of a policy containing language similar to that involved in the instant case. In addition, the Court stated that the legislative history of the Government Driver's Act "in no way indicates an intention to change the conclusion of Irvin."

Staff: United States Attorney Edward L. Shaheen and
Assistant United States Attorney Edward V. Boagni
(W.D. La.)

Testimony by Plaintiff's Medical Experts, That Their Treatment of Plaintiff's Injury Would Have Been Different From That of Government Doctor, Was Not Enough to Prove Malpractice in Absence of Evidence That Treatment Rendered Was Other Than That Regarded as Standard by Medical Specialists in Area. Irene M. Morton v. United States (D.N.C., Civ. No. 618, October 14, 1964).

D.J. No. 157-54-92. Plaintiff, a military dependent, slipped and fell during a cocktail party held at the Officers' Club at Fort Bragg, North Carolina, suffering an ankle injury. The next morning she was admitted to the Womack Army Hospital, where her injury was diagnosed as a fracture of the ankle with dislocation. The affected ankle was too swollen to be set, but the treating physician applied a modified swelling case and administered drugs for the relief of pain. Five days later, it was determined that the swelling had subsided to the extent that a definitive surgical procedure could be performed. A long inversion cast was affixed to plaintiff's leg. This cast was removed one month later, after X-rays showed satisfactory healing. Five months thereafter, plaintiff complained of aching and swelling in the ankle, and X-rays taken at that time disclosed that the fracture had not healed properly.

Plaintiff instituted a tort action against the United States alleging that the Army doctor was negligent in removing the cast too soon, thus causing the ankle bones to move from their set position. In support of this allegation, plaintiff offered the testimony of two orthopedic surgeons who testified that if they had been the treating physicians they would have left the leg inversion cast on for a longer time. They admitted, however, that the Army Hospital physicians followed procedures which were standard in the local area. The District Court held that plaintiff should recover nothing. While noting that the two physicians had testified that they would not have removed the cast so soon, the Court stated that the evidence showed that the Government doctor exercised the commensurate degree of skill, care and judgment required of him under North Carolina law.

Staff: United States Attorney Robert H. Cowen; Assistant United States Attorney, Alton T. Cummings (E.D.N.C.); Denis E. Dillon (Civil Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

THEFT FROM INTERSTATE SHIPMENT

Theft From Railroad Car Is Theft From Interstate Shipment Even Though Theft Occurred Prior to Time Shipment Crossed State Line and Prior to Time Shipment Was Assigned Interstate Route. United States v. Berger, Polakoff, and Satz (C.A. 2, Oct. 9, 1964). D.J. File 15-53-56. Defendants were convicted in the United States District Court for the Western District of New York for stealing and conspiring to steal goods which were part of an interstate shipment, in violation of 18 U.S.C. 659 and 371. They were charged with the theft of 66,640 pounds of brass waste which had been loaded into a gondola car of the New York Central Railroad in Buffalo, New York, destined for Long Island, New York. After the theft a waybill was filled out by the New York Central freight agent indicating that the shipment would be routed through Weehawken, New Jersey. This was the only route used by the New York Central for shipments from Buffalo to Long Island, New York, although it had two other routes available which were wholly intrastate.

On appeal, defendants contended that the goods stolen were not part of an interstate shipment at the time of the theft, since the interstate route was not decided upon until after the theft. The Court rejected this argument and stated that there need not be an intent from the outset that the goods travel by an interstate route; but it was sufficient that the shipper delivered the goods to the carrier, not having specified an intrastate route, and the carrier subsequently chose an interstate route in the reasonable exercise of its commercial judgment.

This case appears to be the first in which 18 U.S.C. 659 has been applied to a situation in which the point of shipment and the point of destination are in the same state and the theft occurs prior to the time that the shipment has actually crossed a state line or has in some way been designated as an interstate shipment. The point of greatest importance in the case is the Court's rejection of the theory that a shipment does not become an interstate shipment until it is designated as such by either the shipper or the carrier. Under the holding of this Court a shipment can never be partially intrastate and partially interstate because if at any time in the course of its journey it takes an interstate route it is deemed to have been an interstate shipment from its inception. Judge Dimock, in his dissenting opinion, criticized the majority's adoption of a relation back theory as being a legal fiction which should not be applied in this case. He contended that the shipment was an intrastate shipment until the carrier executed the waybill assigning the shipment the interstate route, and therefore the shipment was not an interstate shipment at the time the brass was stolen.

It is believed that the holding of this Court is necessary under modern shipping methods to the effective protection of interstate commerce. With the increasing use of intransit sales, and the very broad discretion carriers now have in the selection of the fastest and most economical route to a particular

destination any other rule would substantially reduce federal control over interstate shipments. There is no sound reason why a shipment which actually is or becomes an interstate shipment at some point in its journey should not be an interstate shipment from its inception. Federal jurisdiction over a shipment which actually is an interstate shipment should not be made to begin only at the point in time when the shipper or carrier first intends that it should travel into another state.

Staff: United States Attorney John T. Curtin; Assistant United States Attorney Charles F. Crimi (W.D. N.Y.).

MAIL FRAUD

Statement of Opinion Held Fraudulent; Reckless Indifference to Truth or Falsity of Representation Equivalent to Knowledge of Falsity; Test Mailings by Postal Inspector Not Violative of Defendants' Constitutional Rights. Irwin and Kerns v. United States (C.A. 9, Oct. 21, 1964). D.J. File 36-12-266. Defendants were convicted of sixteen counts of mail fraud in the United States District Court for the Southern District of California in connection with a scheme to sell work-at-home franchises to persons who desired to solicit orders for import items to be filled by overseas suppliers.

Defendants contended that their statements as to profits which could be realized (which the Government proved were false) were opinions about future expectations and were not therefore representations of fact. The Court held, however, that implicit in any expression of opinion is the representation that such opinion is honestly entertained, and that if the person making the statement that the venture would succeed had no basis for believing that the business would be practicable, a jury could find that he had misrepresented what his opinion was. One of the defendants (Kerns) further argued that his co-defendant, Irwin, prepared the solicitation literature, and that there was no proof that he, Kerns, had any knowledge that the franchises were unprofitable. To this argument, the Court responded that there was proof that Kerns was aware of the representations being made and that he never objected to their inclusions. Even assuming that Kerns had no actual knowledge that the facts would not justify an opinion that the franchises were profitable, the Court said he "at the very least acted with reckless indifference in adopting that opinion as his own . . . One who acts with reckless indifference as to whether a representation is true or false is chargeable as if he had knowledge of its falsity."

Finally, the Court ruled that evidence obtained as a result of test mailings sent to the defendants by the postal inspector, with no indication of the inspector's occupation and of the defendants' right to counsel, were not violative of the defendants' constitutional rights under "Escobedo or Massiah or any other Supreme Court decision . . . [since] [t]he accusatorial stage of the proceeding had not yet been reached."

Staff: Former United States Attorney Francis C. Whelan; Assistant United States Attorneys Richard A. Murphy and Robert H. Filsinger (S.D. Calif.).

DENATURALIZATION

Complaint and Affidavit to Show Cause; Sufficiency. United States v. Anton Bimba (E.D. N.Y., 63-C-1328, Sept. 30, 1964) D.J. File 146-7-3536. On September 16, 1963, a complaint was filed under 8 U.S.C. 1451(a) to revoke defendant's naturalization. The complaint, and the supporting affidavit required by the statute, recited substantially the following facts: On February 3, 1926, defendant was arrested in Massachusetts and charged with "Blasphemy" and "Inciting Overthrow of Government." After trial on March 2, 1926, the "Blasphemy" charge was dismissed but defendant was convicted of the "Inciting" charge and fined $100. He appealed and while the appeal was pending on December 9, 1926, he filed his petition for naturalization, swearing that he had never been arrested, charged with the violation of any law, or convicted of any crime. On March 21, 1927, the conviction was disposed of by entry of a nolle prosequi. On April 1, 1927, defendant was admitted to citizenship. The denaturalization complaint and affidavit charged that defendant had deliberately concealed and wilfully misrepresented his arrest record in order to prevent the Government from making a full investigation of his eligibility for naturalization. Defendant moved to dismiss the complaint on the grounds that the statute is unconstitutional; that the court lacks subject-matter jurisdiction for insufficiency of the statutory affidavit; and that the complaint fails to state a claim upon which relief can be granted.

Chief Judge Zavatt denied the motion in a long opinion. The constitutionality of the statute was considered as conclusively established by a long line of Supreme Court decisions. Pointing out that on a motion to dismiss for failure to state a claim the factual allegations are admitted, the Court held that the allegations of the complaint and affidavit were sufficient; that the affidavit need not be based on the affiant's personal knowledge nor embrace the testimony of prospective witnesses. Affidavits containing similar recitals have been previously sustained by the courts. The Court further stated that "The affidavit. . . under consideration gives the defendant all the evidentiary facts upon which the Government's case rests and therefore sufficiently apprises him of the facts and reasons upon which his citizenship is sought to be revoked."

Answering defendant's contention that the concealed conviction was not material under the test laid down in Chaunt v. United States, 364 U.S. 350 (1960), the Court pointed out that the arrests involved in that case were minor, did not reflect on Chaunt's character, and took place long before the critical five-year period preceding naturalization. In this case, on the other hand, the "Incitement" conviction took place well within the five-year period and involved conduct directed at the Government, a factor which Chaunt indicated would be significant. "Viewed most favorably to the Government", the Court stated, "it would seem that this crime is precisely that type which would have warranted denial of citizenship had the existence thereof been disclosed." On such a motion, the Court considered sufficient, without further details, the complainant's allegation that defendant's nondisclosure prevented a full and proper investigation of his qualifications for citizenship.

The Court also rejected defendant's argument, based on United States v. Kessler, 213 F. 2d 53 (C.A. 3, 1954), that the complaint and affidavit were insufficient because they failed to charge that the arrests and conviction were

in fact lawful. In Kessler, the undisclosed arrests had been unlawful under state law, for there was no such crime as charged; there is nothing in the instant record to indicate defendant's arrests were invalid and the nolle prosequi did not take place till three months after his concealment. Also held untenable was the attack on the complaint as failing to allege either the commission of a legal wrong by defendant or the suffering of a legal injury by the Government.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Peter H. Ruvolo (E.D. N.Y.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Trial Type Hearing Not Required in Adjudication of Visa Petition; Maggiore Bakery, Inc. and Giacomo Baiardi v. Esperdy (64 Civ 799, S.D. N.Y., October 23, 1964.) This was an action for declaratory judgment under 28 U.S.C. 2201 and for review under Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009. Plaintiffs challenged the denial by defendant of a petition of plaintiff Maggiore Bakery, Inc. to classify plaintiff Baiardi as a first preference quota immigrant pursuant to 8 U.S.C. 1153(a) (1) and 1154. Maggiore Bakery sought the services of Baiardi as a pastrymaker to make all types of Italian pastries, ices and ice creams. Defendant moved for summary judgment, contending that the visa petition had been properly denied.

Plaintiffs disputed the denial of the visa petition on the grounds that the denial was arbitrary in that the documents submitted in support of the petition established that Baiardi was qualified for classification as a first preference quota immigrant and in that plaintiffs were denied due process because defendant had not complied with Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. 1004, 1006, by giving them the trial type of hearing contemplated by these sections. The Court quickly disposed of plaintiffs' first contention, finding, as did the defendant, that Baiardi was experienced only in the preparation of Sicilian-type sweets and that defendant had not as a matter of law erred in denying the visa petition. Similarly the Court found no merit in plaintiffs' second contention that they were entitled to a hearing under the Administrative Procedure Act. The Court ruled that the provisions of the Administrative Procedure Act requiring a trial type hearing did not apply to the determination of a visa petition because it was not a case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. Defendant's motion for summary judgment was granted.

Staff: United States Attorney Robert M. Morgenthau (S.D. N.Y.); Special Assistant United States Attorney James G. Greilsheimer (Of Counsel).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Federal Tax Lien Has Priority Over Attorney's Fees in Interpleader Action--Federal Law Controlling. United States v. Ray Thomas Gravel Co. (May 27, 1964, S. Ct. Texas) CCH 64-2 USTC par. 9529. The issue was whether attorney's fees awarded in an interpleader action in the state court brought by a debtor of Seabreez Tools, Inc., against whom the United States had filed tax liens, and in which the United States joined, should take precedence over the federal tax liens. It has been settled that such liens are inchoate and cannot be paid out of the Federal lien share of the interpleaded fund. See Seaboard Surety Co. v. United States, 306 F. 2d 855 (C.A. 9). The trial court thought that this ruling did not apply to a state court interpleader suit and held that (1) since the United States had intervened in the suit voluntarily it took the suit as it found it and (2) since the case was under the jurisdiction of state law at its inception the United States was bound by the rule of the state law that a stakeholder who in good faith interpleads the claimants is entitled to an allowance for attorney's fees. In reversing that decision, the Texas Supreme Court held that the question of whether the Federal liens took priority over the interpleader's fees was controlled by Federal law which was fully applicable to either Federal or State court proceedings. A motion for rehearing by one of the plaintiffs adversely affected by this holding was denied on July 15, 1964.

Staff: United States Attorney Barefoot Sanders, Assistant United States Attorney Charles H. Cabaniss (N.D. Texas); Earl J. Silbert and Joseph Kovner (Tax Division)

District Court Decisions

Tax Liens; Assignment of Taxpayer's Accounts Receivable to Factor After Assessment of Tax But Prior to Filing of Tax Lien Held Entitled to Priority Over Tax Lien Because Factor Was Purchaser Against Which Tax Liens Must Be Filed to Be Valid. Pasadena Investment Co. v. Pasadena Air Products, Inc., et al. (S.D. Cal., July 12, 1964). (CCH 64-2 U.S.T.C. ¶9760). On November 16, 1961, Pasadena Investment Company, a factor, entered into a factoring agreement whereby it agreed to purchase from the taxpayer certain unpaid receivables due to the taxpayer from North American Aviation. The factoring agreement gave the factor an option to purchase any accounts receivable which it elected to purchase and the power to refuse to purchase any accounts which it found unacceptable. The factoring agreement was recorded on November 16, 1961. On November 6, 1961, an assessment of federal taxes had been made against the taxpayer (the opinion incorrectly refers to the assessment date as December 6, 1961), but notice of federal tax lien was not recorded until December 15, 1961.

Certain of the accounts receivable arose out of contracts which contained restrictions against any assignment of the amounts due on the contracts. To protect itself in this situation, the factor arranged with taxpayer for an internal control which would channel North American's remittances to taxpayer directly to the factor. However, some of the money escaped this control and did not reach the factor. On December 14, 1961, taxpayer's president had acquired a cashier's check in the amount of $18,807.66 from the proceeds of remittances from North American on factored invoices which had escaped the control. On that date, a revenue collection officer was in the office of taxpayer's president seeking payment of assessed tax liabilities with respect to which notice of tax liens had not yet been filed. The agent secured possession of the check, and, although the president advised that it was a trust fund belonging to the factor, he, nevertheless, endorsed it over the District Director, who promptly covered it into the Treasury. The seizure of the check was defended on the ground that the factor was not a protected purchaser of the accounts receivable, but merely a lender against the accounts receivable as security, and, hence, not protected against an unrecorded tax lien by Section 6323 of the Internal Revenue Code of 1954.

This suit was filed by the factor against the District Director to recover, inter alia, the $18,807.66 which the factor claimed as owner. A motion was filed to dismiss the District Director, but it was overruled by the Court, on the authority of Stuart v. Chinese Chamber of Commerce of Phoenix, 168 F. 2d 709 (C.A. 9), and Kirkendall v. United States, 31 F. Supp. 766 (Ct. Cls.). On the merits, the District Court sustained the factor's claim that the accounts receivable seized by the levy actually belonged to the factor at the time of the levy, and awarded judgment to the factor in the amount of $18,807.66, plus interest. In light of the Court's factual findings, it is conceded that plaintiff had a prior interest in the accounts receivable either as a purchaser or mortgagee, and that it was immaterial which, since both are protected against unrecorded tax liens.

Staff: United States Attorney Frances C. Whelan; Assistant United States Attorney Loyal E. Keir (S.D. Cal.); and Raymond L. McGuire (Tax Div.).

Priorities; Bulk Sale Proceeds; Tax Liens Filed After Filing of Bulk Sales Affidavit by Taxpayer-Vendor Attached Only to Bulk Sale Proceeds After Payment of Creditors Entitled to Payment Under State Law. True's Oil Company v. United States, et al. (E.D. Wash., September 10, 1964). (CCH 64-2 U.S.T.C. ¶9761). Taxpayer operated a service station and, on December 14, 1962, he effected a sale and transfer in bulk of the stock of goods, wares, merchandise, fixtures and equipment located at the service station. At the time of the sale, he furnished the buyer with a Bulk Sales Affidavit as required by state law. By agreement of the parties, True's Oil Company received a certified check in the amount of the purchase price and undertook to disburse the proceeds in accordance with state law. The Government served notices of levy on True's Oil Company on February 13 and 14, 1963, advising it that Federal tax liens were claimed on all property or rights to property pursuant to assessments made against the taxpayer-vendor on February 4 and 11, 1963. At the time the levies were served, True's Oil Company still held the

certified check for the benefit of the bulk sale creditors, and, thereafter, it instituted this suit to have the priorities of the claims against the fund determined. The United States intervened.

The Court ruled that the Washington Bulk Sales Act requires the purchaser to pay first the taxing agencies accorded priority by the Act; next, the limited class of creditors mentioned in and accorded protection by the Act; and, last, any sums remaining to the vendor. The Court then found that the United States is not one of the taxing agencies accorded first priority, nor, under the circumstances of the case, was it one of the class of creditors entitled to protection under the Act. Thus, the Court held that the Federal tax lien attached only to the balance of the proceeds after these two classes had been paid.

Staff: United States Attorney Frank R. Freeman; and Assistant United States Attorney Carroll D. Gray (E.D. Wash.).

Lien Foreclosure; Taxpayer's Retirement Benefits Accumulated Pursuant to New York City Employees' Retirement System Subject to Government's Tax Liens Even Though Retirement System Was Exempt From Attachment Under State Law. United States v. Robert F. Wagner, et al. (S.D. N.Y. September 25, 1964). (CCH 64-2 U.S.T.C. ¶9777). Taxpayer was employed by the New York City Transit Authority and he was a member of the city's employees' retirement system. Prior to his discharge from his job, tax liabilities were assessed against him. Although his discharge worked a forfeit of his pension rights, he nevertheless retained a property right to recover the accumulated deductions from his salary, and the Court ruled that the tax liens, which came into existence at the time of the tax assessments, attached to the property and rights to property then owned by him. The Court therefore granted the Government's motion for summary judgment, even though the retirement fund is exempt from attachment under New York law, since the New York courts have acknowledged that Federal tax liens are not subject to State exemption laws.

Judgment was entered against taxpayer to the extent of the retirement fund because he had been served in New Jersey pursuant to 28 U.S.C. 1655 and he had defaulted. The Court also ruled that, upon making payment in accordance with its judgment, the custodians of the retirement fund would be released and discharged from all liability to the taxpayer and to the Government to the extent of the payment.

Staff: United States Attorney Robert M. Morgenthau; and Assistant United States Attorney Robert Kushner (S.D. N.Y.).

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