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BULLETIN

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MONTHLY TOTALS

The October figures show the first response to the Deputy Attorney General's request for a reduction in the pending caseload. The figures below show an increase for the first four months of fiscal 1966 over the same period in fiscal 1965. Compared with September, 1966, however, the pending caseload shows a decrease of 533 cases. Moreover, the September gap of 14.6 per cent between cases filed and terminated was reduced during October to 7.8 per cent. The Deputy Attorney General's announcement of a caseload reduction drive was made at the Conference early in October. Accordingly, the figures for the first four months of fiscal 1966 would be the first totals to show the response to the announcement. While the reduction was not large, nevertheless it is an encouraging step in the direction of further reductions.

	First 4 Months Fiscal 1965	First 4 Months Fiscal 1966	Increase or Decrease Number	%
Filed				
Criminal	11,091	10,745	- 346	- 3.12
Civil	9,366	9,538	+ 172	+ 1.84
Total	20,457	20,283	- 174	- .85
Terminated				
Criminal	9,394	9,608	+ 214	+ 2.28
Civil	8,660	9,204	+ 544	+ 6.28
Total	18,054	18,812	+ 758	+ 4.20
Pending				
Criminal	11,756	12,273	+ 517	+ 4.40
Civil	23,991	24,340	+ 349	+ 1.45
Total	35,747	36,613	+ 866	+ 2.42

During October, both criminal and civil terminations exceeded filings. With the exception of civil cases in September, this is the first time since the beginning of fiscal 1966 that terminations ran ahead of filings in either criminal or civil cases.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,296	2,465	4,761	2,212	2,194	4,406
Aug.	2,585	2,555	5,140	1,870	2,245	4,115
Sept.	3,162	2,103	5,265	2,448	2,258	4,706
Oct.	2,702	2,415	5,117	3,078	2,507	5,585

For the month of October 1965, United States Attorneys reported collections of $5,409,971. This brings the total for the first four months of this fiscal year to $19,427,497. This is $2,489,885 or 14.70 per cent more than $16,937,612 collected in the first four months of fiscal year 1965.

During October $11,345,007 was saved in 116 suits in which the government as defendant was sued for $13,172,895. 59 of them involving $8,106,369 were closed by compromise amounting to $1,287,736 and 27 of them involving $988,416 were closed by judgments amounting to $540,152. The remaining 30 suits involving $4,078,110 were won by the government. The total saved for the first four months of the current fiscal year was $73,120,243 and is an increase of $18,071,369 or 32.83 per cent over the $55,048,874 saved the first four months of fiscal year 1965.

The cost of operating United States Attorneys' Offices for the first four months of fiscal year 1966 amounted to $6,367,342 as compared to $6,281,354 for the first four months of fiscal year 1965.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of October 31, 1965.

CASES

Criminal

Ala., N.	Ga., N.	Md.	N.Y., S.	Tenn., W.
Ala., M.	Ga., M.	Mass.	N.C., E.	Tex., E.
Ala., S.	Ga., S.	Mich., E.	N.C., M.	Tex., N.
Alaska	Hawaii	Mich., W.	Ohio, N.	Tex., S.
Ariz.	Idaho	Minn.	Ohio, S.	Tex., W.
Ark., E.	Ill., N.	Miss., N.	Okla., N.	Utah
Ark., W.	Ill., E.	Mo., E.	Okla., E.	Va., E.
Calif., N.	Ill., S.	Mo., W.	Okla., W.	Wash., E.
Calif., S.	Ind., N.	Mont.	Ore.	Wash., W.
Colo.	Ind., S.	Nev.	Pa., M.	W.Va., N.
Conn.	Iowa, N.	N.H.	Pa., W.	W.Va., S.
Del.	Kan.	N.J.	P.R.	Wis., E.
Dist. of Col.	Ky., W.	N.Mex.	R.I.	Wyo.
Fla., N.	La., E.	N.Y., N.	S.C., E.	C.Z.
Fla., M.	Me.	N.Y., E.	Tenn., E.	Guam
Fla., S.				V.I.

CASES

Civil

Ala., N.	Dist. of Col.	Ky., E.	Mont.	Ohio, N.
Ala., M.	Fla., N.	Ky., W.	Neb.	Ohio, S.
Ala., S.	Fla., S.	La., W.	Nev.	Okla., N.
Alaska	Ga., N.	Me.	N.H.	Okla., E.
Ariz.	Ga., M.	Mass.	N.J.	Okla., W.
Ark., E.	Hawaii	Mich., E.	N.Mex.	Ore.
Ark., W.	Ill., N.	Minn.	N.Y., E.	Pa., E.
Calif., S.	Ill., S.	Miss., N.	N.C., E.	Pa., M.
Colo.	Ind., N.	Miss., S.	N.C., M.	Pa., W.
Conn.	Ind., S.	Mo., E.	N.C., W.	P.R.
Del.	Iowa, S.	Mo., W.	N.D.	R.I.

CASES (Cont.)

Civil (Cont.)

S.C., E.	Tenn., W.	Tex., W.	Va., W.	W.Va., S.
S.C., W.	Tex., N.	Utah	Wash., E.	Wyo.
S.D.	Tex., E.	Vt.	Wash., W.	C.Z.
Tenn., E.	Tex., S.	Va., E.	W.Va., N.	Guam
Tenn., M.				V.I.

MATTERS

Criminal

Ala., N.	Ga., M.	La., E.	N.D.	Tex., E.
Ala., M.	Ga., S.	La., W.	Ohio, N.	Tex., S.
Ala., S.	Hawaii	Me.	Okla., N.	Tex., W.
Alaska	Idaho	Mich., W.	Okla., E.	Utah
Ariz.	Ill., E.	Miss., N.	Okla., W.	Vt.
Ark., E.	Ind., N.	Mont.	Pa., W.	Wash., E.
Ark., W.	Ind., S.	Neb.	R.I.	W.Va., N.
Calif., S.	Iowa, N.	N.H.	S.C., E.	Wyo.
Colo.	Iowa, S.	N.C., E.	S.D.	C.Z.
Del.	Ky., E.	N.C., M.	Tenn., W.	Guam
Fla., N.	Ky., W.	N.C., W.	Tex., N.	V.I.
Ga., N.				

MATTERS

Civil

Ala., N.	Idaho	Mich., E.	Ohio, N.	Tex., N.
Ala., M.	Ill., N.	Mich., W.	Ohio, S.	Tex., E.
Ala., S.	Ill., E.	Miss., N.	Okla., N.	Tex., S.
Alaska	Ill., S.	Miss., S.	Okla., E.	Tex., W.
Ariz.	Ind., N.	Mont.	Okla., W.	Utah
Ark., E.	Ind., S.	Neb.	Pa., E.	Vt.
Ark., W.	Iowa, N.	N.H.	Pa., M.	Va., E.
Calif., S.	Iowa, S.	N.J.	Pa., W.	Va., W.
Colo.	Ky., E.	N.Mex.	R.I.	Wash., E.
Conn.	Ky., W.	N.Y., E.	S.C., E.	Wash., W.
Dist. of Col.	La., W.	N.Y., S.	S.D.	W.Va., N.
Fla., N.	Me.	N.C., M.	Tenn., E.	Wis., E.
Ga., N.	Md.	N.C., W.	Tenn., M.	Wis., W.
Ga., M.	Mass.	N.D.	Tenn., W.	Wyo.
Ga., S.				Guam

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Supreme Court Affirms District Court Dismissal of Complaint. United States v. Huck Manufacturing Company, et al., (No. 8 - OT 1965) D.J. File No. 60-126-43. On December 6, 1965, the Supreme Court affirmed 4 to 4, (Justice Fortas did not participate) the judgement of the District Court for the Eastern District of Michigan, which was based on the premise that a patentee may, without violating the Sherman Act, condition a license to make and sell a patented article upon the licensee's maintenance of prices set by the patentee.

Our complaint charged that Huck (the patentee) and Townsend (the licensee) agreed that Townsend would sell the patented product (lockbolts) at the prices and on the terms and conditions established by Huck and that Huck, in turn, would not issue any additional licenses under its patents so long as Townsend followed Huck's prices. The district court held that this arrangement, if it existed, would not violate the Sherman Act, under the rule of United States v. General Electric Co., 272 U.S. 476, that a patentee may lawfully require a licensee to agree to follow the prices, terms, and conditions of sale of the patent owner.

In General Electric, the Supreme Court held that such a price fixing agreement was within the permissible scope of the patent monopoly because it was "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." An equally divided Court declined to overrule General Electric in 1947, United States v. Line Material Co., 333 U.S. 287.

In the present case, the government once again urged the Court to overrule General Electric. We argued, first, that the patent law gives the patentee no more than the right to exclude others from making, using or selling his invention. Accordingly, we contended that when the patentee enters into licensing agreements, he is merely exercising his general authority to dispose of his property, but that nothing in the statute authorizes him to demand a price fixing agreement prohibited by the antitrust laws as an additional consideration for waiving his right to exclude.

We also argued that the patentee's power to charge a royalty enables him to collect an agreed sum from users of the invention, and that this is a fair measure of its value, but that the power to control the competitive activities of licensees imposes an undue burden on the public by depriving it of cost savings or other competitive advantages which licensees might otherwise effect. In addition, we contended that the policy of the patent laws to promote invention and discovery provides no basis for extending a price fixing privilege to patentees. We urged that the reasons which led the Supreme Court to outlaw price fixing as unlawful per se also compel rejection of the claim that any incentive to licensing provided by the rule in General Electric aids competition more than the price fixing hurts it.

Finally, we argued that even if the Court should decide not to overrule General Electric, the agreement violated Section 1 of the Sherman Act. Since Townsend undertook to follow Huck's prices not in return for the right to use Huck's patents, but to assure that Huck would not license anyone else, we urged

that the agreement went beyond what the General Electric doctrine permitted. In this connection, the district court entered a finding after the government had filed its notice of appeal that during a pre-trial conference the government had asserted that it was not seeking to overrule General Electric since the facts in this case went beyond the permissible scope of the General Electric doctrine. In the Supreme Court, the defendants urged that this was not a proper case in which to consider whether to overrule General Electric since the government had expressly waived that issue in the district court. In response, we pointed out that despite our position in the court below, we had raised all the issues that the court could decide. We also argued, that the defendants were not prejudiced, because the court dismissed the complaint at the close of our case, and the defense would be free upon remand to put in their defense -- which was that the claimed price-fixing agreement did not exist.

It is not known whether the four votes for affirmance were votes to reaffirm the General Electric rule, or merely votes that the government had waived the issue. No opinions are written when the Court affirms by an equally divided vote.

Staff: Donald F. Turner, Robert B. Hummel and Jon D. Hartman (Antitrust Division)

Court Imposes Fines and Suspended Jail Sentences. United States v. Electric Hose and Rubber Co., et al., (E.D. Mich.) D.J. File No. 60-175-31. The indictment in this case, which was returned on January 14, 1965, alleged a conspiracy to fix prices on industrial hydraulic hose. All defendants pled nolo on June 28, 1965, and Chief Judge Theodore Levin imposed the following sentences on December 9, 1965:

Defendant	Sentence
Electric Hose and Rubber Co.	$25,000
V. W. Wells, Vice President	1,500, 2 years' probation
The B. F. Goodrich Co.	50,000
George Fischer, Manager, Hose Sales	1,500, 2 years' probation
The Goodyear Tire & Rubber Co.	50,000
Robert Mercer, Manager, Hose Sales	1,500, 2 years' probation
H. K. Porter Co., Thermoid Division	15,000
United States Rubber Co.	50,000
Lee National Corp.	10,000

In addition to the fines described above Judge Levin suspended the imposition of jail sentences with respect to each of the individual defendants and placed each of them on two years' probation. The suspension of the imposition of jail sentences and the two years' probation means that if any of the individuals violate probation within the two-year period, the court may impose an actual prison term up to the maximum of one year. The sentences are of

particular significance since sentences in the Eastern District of Michigan are determined by a conference of the trial judge and two of his fellow district judges. This procedure is intended to bring about uniform penalties within the District.

Another indictment returned by the same grand jury charges the hose manufacturers', -- i.e. the companies that buy industrial hydraulic hose to make hose assemblies, -- with conspiring among themselves to persuade and induce the hose manufacturers to give them preferential purchasing prices. This case is still pending.

Staff: Norman H. Seidler, and Dwight B. Moore (Antitrust Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

GAMBLING

Wagering Taxes; Recent Supreme Court Decisions Expanding Self-Incrimination Privilege Not Extended to Wagering Tax Requirements Relative to Registration and Payment of Special Occupational Tax; Adverse Publicity Generated by Prosecutor and Judge Not Prejudicial. United States v. Costello, et al.; United States v. Piccioli (C.A. 2, October 29, 1965), and United States v. Grassia (C.A. 2, November 26, 1965). D.J. File Nos. 160-14-233, 160-14-222, 160-14-230. Defendants were convicted of wilful failure to pay the special gambling occupational tax, 26 U.S.C. 7203, and with wilful failure to register, 26 U.S.C. 4412.

All of the defendants challenged the constitutionality of the federal wagering tax statutes, citing the recent Supreme Court decisions involving self-incrimination: Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) and Malloy v. Hogan, 378 U.S. 1 (1964). Defendants attempted to distinguish United States v. Kahriger, 345 U.S. 22 (1953) which upheld the constitutionality of the federal wagering tax laws. Defendants maintained that remarks made by the prosecutor and the judge reflected that the Government's purpose in applying the statute against them was not to collect revenue but to promote the enforcement of state laws against gambling. In rejecting this argument, the Court said that these statements made during the trial come within the "suggestion in the debates that Congress sought to hinder if not prevent, the type of gambling taxed." Kahriger, 345 U.S. at p.27, n. 3. In the Piccioli opinion, the Second Circuit conceded that some statements by the judge may have been improper; the Court stated that in passing sentence, the judge can consider evidence which showed a violation of state gambling laws and the effect of gambling on other state crime.

Defendants also asserted that the enlargement of the self-incrimination privilege by Murphy v. Waterfront Comm'n, which overruled the doctrine of United States v. Murdock, 284 U.S. 141, should also apply to Kahriger relative to federal wagering tax statutes. The Court agreed that defendants' contention would be serious if Kahriger stood alone, but cited Lewis v. United States, 348 U.S. 419 (1955) as authority that the registration requirement cannot be considered compulsory. The Court stated this concept of non-compulsion is applicable to any possible incrimination relating to state gambling laws which may result from registration pursuant to 26 U.S.C. 4412. In the Grassia opinion, the appellate court recognized that the rationale of Albertson v. Subversive Activities Control Board, 86 S. Ct. 194, announced subsequent to the Costello opinion, may lead the Supreme Court to overrule its previous decisions in Kahriger and Lewis but deemed the constitutionality issue more appropriate for the Supreme Court's determination.

The defendants also argued that they were denied a fair hearing because of pretrial publicity, much of it emanating from the Government through oral statements to the press. The Court agreed these statements were improper and a possible basis for reversal. The Court pointed out, however, that defendants

failed to exercise any pretrial motions to eliminate the effects of the publicity. Noting the lateness of defendants' first procedural objection to the publicity, which occurred after the verdict, the Court stated defendants cannot gamble on acquittal and then claim lack of "an impartial jury" after conviction.

Staff: United States Attorney Jon O. Newman;
Assistant United States Attorney Howard R. Moskof (D. Conn.).

OBSCENITY

Forfeiture of Imported Obscene Feature-Length Motion Picture Film. United States v. Motion Picture Film Entitled "491", (S.D. N.Y.). Department File No. 54-51-1199. On November 17, 1965, the District Court found the Swedish motion picture film "491" obscene and entered a forfeiture decree under 19 U.S.C. 1305. This was the first case in 30 years contesting the alleged obscenity of an imported feature-length film. The picture was produced in Sweden by Vilgot Sjoman, a protege of Ingmar Bergman. It was seized in April 1965 by New York Customs officials. The film runs for 90 minutes, is in black and white, Swedish dialogue, with English subtitles. It deals with the amoral activities of several young Swedish delinquents and contains several scenes strongly suggesting homosexuality, rape, sodomy and bestiality. Mr. Ephraim London, attorney for the importer, Janus Films, Inc., New York City, contended, among other things, that 19 U.S.C. 1305, the statute under which "491" was seized, violated due process in that its procedures constituted an unconstitutional prior restraint. The Court ruled that the procedures in 1305 are not unconstitutional, that under 1305 Customs officials have a reasonable time in which to process suspected obscene importations, and that in the case of "491" there had been no undue delay by Customs. The Judge then found that "491" appealed to the average viewer's prurient interest, that it was "characterized by patent offensiveness," went "substantially beyond the customary limits of candor in description and representation," and was "utterly without redeeming social importance." He therefore ruled that it was obscene and entered a forfeiture decree.

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

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Alien Who Entered as a Stowaway in 1958 After Deportation in 1955 for a Narcotics Conviction Does Not Qualify For Suspension of Deportation. Giuseppe Gagliano v. INS; CA 2, Nos. 29445, 29603, December 15, 1965.

This is a consolidation of an appeal from an order of the District Court for the Southern District of New York dismissing a writ of habeas corpus and a petition to review an order of the Board of Immigration Appeals denying a motion to reopen the deportation proceedings of the appellant-petitioner.

Gagliano, the appellant and petitioner, is an Italian national who first entered the United States in 1921 as an alien seaman. In 1955 he was deported to Italy because of a conviction in 1927 for unlawfully selling narcotics. He re-entered the United States illegally as a stowaway in 1958.

The first issue before the Court was whether subdivision (1) of 8 U.S.C. 1254(a) controlled the determination of Gagliano's application for suspension of deportation or subdivision (2) which requires a longer period of physical presence within the United States on the part of the applicant. Under deportation proceedings brought pursuant to the provisions of 8 U.S.C. 1252(f) the 1955 order for Gagliano's deportation was reinstated because he had unlawfully entered the United States after being deported under 8 U.S.C. 1251(a)(11) for the narcotics conviction. Gagliano contended that he qualified for suspension of deportation under subdivision (1) of 8 U.S.C. 1254(a) on the basis that he had been ordered deported only for making an illegal entry. The Court disagreed and found the substantive ground of deportation to be 8 U.S.C. 1251(a)(11) and that Gagliano had to satisfy the provisions of subdivision (2) of 8 U.S.C. 1254(a) to be eligible to have his deportation suspended.

The last issue resolved by the Court was whether Gagliano as required by 8 U.S.C. 1254(a)(2) had been physically present in the United States for seven years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation. The Court noted a conflict in the Circuits as to when the ten year period began to run. The Ninth Circuit in Fong v. INS, 308 F. 2d 191 (1962) held that the ten year period was to be computed from the date of commission of the first deportable act and the Eighth Circuit in Patsis v. INS, 337 F. 2d 733 (1964) cert. den. __U.S.__(1965) reached the opposite conclusion that the ten year period ran from the date of commission of the last deportable act. The Court agreed with the reasoning of the Eighth Circuit and held that Gagliano's re-entry as a stowaway within the ten year period barred his request for discretionary relief. The judgment of the District Court was affirmed and the petition for review dismissed.

Staff: United States Attorney Robert M. Morgenthau (S.D. N.Y.)
Francis J. Lyons, Esq., and James G. Greilsheimer, Esq., of Counsel

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Condemnation: Capitalization of Income Held Permissible Valuation Approach for Cemetery Land; Whether Sale Is Admissible in Evidence as Comparable Is Within Discretion of Trial Court; Land Valued With Zoning Regulations in existence on Date of Taking. United States v. Eden Memorial Park Association, 350 F. 2d 933 (C.A. 9, 1965), D.J. File No. 33-5-2178. United States condemned land dedicated for a cemetery for use in the federal interstate highway program. The Government appealed because the condemnee had been allowed to capitalize projected income from the sale of cemetery lots, and because the jury was not allowed to consider in valuing cemetery land the selling price of comparable land in the vicinity not zoned for cemetery. The condemnee appealed because of the refusal of the trial court to instruct that 6.5 acres taken which was not zoned for cemetery use should have been valued as if it were so zoned. The court of appeals affirmed the trial court on all three points.

The Ninth Circuit in a very brief opinion stated there are three methods of valuation, comparable sales, reproduction costs and capitalization of income. The court quotes a scholarly work to the effect that all three approaches are not always applicable, but does not make any distinctions in this case. On the second point raised by the Government, the court held that the introduction of comparable sales was a matter within the sound discretion of the trial court. On the condemnee's appeal, it was noted that evidence was introduced showing the probability of a change of zoning, and it was held that in a condemnation case, land must be valued as it exists on the date of taking subject to the existing zoning regulations.

Staff: A. Donald Mileur (Land and Natural Resources Division).

Condemnation: Refusal of Discovery of Appraisal Expert Upheld; Future Lease and Sale-leaseback Held to Show Only Prospective Highest and Best Use; Condemnees Could Not Complain Where Pre-trial Ruling Reversed Before Close of Trial. Dicker v. United States (C.A. D.C., October 22, 1965), D.J. File No. 33-9-623-1. The condemnees acquired the property in March 1962, for one million dollars. The property at that time consisted of warehouses and unimproved lots. The Government in August 1962, entered into a five year lease of the property effective May 1963 and subject to a comprehensive remodeling of the buildings for office space. In November 1962, the condemnee entered into a sale-leaseback arrangement with a life insurance company with a purchase price of $2,800,000 after the buildings were remodelled and the government lease commenced. In January 1963, the Government condemned the fee simple estate for another use. The jury awarded $1,303,594 for the property. On appeal by the condemnee, the Court of Appeals affirmed the lower court.

Condemnees complained because they were not allowed discovery of two expert appraisers hired by the Government but not called to testify at trial. Condemnees contended they were not called because their appraisals were in excess of

$2,000,000. Court held that, where condemnees knew before the trial that the Government had hired these appraisers, the learning of the amount of their appraisals subsequent to the trial could not qualify as "newly discovered evidence." In any event, the court pointed out that their testimony would have been cumulative only, and "That the Government consulted them but did not use their opinions is not relevant evidence of value." The opinion then continued:

> Appellants could not show the prior consultation in order to bolster the witnesses' credibility, nor could they seek to arouse jury prejudices by showing the prior consultation under the guise of proving the experts' qualifications. If Appellants wanted more expert testimony on value it was for them to produce such evidence.

This opinion would thus seem to affirm the position which the Government has taken in other cases that when condemnees call an expert consulted by the Government but not used, such expert appears as the condemnees' expert, and his prior consultation with the Government is not admissible evidence.

The appellants complained of the trial court's ruling that the government lease and sale-leaseback were admissible to show "highest and best use" but not as "indicia of fair market value." It was held that they were not entitled to an instruction that the lease and sale-leaseback agreements were direct evidence of market value. Evidence of a prospective highest and best use have only a speculative bearing on fair market value. Any ambiguity in the court's earlier rulings were cleared up by the charge which plainly linked the prospective highest and best use to value at the time of taking. The court also held that there was no prejudice to appellants where the trial court prior to the close of the trial reversed an earlier ruling that excluded certain amounts expended in remodeling the warehouse buildings in preparation for the Government lease.

Staff: A. Donald Mileur (Land and Natural Resources Division).

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TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

CRIMINAL TAX MATTERS

Special Notice

In a handful of criminal tax cases in the past two months, Rule 20 transfers have been accomplished without prior approval from the Tax Division. Each of these instances had the earmarks of "forum shopping" by defense counsel to engineer the entry of a plea before a lenient judge. In one instance, the "bargain" sentence consisted of a $200 fine against a flagrant non-filer who had been a fugitive, not only from the federal charge but also from state authorities on bad check charges.

United States Attorneys and their Assistants are urged to review the discussion relating to the handling of criminal tax cases in Title 4 of the United States Attorneys' Manual. The portion of the Manual dealing with Rule 20 transfers appears at page 5 of Title 4 and reads as follows:

* * * * *

> Transfers of criminal tax cases for the entry of a plea of guilty under Rule 20, Federal Rules of Criminal Procedure, are sometimes requested by defendants "shopping" for a lenient court. Because of this possibility and because of other considerations that may be known to the Department, a transfer may interfere with the administration of justice. Express authorization must, therefore, be secured from the Tax Division before the United States Attorneys may consent to such transfers.

CIVIL TAX MATTERS

District Court Decisions

Failure to Honor Levy; Where Taxpayer Maintained Two Checking Accounts With Bank, One Overdrawn in Excess of Other, District Court Found That Bank Held No Property of Taxpayer Subject to Government's Levy. United States v. National Bank of Commerce (E.D. La., Oct. 15, 1965). In this action the United States sued the National Bank of Commerce for failure to honor a levy pursuant to Section 6332 of the Internal Revenue Code of 1954. Taxpayer, not a party to the action, maintained a general checking account and a payroll account with the bank. On February 7, 1964, notice of levy was served on the bank and at that time the payroll account showed a credit, but the general account was overdrawn in an amount exceeding the balance of the payroll account. The bank did not offset or apply the credit in the payroll account to the overdraft in the general account until February 21, 1964. The Court held that the payroll and general accounts were in fact one account that was maintained as two accounts for the convenience of its customer, the taxpayer. Consequently, when the

United States served its notice of levy on the bank, the Court concluded that the bank did not hold any property of taxpayer that was subject to the levy.

Alternatively, the Court concluded that the bank would still prevail by virtue of its plea of compensation (setoff). Under Louisiana law (Article 2207 LSA - Revised Civil Code) when two persons are indebted to one another a compensation takes place between them that extinguishes both debts. Compensation takes place by operation of law even unknown to the two debtors. Consequently, the debtor-creditor relationship existing between the bank and taxpayer regarding the credit in the payroll account would have been compensated by taxpayer's overdraft in the general account. Thus, the Court reasoned that whether the accounts were treated separately or as a single account, the bank would prevail. The Government, relying on Bank of Nevada v. United States. 251 F.2d 820, certiorari denied, 356 U.S. 938, had contended that since the bank had not exercised its right of setoff until after the levy was served, the United States was entitled to have the levy honored.

Staff: United States Attorney Louis C. LaCour; Assistant United States Attorney Ernest N. Morial (E.D. La.); and Sherin V. Reynolds (Tax Division).

Priority of Liens; Federal Tax Lien Entitled to Priority to Proceeds From Sale of Liquor License as Against Claim of Judgment Creditor and Attorney's Lien Where Tax Lien Filed Prior to Time Judgment Obtained. United States v. Dorothy M. Shearer, et al. (D. Mass., June 15, 1965). (CCH 65-2 U.S.T.C. ¶9660). Taxpayer, Dorothy M. Shearer, became indebted to the United States for various excise and withholding tax liabilities. Notices of federal tax liens pertaining to these liabilities were filed on various dates between September 30, 1960 and July 5, 1962. On May 21, 1955, taxpayer purchased a restaurant business, including an alcoholic beverage license, from defendant Alexandria Joseph, giving in return a promissory note in the amount of $12,500, secured by a chattel mortgage covering the tangible personal property on the premises. The mortgage was properly recorded on May 25, 1955, and, subsequently, was foreclosed by Joseph with the property being sold on October 31, 1962, leaving a balance of $8,618.14 due on the promissory note. In February, 1963, taxpayer entered into an agreement to transfer the liquor license for $4,100, subject to approval of the transfer by the Alcoholic Beverage Control Commission. The Commission approved the transfer of the license on March 21, 1963. On March 22, 1963, Joseph commenced a state court action to reduce the taxpayer's liability on the note to judgment and he recovered judgment on February 26, 1964. The judgment ordered the purchaser of the liquor license to pay the $4,100 to Joseph. The United States was not a party to the state court action, and, on March 5, 1964, the United States commenced the instant action to foreclose federal tax liens against the $4,100 fund. The Government obtained an order restraining Joseph from disposing of the $4,100, pending a determination of the priorities to the fund. Taxpayer's attorney was allowed to intervene, as he claimed an attorney's lien on the $4,100 fund.

The Court held that when the Alcoholic Beverage Control Commission approved the transfer of the license on March 21, 1963, taxpayer had a property right in the proceeds, subject to the federal tax liens previously filed. Since Joseph did not achieve the status of a judgment creditor until after the tax liens were recorded and the liquor license was transferred, the Court ruled that the

federal tax liens were entitled to priority. The Court also awarded the tax liens priority over the asserted attorney's lien on the ground that at the time the $4,100 fund came into existence, the amount of the attorney's lien had not as yet been determined, and, therefore, was not choate.

Staff: United States Attorney W. Arthur Garrity, Jr., and Assistant United States Attorney Stanislaw R. J. Suchecki (D. Mass.)

Federal Tax Liens; Where District Director Refused to Grant Partial Discharge of Tax Liens Because Forced Sale Value of Taxpayer's Property Remaining Subject to Liens Was Considered Insufficient, District Court Concluded That It Was Abuse of Discretion Not to Consider Fair Market Value of Such Property. Philanthropic Institute of America v. Roland V. Wise, District Director. (D. Ariz., June 14, 1965). (CCH 65-2 U.S.T.C. ¶9492). A jeopardy assessment of federal taxes in the amount of $91,500 was made against taxpayer, a non-profit corporation, and notices of tax liens were filed and levies were served on a brokerage account maintained by taxpayer. Taxpayer had an equity of $140,000 in the brokerage account and an equity of $250,000 in certain real estate. Thereafter the District Director rejected requests for abatement, for a proposed trust arrangement and for an agreement to permit dividend income on the proceeds of a sale of a portion of taxpayer's stock to be used to pay encumbrances on the real estate of taxpayer to avoid the danger of foreclosure by the holders of the encumbrances. Taxpayer then submitted an Application for Partial Discharge of Property from Federal Tax Liens and Levy which was rejected, and an explanation was given that the property remaining subject to the tax liens was "suffering from a depressed real estate market" and that a forced sale of the property probably would result in a recovery of only 25 per cent of its fair market value, based upon prior experience.

Tax payer then instituted suit to restrain collection of the assessment, having petitioned the Tax Court for a redetermination, and sought to dismiss the action.

The Court, in denying the Government's motion and in granting a preliminary injunction, noted that injunctive relief was a remedy provided for under the Administrative Procedure Act when an agency's action caused legal wrong to any person and that this remedy was provided for when agency action was found to be arbitrary or capricious or when an abuse of discretion occurs. The Court concluded that under Treasury Regulations, Section 301.6325-1, it is provided that a fair market value test is to be used rather than a forced sale value test, and the Court further concluded that the District Director had abused his discretion in rejecting taxpayer's Application for Partial Discharge based upon considering only the forced sale value of the property involved. Accordingly, the preliminary injunction sought by taxpayer was issued.

The Government filed a notice of appeal but it was subsequently stipulated that certain property of taxpayer would be sold and the proceeds, (together with additional cash or property, if required) would be held to satisfy any liability determined by the Tax Court, and an injunction against further collection activities could be issued. The notice of appeal was, in light of these developments, withdrawn.

Staff: United States Attorney William P. Copple (Ariz.) and John O. Jones (Tax Division).

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I N D E X