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UNITED STATES ATTORNEYS BULLETIN

Vol. 14 May 27, 1966 No. 11

ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

Forms DJ 25 -- Authority to Incur Expenses

With the approach of the new Fiscal Year it is very important that Forms DJ 25 clearly indicate whether the expenses will be incurred prior to July 1, 1966 or subsequent to June 30, 1966, so that the appropriate Fiscal Year funds can be charged.

Each U. S. Attorney is also urged to notify the Budget and Accounts Office in the Department of any 1966 authorizations for witness expenditures which will not be used prior to July 1. Our witness appropriation is fully committed and any liquidation of unused obligations will assist us.

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 8, Vol. 14, dated April 15, 1966:

MEMOS	DATED	DISTRIBUTION	SUBJECT
278-S5	4/18/66	U. S. Attorneys	Attorneys' Fees in Social Security Cases Under 42 U.S.C. 406(a)(b)
441	4/4/66	U. S. Attorneys	Revision of Prosecutive Policy in Credit Card Cases
461	4/8/66	U. S. Attorneys & Marshals	Equal Employment Opportunity
462	4/14/66	U. S. Attorneys	Bail and Other Court Bonds of Reliable Insurance Company, Dayton, Ohio
463	4/22/66	U. S. Attorneys & Marshals	Minority Group Status Questionnaire

ORDERS	DATED	DISTRIBUTION	SUBJECT
358-66	4/19/66	U. S. Attorneys & Marshals	Designating James T. Devine as Equal Employment Opportunity Officer for Department of Justice
359-66	4/19/66	U. S. Attorneys & Marshals	Placing Assistant Attorney General Frank M. Wozencraft in Charge of Office of Legal Counsel
360-66	4/20/66	U. S. Attorneys & Marshals	Assigning Functions with Respect to Judgments, Fines, Penalties, and Forfeitures
361-66	4/22/66	U. S. Attorneys & Marshals	Community Relations Service
362-66	5/6/66	U. S. Attorneys & Marshals	Reassigning from Civil Rights Division to Criminal Division Responsibility for Performance of Certain Functions Relating to Fed. Prisoners and Juveniles
363-66	5/9/66	U. S. Attorneys & Marshals	Designating Mary O. Eastwood as Representative from Department of Justice on Administrative Committee of Federal Register

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Final Judgment Pursuant to Divestiture Mandate. United States v. Aluminum Company of America, et al. (N.D. N.Y.) D.J. File 60-0-37-256. On April 27, 1966, Senior District Judge Brennan entered a final judgment pursuant to the divestiture mandate issued by the Supreme Court on June 1, 1964. The judgment declares that Alcoa's acquisition of Rome violated Section 7 and directs Alcoa to sell Rome (all three plants) within six months of April 27, at a price (upset price) no less than the total of (1) the adjusted book value of land, plant and equipment as of the date of sale, (2) the book value as of the date of sale of all inventories, supplies, raw material, work in process and finished goods, (3) expenses incurred by Alcoa for pension and termination pay plans, and (4) all incidental expenses relative to the sale. This portion of the judgment also permits Alcoa to make capital additions to the various Rome plants and include the book value thereof in the purchase price. In a 13-page opinion accompanying the final judgment Judge Brennan stated:

> It is not intended however that Alcoa should automatically reject any and all purchase offers which do not meet the upset price. The provision in the present judgment is intended to eliminate speculators but not to automatically exclude purchasers showing an ability and an intention to continue Rome as an active competitor in its field.

In his opinion Judge Brennan stated that he was impressed with what he termed "the similarity of facts" between this case and U.S. v. Kaiser and therefore concluded that Alcoa was entitled to a judgment adopting "substantially all but one of the provisions of the Kaiser judgment." The judgment in the Kaiser case was entered by consent of the parties and essentially provided for (1) an attempt by Kaiser to sell the Bristol facilities within nine months at an upset price and (2) after a bona fide but unsuccessful attempt to sell by Kaiser, an automatic return of the facilities to Kaiser.

The judgment also provides that if Alcoa is unable to sell Rome within six months, it may be ordered to continue its efforts to sell for an additional three months, unless it can show that there is no reasonable probability that Rome can be sold within the extended period. If Alcoa is unable to sell Rome within the extended period (or after six months, if no extension is ordered), it has the right to apply to the court for a determination that it has made a bona fide but unsuccessful effort to sell. Upon such determination, the court has the option to (1) allow Alcoa to retain its ownership in Rome, or (2) enjoin Alcoa for five years from manufacturing aluminum conductor products at Rome, or (3) order Alcoa to sell that part of Rome's assets used in the production of aluminum conductor products, or (4) for good cause shown, order such other relief as may appear appropriate.

Other provisions of the judgment relate to advertisement of the availability of Rome for purchase, reporting procedures, prohibitions of common directorship, a five-year injunction prohibiting Alcoa from acquiring any wire and cable company, visitation rights and taxation of costs.

Throughout the relief phase of this case, which included an evidentiary hearing from October 4-7, the Government strenuously opposed defendants' efforts to persuade the Court to enter a Kaiser type judgment. The Government argued that the "automatic retention" and "upset price" provisions of the Kaiser judgment could lead only to a failure of divestiture. In essence, the Government's position was that the open end feature of the "upset price" provision would enable Alcoa arbitrarily to inflate the purchase price during the sale period to a level that would discourage even the most ardent prospective purchasers.

At a conference in chambers on February 4, 1966, Judge Brennan indicated that he was not entirely satisfied with any of the proposals theretofore submitted by the parties. He was most favorably inclined toward the Kaiser type judgment, although he did not like the "automatic retention" features of that judgment. Judge Brennan ordered the parties to attempt to draft another proposed final judgment that would reflect his thinking at that time. The parties were unable to agree on a joint draft, so each submitted a proposed final judgment. In addition to the "upset price" modification, previously discussed, the judgment entered differs from the Kaiser judgment in that it breaks the nine-month sale period into two periods of six and three months, and does not "automatically" relieve Alcoa from divestiture after the sale period, although it requires the Government to show "good cause" why Alcoa should not be allowed to retain all or substantially all of Rome if it cannot sell within the prescribed period.

Staff: Donald F. Melchior, Charles D. Mahaffie, Jr., John M. Lundsten and Leo V. Finn (Antitrust Division)

Motion to Transfer Denied. United States v. Hat Corporation of America, (D. Conn.) D.J. File 60-148-82. On May 13, 1966, the district court denied a motion by defendant Hat Corporation of America to transfer the case for the convenience of the parties and witnesses to the Southern District of New York, 28 U.S.C. §1404(a). The Government claimed that many witnesses from Connecticut are expected to be called, that a transfer to New York would further burden an already congested docket there, and that a substantial delay in the trial would result. The Court held:

> Having considered the competing interests, claims, and conveniences, the court does not find transfer of the action is warranted. Accordingly, the motion is denied.

On the same day the Court also granted a motion by defendant Stylepark Industries, Inc. to dismiss the action against it for improper venue. It was conceded that Stylepark was not an "inhabitant" of Connecticut and could not be "found" in Connecticut. The Court held:

> The uncontroverted facts in the instant case reveal Stylepark has had contact with Connecticut in only three areas of its business. First, it purchases its hats from a Tennessee Corporation which, it turn, buys certain hat body requirements in Connecticut from defendant Hat Corporation. Second, from May 6, 1963, to May 31, 1965, it sold $7,921 of its products to Connecticut customers. Finally, on two or three occasions one of its salesmen made a transient call on a customer store in this state.

In this court's opinion these factors do not constitute a nexus between Stylepark and Connecticut sufficient to satisfy the venue requirements under the statute. Stylepark has neither offices nor employees in this state. It has no bank accounts, inventories or telephone listings here. No salesmen or representatives regularly or systematically solicit in Connecticut. The percentage of its total sales over a two year period was less than one-half of one percent. Stylepark's relationship with another corporation which does transact business in Connecticut is too remote and tenuous a link to weigh much in the balance.

The government's alternative claim is based on 15 U.S.C.A. §25, which provides in relevant part, that the court may, in the interest of justice, order a defendant to be served in certain antitrust suits whether or not that defendant resides in the district. The short answer to this contention is that the government has not applied procedurally to the court for such an order; nor has it attempted to show that joinder of Stylepark in this suit would be in the interests of justice.

Staff: John D. Swartz and John H. Clark (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

CARGO PREFERENCE ACT

Policy of Cargo Preference Act to Have Goods Transported in American Flag Vessels Does Not Override Warranty in Contract of Carriage That Base Charged Government Is Not Higher Than That Charged Private Shippers. United States v. Bloomfield Steamship Co. (C.A. 5, No. 21793, April 29, 1966). D.J. File 61-18744. Bloomfield, a subsidized American steamship company, carried a substantial number of grain shipments, financed by the International Cooperation Administration, to West Germany. In its contract of carriage Bloomfield warranted to the United States that the rate charged for carriage "does not exceed the prevailing rate, if any, for similar services, or the rate paid to the supplier for similar services by other customers similarly situated." Although the record indicated that the Government was charged nearly twice the rate Bloomfield had charged private shippers, the district court held Bloomfield not liable to the Government on the claim for money had and received. The court reasoned that the policy of the Cargo Preference Act of transporting cargo in American vessels overrode the specific warranty in the contract between the parties so long as the rates charged the Government were "fair and reasonable rates for United States-flag commercial vessels," 46 U.S.C. 1241(b).

The Court of Appeals reversed and remanded for the entry of judgment in favor of the Government for the excess over the rate charged to private shippers for similar commercial shipments. Contrary to the district court, the Fifth Circuit held that the policy of the Cargo Preference Act of having cargo transported in American vessels was not inconsistent with the express contractual warranty.

Staff: Alan Raywid (Civil Division)

FEDERAL TORT CLAIMS ACT

Tortfeasor Who Pays Jury Verdict Rendered in State Court Proceeding Is Not Entitled to Indemnity From United States as Alleged Joint Tortfeasor Solely on Basis of State Court Judgment, Since Congress Waived Sovereign Immunity Conditioned on Trial by Federal District Court Without Jury. City of Pittsburgh v. United States (C.A. 3, No. 15343, April 21, 1966). D.J. File 157-64-204. A pedestrian who fell and sustained personal injuries on a sidewalk in front of a building owned and operated by the United States sued the City of Pittsburgh in a state court claiming it neglected to assure that the Government kept the sidewalk in proper repair. The City gave the United States notice of the suit and attempted to have it "vouched-in" as an additional defendant in that proceeding. After the Federal Government filed objections, the state court dropped the United States as an additional defendant on the ground it was immune and had not consented to that court's jurisdiction. Subsequently, the pedestrian's action against the City of Pittsburgh

was tried in the state court and resulted in an $1,100 jury verdict against the City.

The City paid the judgment and then brought this action against the United States under the Tort Claims Act for indemnity, arguing that, in the circumstances of this case, if the United States were a private person, it would be liable under Pennsylvania law as an indemnitor for the amount of the judgment paid by the City. The district court granted summary judgment for the city against the United States. The Third Circuit, however, reversed and held that the Tort Claims Act could not be construed as permitting the United States to be bound by the verdict of a state court jury, even though that is the obligation imposed by Pennsylvania law on a private property owner. The Court pointed out that Congress, in the Tort Claims Act, had conditioned the waiver of sovereign immunity on the requirement that the liability of the United States must be determined by a federal district court without a jury. And, "to say that the federal judge's endorsement of the judgment declared by the state court jury without having heard the evidence is a compliance with the Congressional requirement would be to substitute form for substance, for it would deprive the United States of its statutory right to contest the issues of its negligence, the contributory negligence of the pedestrian, and the extent of her damages before a federal judge."

Staff: Jack H. Weiner (Civil Division)

MILITARY DISCHARGE

District Court Lacks Primary Jurisdiction Over Suit to Enjoin General Discharge From Air Force. Rufus R. McCurdy, Jr. v. Zuckert, Secretary of the Air Force (C.A. 5, No. 23143, April 14, 1966). D.J. File 145-14-527. Sergeant McCurdy moved the district court for a temporary injunction enjoining the Air Force from issuing him a general discharge. The basis of his action was that the decision to issue a general discharge was based on the recommendation of a Board of Officers convened under an Air Force regulation relating to the "Discharge of Airmen Because of Unfitness," whereas the regulation provided that action could not be taken under it "in lieu of taking disciplinary action." And, apparently, as he saw it, the discharge was being given in lieu of instituting court-martial proceedings against him for allegedly having sexually molested his daughter and step-daughter. The district court denied both a temporary injunction and also the Secretary's motion to dismiss for lack of jurisdiction. However, that court retained jurisdiction until McCurdy had an opportunity to have his case heard by the Air Force Board for Correction of Military Records.

The Fifth Circuit vacated that judgment and remanded to the district court with directions to dismiss the complaint for lack of primary jurisdiction. In so doing, the Court of Appeals pointed out that McCurdy would suffer no irreparable injury from the general discharge, even if the discharge were unlawful. This followed from the fact that under 10 U.S.C. 1553 and orders implementing it, McCurdy would be entitled to a mandatory administrative hearing after discharge as the result of which he would be eligible, on a proper

showing, to an honorable discharge and all benefits he would have been entitled to had he remained in the service until properly discharged.

Staff: United States Attorney Edward F. Boardman; Assistant United States Attorney Emiliano J. Salcines, Jr. (M.D. Fla.)

MILITARY INSTALLATIONS

10 U.S.C. 125, Relating to Abolition of Any "Power, Function, or Duty" of Department of Defense, Is Constitutional But Has No Application to Closing of Naval Repair Facility. Harry F. Armstrong v. United States, et al. (C.A. 9, No. 19,686, December 28, 1965). D.J. File 145-6-686. Plaintiff, an electrician at the Naval Repair Facility of the Naval Station at San Diego, California, brought this alleged "class action" against the Government, the Secretary of Defense, the Secretary of the Navy, and the Commanding Officer of the Facility. He sought an injunction preventing the closing of the Naval Repair Facility, claiming (1) that 10 U.S.C. 125, under which, in his view, the Secretary of Defense made the challenged closing order, is unconstitutional for unlawfully delegating legislative powers; and (2) if the section is not unconstitutional, the Secretary's order is invalid because of his failure to comply with the requirements of that section. 10 U.S.C. 125 provides in part that "the Secretary of Defense shall take appropriate action (including the * * * abolition of any function, power, or duty) to provide more effective, efficient, and economical administration and operation, and to eliminate duplication in the Department of Defense" and requires the Secretary to report the details of a planned abolition of a "function, power, or duty" to the House and Senate Committees on Armed Services. Here, the Secretary had not reported the planned closing of the Repair Facility to those committees.

The district court upheld the constitutionality of the provision, rejected plaintiff's alternative contention, and dismissed the action (233 F. Supp. 188 (S.D. Cal.)). The Ninth Circuit affirmed, pointing out that, with respect to the alternative claim, the closing of a Naval Repair Facility was not the abolition of a "function" which had to be reported under the statute to the congressional committees. On May 16, 1966, the Supreme Court denied Armstrong's petition for certiorari.

Staff: United States Attorney Manuel L. Real, Assistant United States Attorney Donald A. Fareed (S.D. Cal.)

SOCIAL SECURITY ACT

Secretary Need Not Show That Work Is Available in Claimant's Rural Village Where Record Shows Job Availability Within 50 to 100 Miles of Claimant's Home. Charley E. Bells v. Celebrezze (C.A. 4, No. 10,228, May 2, 1966). D.J. File 137-84-297. The Fourth Circuit affirmed the district court's decision upholding the Secretary's denial of disability benefits under the

Social Security Act in this case. In so doing, the Court of Appeals held that to sustain a denial of benefits, the Secretary was not required to show that work was available to the claimant in his own rural village. Rather, where work opportunities within claimant's abilities were shown by the record to exist in cities within 50 to 100 miles of his home via interstate highways, claimant could be expected to look for work in those cities.

Staff: Richard S. Salzman (Civil Division)

District Court May Not Declare Claimant Disabled Merely Because Secretary Failed to Make Proper Findings. Thornbury v. Gardner (C.A. 6, No. 16526, April 22, 1966). D.J. File 137-30-283. On review of a denial of Social Security Act disability benefits, the district court held that, since no specific findings as to what employment could be engaged in by the claimant had been made by the Secretary, he had failed to carry the "burden" which earlier Sixth Circuit cases had placed upon him in cases where the claimant could not return to his former work. Accordingly, the court reversed the Secretary and remanded for the grant of benefits. On the Secretary's appeal, it was argued that a claimant could not properly be found "disabled" by a district court simply because the Secretary had failed to make the proper type of findings. It was our position that unless it could be said on the record that, as a matter of law, no finding by the Secretary that claimant could do certain types of work could be sustained, the court must remand the case to the Secretary so that he can make findings of the type required. Agreeing with our position, the Sixth Circuit held that it was error to remand for the grant of benefits, and ordered the case remanded for the purposes of taking additional evidence and permitting the making of additional findings by the Secretary.

Staff: Robert C. McDiarmid and Robert J. Vollen
(Civil Division)

DISTRICT COURT

BANKRUPTCY ACT

Motion by Trustee to Deny Priority to Non-tax Claim of United States in Chapter X Reorganization Proceeding Denied; Right to Priority Was Vested by Plan of Reorganization Declared Substantially Consummated Long Before Trustee Made Motion. In the Matters of North Atlantic and Gulf Steamship Company, Inc., et al. (S.D. N.Y., April 11, 1966). D.J. Files 61-51-2469; 61-51-2501. The claim of the Government was for additional charter hire due from the debtor and was asserted as a priority claim under 31 U.S.C. 191 on April 29, 1959. After administration had been largely completed and partial distributions made to creditors, a plan of reorganization was duly confirmed by the court on September 19, 1962. The plan provided, in part, that "all tax and other claims of the United States, * * * shall be paid in full in cash in such amounts as shall finally be determined by settlement, litigation or otherwise, * * *." On December 26, 1962, an order was entered under §229(b) of the Bankruptcy Act declaring that the plan had been substantially consummated. Although the trustee consistently took the position throughout

the reorganization proceedings that the Government's claim, if valid, was entitled to priority, a motion to deny priority was filed.

The District Court held that to deny the Government the priority granted by the plan would be in derogation of its vested rights as a creditor and would plainly be an alteration or modification of the plan which would materially and adversely affect the participation provided for priority creditors, in direct contravention of § 229(c). The Court further held that even were the trustee not barred by § 229 and by equitable estoppel, it would, in the exercise of its discretion, refuse to entertain the trustee's motion to deny priority at that late date.

Staff: Gilbert S. Fleischer (Civil Division)

CONTRACTS

Capital Expenditures Improperly Charged to Reimbursable Costs of Production; Contract Terms Ambiguous; Contract Reformed to Conform to Intention of Parties; U. S. Estopped to Claim Overpayments Which Audit Should Have Revealed; U. S. Entitled to Prejudgment Interest at 6% Per Annum. United States v. Hanna Nickel Smelting Co., et al. (D. Ore., Civil No. 63-530, April 27, 1966). D.J. File 77-16-1491. In 1962, the Symington subcommittee of the Senate Armed Services Committee concluded that the Hanna Nickel Company had overcharged the Government during 1955-1961 by including capital expenditures in reimbursable costs of production under a large nickel supply contract.

After referral by the General Services Administration, suit was filed in the District Court in Oregon in 1963. In its complaint, the Government sought (1) $1,816,958 for overcharges to costs of production, (2) downward reformation of the 58.77 cents price per pound for nickel undelivered on March 31, 1961, and (3) 6% interest on the overpayments of costs of production. Before trial the Government reduced its major claim to $1,392,377.

The Court held that the contract terms were ambiguous but that, with respect to many of the claimed overcharges, the Company's accounting practices which were supported by expert testimony were authorized by the contract. However, the Court found that $231,506 of the Government's claim for overcharges clearly involved expenditures for capital equipment to be used in future commercial nickel production which were made "solely to obtain reimbursement" from the Government. The Court characterized Hanna's charging the Government for these expenditures as "a classic case of unjust enrichment."

As an alternative ground, the Court held that the Government was estopped to assert most of its post-1957 claim because the Government's auditors "knew or should have known" of the company's accounting methods and that the company had relied to its detriment on the Government's apparent silent acquiescence in the accounting treatment. The Court held that change of position is unnecessary when acquiescence is the ground for estoppel, citing Mahoning Investment Co. v. United States, 3 F. Supp. 622 (Ct. Cl., 1933), cert. denied 291 U.S. 675 (1934).

Because most of the disputed expenditures on which the Government's accounting position prevailed affected an agreed formula employed by the parties in negotiating a price revision in 1961, the Court reformed the price downward by 1.24 cents per pound. This meant an additional award to the Government of $241,798. Primarily because it found that Hanna was unjustly enriched, the Court awarded the Government prejudgment interest at 6% in the amount of $87,329 from the dates of the overpayments. The Government's total recovery was thus $624,158 -- a figure which included $63,525 paid by Hanna to satisfy one count of the complaint.

Staff: James H. Prentice, Lewis H. Gold (Civil Division); United States Attorney Sidney I. Lezak (D. Ore.)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

MAIL FRAUD

Instruction as to Good Faith Not Warranted by Evidence. United States v. March, 251 F. Supp. 642 (M.D. Pa., 1966). D.J. File No. 36-63-66. Defendant March was convicted on charges of mail fraud in connection with a scheme for selling plastic boats. The evidence had shown that he and a codefendant represented to dealers that the boats were in production and ready for shipment when no boats had been produced and could not be manufactured at defendants' facilities.

Defendant moved for a new trial alleging error in the Court's failure to grant a request for an instruction that, if March acted in good faith and lacked criminal intent, he would not be guilty of anything. After reviewing the proof, the Court found that there was not a shred of evidence that would call for a good faith instruction. It was held that the Court correctly charged that "no amount of honest belief that his corporate enterprise would eventually succeed can excuse a willful misrepresentation by which the purchasers' or prospective purchasers' funds were obtained."

Staff: United States Attorney Bernard J. Brown; Assistant United States Attorney Harry A. Nagle (M.D. Pa.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

NOTICE

In the case of Klissas v. INS which appeared in 14 United States Attorneys Bulletin 7, page 130, dated April 1, 1966, the word "by" in line 5, paragraph 2, should be deleted, so that the sentence will read "However, the Court found the deportation record supported the second deportation charge that petitioner failed to file address reports."

IMMIGRATION

Chinese Crewmen Denied Stay of Deportation to Adjust Their Status to Permanent Residents. Chan Hing & Lai Cho v. Esperdy (S.D.N.Y., 66 Civ. 364, May 4, 1966.) Plaintiffs, natives and citizens of China, who entered the United States in 1965 as alien crewmen and overstayed their temporary admission, were ordered deported to Hong Kong. They brought this declaratory judgment action to challenge defendant's refusal to stay their deportation.

Plaintiffs sought the stay of deportation to allow them to be classified as refugees and entitled to conditional entries pursuant to Section 203(a)(7) of the Immigration and Nationality Act as amended, 8 U.S.C. 1153(a)(7). Under the regulation 8 CFR 235.9, applications for conditional entries into the United States by refugees may be made only in specified foreign countries. Plaintiffs contended that the regulation was invalid in that the issuance of conditional entries in the United States was not permitted. This contention was rejected by the Court upon the basis of the language of the statute and its legislative history. The Court found that Congress intended that conditional entries were to be authorized only in foreign countries. The Court noted that the acceptance of the argument of plaintiffs who entered in 1965 would nullify the provisions of Section 203(a)(7) which permit examination within this country and adjustment of status of refugees who have been here for at least two years.

Plaintiffs also complained of the fact that conditional entries were not being issued in Hong Kong, the place to which they were ordered deported. The Court held that the decision of the Attorney General not to issue conditional entries in Hong Kong at the present time was a valid exercise of executive authority in foreign affairs with which the Court may not interfere. Defendant's motion for summary judgment was granted.

Staff: United States Attorney Robert M. Morgenthau (S.D.N.Y.)
Special Assistant United States Attorney Francis J. Lyons, of Counsel.

Chinese Crewman Not Qualified for Adjustment of Status as Refugee. Tai Mui v. Esperdy (S.D.N.Y., 66 Civ. 316, May 4, 1966.) Plaintiff, a Chinese alien crewman who was ordered deported for overstaying his temporary admission, brought this declaratory judgment action to review the denial by defendant of plaintiff's application for a stay of deportation. Defendant moved for dismissal of the action on the grounds that the Court lacked jurisdiction over the

subject matter and that the denial of a stay of deportation under the circumstances was warranted.

The Court first considered defendant's argument that jurisdiction to review the denial of a stay of deportation was in the Court of Appeals under the provisions of Section 106(a) of the Immigration and Nationality Act as amended, 8 U.S.C. 1105a. Conceding that the issue was a close one, the Court decided that it did have jurisdiction.

On the merits of the action, the Court found in favor of defendant and granted his motion for summary judgment. The basis for plaintiff's seeking a stay of deportation was that he was a refugee and entitled to issuance of a conditional entry and adjustment of his status to that of a permanent resident pursuant to the provisions of Section 203(a)(7) of the Immigration and Nationality Act as amended, 8 U.S.C. 1153 (a)(7). The Court held that the phrase "adjustment of status" in Section 203(a)(7) meant adjustment under Section 245 of the Act, 8 U.S.C. 1255, and that plaintiff, being an alien, crewman was by the specific provisions of Section 245 ineligible for its relief.

Staff: United States Attorney Robert M Morgenthau (S.D.N.Y.)
Special Assistant United States Attorney Francis J. Lyons, of Counsel.

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Condemnation: Appellate Review of Commission's Report Under Clearly Erroneous Standard. United States v. Moore (C.A. 4, No. 10331, May 11, 1966, D.J. File 33-48-721-62). The United States condemned appellant's coal leasehold interest. The issue of just compensation was referred by the district court to a commission under Rule 71A(h), F.R.Civ.P. After a hearing, the commission filed its report. The district court, after considering additional testimony presented by the coal lessee, overruled the lessee's objections and confirmed the report, approving the commission's award of $1,500 as just compensation.

On the coal lessee's appeal, the claim was made that the findings of the commission and the district court were unwarranted and insufficient. In a per curiam opinion, the Court of Appeals affirmed, stating: "As we cannot say these determinations are clearly erroneous, we affirm. F.R.Civ.P. 71A and 53(e)(2)."

Staff: Raymond N. Zagone (Land and Natural Resources Division).

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CIVIL TAX MATTERS

Appellate Decision

Federal Tax Lien; Property of Taxpayer; Court of Appeals Affirms District Court's Summary Judgment That Account Receivable Due Taxpayer Was Property of Taxpayer to Which Government's Tax Lien Could Attach. Parlane Sportswear Co., Inc., et al. v. United States, (C.A. 1, No. 6643, May 4, 1966). D. J. File 5-36-2824. Del Ray Sportswear, Inc., a clothing processor, performed work for Sherry Hill Sports Wear, Inc. and Parlane, clothing manufacturers. On October 2, 1962, the Internal Revenue Service made an assessment against Del Ray for an unpaid withholding tax deficiency. Thereafter on November 2, 1962, notice of federal tax lien was properly filed, and Notice of Levy was served on Parlane on November 8, 1962. On November 9, 1962, Del Ray had work in process for both Parlane and Sherry Hill but was unable to make delivery because of insufficient funds to pay its employees. Parlane advanced the necessary payroll funds to Del Ray and took an assignment of all amounts due Del Ray from Sherry Hill. Thereafter Sherry Hill's checks payable to Del Ray were delivered to Parlane.

The Court reasoned that Sherry Hill's payment to Del Ray was for the goods delivered to it by Del Ray and not for unpaid wages. As such, Parlane took a simple assignment of Sherry Hill's debt due Del Ray, the property of Del Ray, after the Government's lien had been validly recorded.

Staff: Lee A. Jackson, Joseph Kovner, and Robert Waxman (Tax Division)

District Court Decisions

Tax Liens; Priority; Government's Tax Liens Not Extinguished From Taxpayer's Property by County's Foreclosure Proceeding and Subsequent Purchase of Properties by City Pursuant to ORS 310.280, et. seq. United States v. J. Francyl Howard, et al. (D. Oregon, April 22, 1966). (CCH 66-1 U.S.T.C. ¶9389). This was an action by the United States to reduce to judgment certain tax liabilities; to foreclose its tax liens on Tracts I and III which were owned by the taxpayers; and to set aside as fraudulent a conveyance of Tract II to taxpayer's son and daughter. The Court's opinion concerns the second phase of this litigation, i.e., the foreclosure of the Government's liens against Tracts I and III. Prior to this action, the county, pursuant to ORS 310.280, et. seq., brought judicial foreclosure actions against certain blocks and lots within Tracts I and III but failed to name the United States pursuant to 28 U.S.C. 2410. Subsequently, the city purchased certain of the foreclosed property from the county to protect its liens pursuant to ORS 310.280.

The Court reasoned that for the Government's tax liens of record at the time the county's foreclosure action was commenced to have been extinguished from the property, the United States must have been named a party pursuant to 28 U.S.C. 2410. The Court concluded that the unique Oregon statutory provision

which allows a county to name only those persons appearing on its tax rolls when bringing a foreclosure action and further provides that to protect its liens a city can purchase the property from the county and get clear title could not affect a federal tax lien which is governed by federal law.

Staff: United States Attorney Sidney I. Lezak; Assistant United States Attorney Jack G. Collins, (D. Ore.).

Jurisdiction; Suit by Non-taxpayer Against United States to Recover Property Allegedly Seized to Satisfy Liability of Another Denied. Schieck v. United States. (D. Wyo., April 8, 1966). (CCH 66-1 U.S.T.C. ¶9388). Plaintiff, a non-taxpayer, instituted suit against the United States for the purpose of recovering a specific sum of money which was allegedly seized by the Internal Revenue Service to apply to the federal tax liabilities of another. The United States successfully contended that even if plaintiff's fact allegations were correct, the Court did not have jurisdiction under Sections 1340 and 1346, Title 28 U.S.C., to entertain the suit. Moreover, suits against the United States under Section 1346(a)(1) pertain to the remedy available to taxpayers in situations where it is contended that such taxpayer is entitled to a refund of taxes which were wrongfully paid or collected. Phillips v. United States, 346 F.2d 999 (C.A. 2); First National Bank of Emlenton v. United States, 265 F.2d 297 (C.A. 3). Further, since Section 1340 is merely a general grant of jurisdiction to the district court, this provision is of no assistance in the absence of a specific grant of jurisdiction or waiver of sovereign immunity.

It was recognized that the non-taxpayer would have a remedy against the District Director of Internal Revenue under the common law theory of assumpsit where its property is subjected to the satisfaction of another's tax liabilities. City of Philadelphia v. The Collector, 5 Wall 720; Collector v. Hubbard, 12 Wall 1; Stuart v. Chinese Chamber of Commerce, 168 F.2d 709 (C.A. 9); United States v. Kales, 314 U.S. 186. Such a remedy has been viewed as a fiction adopted in order to avoid unjust enrichment of the Government. (As to whether this is a common-law action or statutory remedy, see Flora v. United States, 362 U.S. 145, 153). However, the Court determined that not even this approach would be of any benefit to plaintiff in the instant proceeding since the affidavits attached to the Government's motion to dismiss effectively controverted plaintiff's allegation that his money was seized by the District Director and applied as payment to the tax liabilities of a third person.

Staff: United States Attorney Robert N. Chaffin, (Wyo.); and Joel P. Kay, (Tax Division).

Computation of Wagering Excise Tax; Where Taxpayer Failed to Maintain Records of Gambling Operation, Tax Was Computed by Multiplying Number of Days of Operation by Four-day Average of Bet Slips Seized in Raid; Penalties: Wilful Failure to Maintain Records, File Wagering Excise Tax Returns and to Pay Wagering Excise Tax Held Not Sufficient to Support Assessment of 50% Fraud Penalty, but Court Substituted Delinquency Penalty in Amount of 25% of Tax. United States v. Washington. (E.D. Va., March 1, 1966). (CCH 66-1 U.S.T.C., ¶15,678). The Internal Revenue Service determined the amount of the wagering excise tax by computing the average of the daily bets over a four-day period

on the basis of bet slips seized in a raid of taxpayer's gambling operation. This average was multiplied by 255, the number of days of operation determined by the Internal Revenue Service on the basis of dated "keep-in" bets. The "keep-in" tickets which were seized in the raid covered a period from August 1960 to May 1961. The Service also computed a wagering excise tax on these "keep-in" bets, but elected to use a two-day period rather than a four-day period to determine the daily average. The Court determined that this computation of the average daily "keep-in" bets was arbitrary, holding that the Government should have used a four-day period for purpose of computing the average daily "keep-in" bets.

The Court refused to impose the 50% fraud penalty under Section 6653 of the Internal Revenue Code even though the Court found that defendant had (1) failed to register as a gambler as required by law (2) had failed to maintain records of his wagering business as required by law (3) had failed to file monthly wagering excise tax returns, and (4) had failed to pay the wagering excise taxes due. However, even though the Government had not assessed the delinquency penalty under Section 6651 of the Internal Revenue Code, the Court determined that the evidence supported the imposition of a delinquency penalty in the maximum amount of 25%.

Staff: United States Attorney C. Vernon Spratley, Jr., (E.D. Va.); and Thomas R. Manning, (Tax Division).

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