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# UNITED STATES ATTORNEYS
# BULLETIN

## SPECIAL NOTICE (BAR JOURNAL ITEM)

The following item, which appeared in the December 23 issue of the Bulletin under the Tax Division, contained an error. Because of the importance of this notice, which it is hoped will be placed in local bar publications, the corrected version of this notice is set out below.

### Suits Against the United States Under 28 U.S.C., Section 2410

In order to avoid unnecessary litigation, United States Attorneys are requested to acquaint members of the local bar and other interested parties with provisions of 28 U.S.C., Section 2410, as amended by Section 201 of the Federal Tax Lien Act of 1966 (P.L. 89-719). To that end, the following item may be inserted in local bar publications:

Under 28 U.S.C., Section 2410, as enacted and previously amended, the United States has consented to be named a party defendant in any suit instituted in a federal or state court having jurisdiction of the subject matter for the purpose of quieting title to or foreclosing a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien. As amended by Section 201 of the Federal Tax Lien Act of 1966, the Government's consent to be sued under Section 2410 has been broadened to include "partition" actions, "condemnation" actions, "interpleader" actions and actions "in the nature of interpleader".

Any pleading (whether or not designated as a complaint) which attempts to join the United States as a party in the types of actions named, where the action involves liens arising under the Internal Revenue Code, must set forth with particularity the nature of the interest or lien of the United States, i.e., (1) the name and address of the delinquent taxpayer, (2) if a notice of tax lien has been filed, the identity of the internal revenue office which filed the notice, and (3) the date and place such notice of lien was filed. Moreover, as in the past, service of process must be made upon the United States Attorney's office and a copy of the process and complaint must be sent to the Attorney General of the United States by registered or certified mail. Unless these requirements are met, the pleading is defective as to the United States and is subject to a motion to dismiss. In such event, a judgment rendered in such a suit, or a judicial sale pursuant to such judgment, will not disturb the lien of the United States.

A judgment or decree in any such action shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, in a mortgage or lien foreclosure action, the property involved will be discharged from a junior

federal mortgage or lien only if a judicial sale of the property is sought; in such situations, except where federal law precludes redemption, the United States may redeem real property sold within 120 days from the date of sale, or such longer period as may be allowed under local law.

# UNITED STATES ATTORNEYS BULLETIN

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## ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Inspection of Grand Jury Testimony Granted Only as to Officers of Corporations Who Were So Employed at Time of Their Grand Jury Testimony. United States v. Aeroquip Corp., et al., (E. D. Mich.) D. J. File 60-182-87. In this case the corporate defendants moved for pretrial inspection of the grand jury transcripts of persons who were officers and employees of the defendant corporations at the time they testified before the grand jury, and for the transcripts of others who once had been officers and employees of the corporations but who had left such employment at the time of their grand jury testimony. In addition, the motions also covered persons who had appeared before the grand jury to produce documents in response to subpoenas duces tecum directed to their corporations.

The motions initially were made pursuant to new Rule 16(a)(3), F. R. Cr. P., but at the oral argument the corporate defendants expanded their motions to include a request for the transcripts based upon "particularized need." Presumably this latter request was based upon Rule 6(e), but this was never specifically claimed.

We opposed the initial motions on the grounds that Rule 16(a)(3) did not apply to officers or employees of a corporate defendant who appeared before the grand jury pursuant to subpoenas ad testificandum because they were not representing the corporation when they so appeared but instead were giving their personal testimony. We further opposed the expanded motions on the ground that no "particularized need" was present. We did not oppose the motions as they applied to persons appearing before the jury pursuant to subpoenas duces tecum addressed to the corporations, but as to these individuals we argued that the order for inspection should be entered along the lines of the order in United States v. Badger Paper Mills, Inc.

On December 15, 1966 the Judge entered his opinion granting inspection only as to officers of the corporations who were so employed at the time of their grand jury testimony. While he recognized that corporations could be held liable for the acts of their employees regardless of their official capacity, he held that he would apply Rule 16(a)(3) only as he had stated. He held that Dennis v. U. S., 384 U. S. 855 was inapplicable to Rule 16(a)(3).

As to the ad testificandum witnesses, the Judge rejected our argument for a Badger-type inspection order. Instead, he stated that each counsel was not to disclose the transcript to anyone except as necessary to defend the case, and anyone to whom disclosure was made was ordered to treat it as confidential.

On the issue of particularized need the Court distinguished the Dennis and National Dairy cases on the ground that these involved access to grand jury testimony for purposes of impeachment of witnesses after they had testified at trial. Dennis, the Court held, does not sweep away all prior requirements of grand jury secrecy.

> . . . In the case at bar, none of the defendants has presented a convincing case of such particularized need at the present time. Mere contention, as raised in these proceedings, that the memory of grand jury witnesses has faded is not in itself sufficient to overcome the policy of grand jury secrecy. The contention that all the information recorded in the grand jury proceeding constitutes a huge storehouse of relevant data which has been in the exclusive possession of the government for many years is also not sufficient to require wholesale pre-trial disclosure of such information at this time. While the amendments to Rule 16 and the Dennis decision have substantially liberalized the extent to which pre-trial discovery is available in criminal matters, such discovery is still not equivalent to that available in civil matters.

Staff: Carl L. Steinhouse, Dwight B. Moore, David G. Budd and John A. Weedon (Antitrust Division)

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## CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

### JENCKS ACT

Composite Drawing Prepared by FBI Agent From Victim's Descriptions of Robbers Held Not Producible Under Jencks Act. United States v. Zurita, (C.A. 7, No. 15620, Nov. 9, 1966). Defendant's conviction of bank robbery (18 U.S.C. 2213(d)) was affirmed.

Defendant and two others held the manager of a Gary, Indiana bank and his wife hostages overnight and the next morning accompanied the manager to the bank and robbed it. An interviewing FBI agent drew a composite picture of the robbers from the descriptions given by the manager and his wife. Although the couple testified and identified the defendant at the trial, the composite drawing was not introduced. Upon a motion by defendant under 18 U.S.C. 3500, the trial judge ruled the drawing non-producible.

The Seventh Circuit affirmed, holding that the drawing clearly did not fall within section 3500 (e)(1), which is limited to "a written statement." Subsection (e)(2) refers to a recording or transcription that is "a substantially verbatim recital of an oral statement." In Palermo v. United States, 360 U.S. 343 (1959), the Supreme Court had construed subsection (e)(2) strictly, to exclude any document containing the transcribing agent's "selections, interpretations, and interpolations." Because the composite drawing contained the FBI agent's manual interpretation of the victim's descriptions, it was not, technically speaking, a verbatim report, and so subsection (e)(2) was found to be inapplicable.

Staff: United States Attorney Alfred W. Moellering; Assistant United States Attorney Richard F. James (N.D. Ind.).

### BANKING

Embezzlement; "Funds" Includes Money. Napoleon Persone Zamora v. United States (C.A. 10, December 1, 1966). The defendant bank cashier was tried and convicted for the embezzlement of $250,000 of bank funds under 18 U.S.C. 656, and for making of false entries in violation of 18 U.S.C. 1005. In his appeal, the defendant asserted error in the trial court's refusal to give an instruction which would have made a distinction between "moneys" and "funds and credits," contending that if anything was embezzled it was money and not funds and credits. The Court of Appeals in affirming the conviction held: "The court's refusal to give the instruction was proper. The

word 'funds' is broader than but in its usual sense includes 'moneys.' In re Pilch's Estate, 141 Colo. 425, 348 P. 2d 706. See Bishop v. United States, 8th Cir. 1926, 16 F. 2d 406, 19 F. 2d 222."

Staff: United States Attorney John Quinn; Assistant United States Attorney John A. Babbington (D. N. Mex.).

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# IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

## IMMIGRATION

Administrative Refusal of Conditional Entries and Immigrant Visas and Adjustment of Status to Chinese Crewmen Upheld. Tai Mui v. Esperdy, Chan Hing and Lai Cho v. Esperdy, and Woo Cheng Hwa v. INS (C.A. 2, Nos. 30621, 30622, and 30552, December 9, 1966) D.J. Files 39-51-2694, 39-51-2697 and 39-51-2754. Three of the above cases involved appeals by Chinese crewmen from orders of the United States District Court for the Southern District of New York dismissing their declaratory judgment actions brought to challenge decisions of the District Director of New York and the Board of Immigration Appeals denying their application as refugees to become permanent residents under the provisions of the 1965 amendment to the Immigration and Nationality Act, 79 Stat. 911, 912-13. The remaining case was a petition to review the final order for the deportation of a Chinese crewman.

The first issue passed on was whether the lower court had jurisdiction of the declaratory judgment actions in view of the fact that all appellants were under final orders of deportation and that 8 U.S.C. 1105a provides that final orders of deportation entered pursuant to 8 U.S.C. 1252(b) may only be reviewed by a petition to a court of appeals or by habeas corpus proceedings. Two appellants, Chan Hing and Lai Cho were contesting the denial of stays of deportation by the District Director. As to these actions the Government conceded and the Second Circuit held that the lower court had jurisdiction since the denial of stays of deportation were not made in deportation proceedings conducted under 8 U.S.C. 1252(b). The remaining appellant Tai Mui sought by his action to have the lower court review the denial by the District Director of his application as a refugee for a conditional entry under 8 U.S.C. 1153(a)(7). The appellee District Director argued that after the denial of his application for conditional entry Tai Mui should have moved to reopen his deportation proceedings to permit him to apply for adjustment of his status. The Court found that such a motion would have been futile because the Board of Immigration Appeals and the Special Inquiry Officer were bound by regulations of the Attorney General declaring ineligible for adjustment of status an alien lacking refugee classification approved by the District Director whose determination was by regulation expressly immunized from review. While conceding that the issue was not free from doubt in view of the decisions in Foti v. INS, 375 U.S. 217 (1963); Giova v. Rosenberg, 379 U.S. 18 (1964) and decisions by circuit courts on related questions of jurisdiction, the Second Circuit held that the lower court also had jurisdiction of Tai Mui's action.

The Second Circuit then proceeded to consider the substantive questions raised on the appeals and by the petition for review of a deportation order. The

first issue was whether the provisions of 8 U.S.C. 1153(a)(7) permitting the adjustment of status of certain refugees incorporated the limitation of 8 U.S.C. 1255 making adjustment of status thereunder unavailable to an alien crewman or whether the Attorney General by regulation might so provide. After consideration of the legislative history of 8 U.S.C. 1153(a)(7), the Court concluded that Congress intended that refugees must meet the requirements of 8 U.S.C. 1155 and that alien crewmen claiming refugee status were disqualified for adjustment of status.

The next issue was the validity of the regulations governing the issuance of conditional entries. Appellants Chan Hing and Lai Cho did not have two years of physical presence in the United States and were therefore ineligible under 8 U.S.C. 1153(a)(7) for the availability of immigrant visas in lieu of conditional entries to refugees in the United States. It was their position that the regulation 8 CFR 235.9 was invalid for failure to list the United States as a non-Communist or non-Communist dominated country where an alien might be granted a conditional entry and depart to another country from which he could enter the United States. On this point the Court found that the statute clearly contemplated that conditional entries were only to be issued abroad to refugees who were then to be paroled into the United States for possible adjustment of status after two years of physical presence. The same appellants also urged that the regulations were arbitrary in listing only countries in Europe and the Middle East and excluding any in the Orient as places where conditional entries could be issued. The Court said as to this argument it encountered the difficulty that it could hardly direct the Attorney General to supply the office the appellants wanted and that the only recourse open to the Court in its opinion was to stay the deportation of all Chinese refugees who sought conditional entries until such an office was established or until they had two years of physical presence in the United States. The Court said it would require far weightier evidence of arbitrary action than had been presented before seriously considering any such confrontation with the Executive Branch. The Court then quoted from a letter of the State Department to the Attorney General which stated that only certain countries in Europe and the Middle East under the Fair Share Refugee Law of July 4, 1960 had by agreement consented to the presence of United States immigration officers within their territories and examination of refugee applicants for parole into the United States and also for the return to such countries within two years of any refugees found to be statutorily inadmissible into the United States. The letter pointed out that Congress was aware of these arrangements when it enacted 8 U.S.C. 1153(a)(7) and consequently the State Department had continued the former procedures in force for the entry of refugees under 8 U.S.C. 1153(a)(7). The letter further stated that the Secretary of State and Attorney General have agreed that if any changes in the procedures were found desirable they would be promptly effected. The Court noted that while only five Chinese were found qualified for conditional entry in the fiscal year ending June 30, 1966, the vast majority of aliens adjusted to the status of permanent residents under 8 U.S.C. 1153 (a)(7) were Chinese. In the Court's

opinion there was no indication that any discrimination against Chinese refugees had been practiced up to the time of its decision.

The orders of the lower court dismissing the declaratory judgment actions were affirmed and the petition of Woo Cheng Hwa for review of his deportation order was denied.

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

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# TAX DIVISION

Assistant Attorney General Mitchell Rogovin

## CIVIL TAX MATTERS

### Appellate Decisions

### SUPREME COURT

American National Red Cross Is Instrumentality of United States Immune From State Taxation of its Operations; Congress Has Not Waived That Immunity With Respect to State Unemployment Taxes; Three-Judge District Court Required to Enjoin Imposition of Colorado Unemployment Taxes on Red Cross; Neither Eleventh Amendment Nor Tax Injunction Act (28 U.S.C. 1341) Apply to Suits by United States. Department of Employment, et al. v. United States, et al. (Sup. Ct. December 12, 1966) D.J. File 236517-6-6. The Government and The American National Red Cross sued the Colorado Department of Employment and its Executive Director to enjoin imposition on Red Cross of taxes under the Colorado Employment Security Act, which applies to charitable institutions, and to recover such taxes already paid under protest. In affirming the judgment of the three-judge district court granting the injunction and refund, the Supreme Court held "that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations, and that this immunity has not been waived by congressional enactment." It did not attempt to state any "simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality." In concluding that "Red Cross is clearly such an instrumentality," it pointed out that Red Cross' Congressional charter subjects it to "governmental supervision and to a regular financial audit by the Defense * * * Department"; that the President appoints its principal officer and seven other members (all Government officers) of its fifty member Board of Governors; and that statutes and executive orders confer upon "Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need." The Court pointed out also that insofar as its "employees are not employees of the United States and * * * government officers do not direct its everyday affairs--Red Cross is like other institutions--e.g., national banks--whose status as tax-immune instrumentalities of the United States is beyond dispute."

Before reaching the merits, the Court held that Swift & Co. v. Wickham, 382 U.S. 111 (1965) did not make it inappropriate to have the trial before a three-judge court; and that neither the Tax Injunction Act (28 U.S.C. 1341)

nor the Eleventh Amendment was an impediment to the action since they do not apply to suits by the United States.

Staff: William Massar (Tax Division)

Federal Tax Lien Act of 1966 Does Not Afford Relief to Creditor Whose Security Interest Would Not Have Been Protected Under Local Law Against Judgment Lien Arising, as of Time of Tax Lien Filing; Interpleader Attorney's Fee Not Protected by 1966 Act; Situs of Personal Property Is at Residence of Taxpayer for Purposes of Filing Federal Tax Lien. United States v. Strollo, et al. (D.Ct. of Appeals of Fla., 2d Dist., December 21, 1966). The Florida District Court of Appeal has made the first decision under the Federal Tax Lien Act of 1966, construing the provisions for commercial transaction financing arrangements, interpleader attorney's fees, and situs of property for filing notice of lien. The facts, which were not in dispute, are: On July 5, 1963, the bank filed a general notice of assignment with the Secretary of State of Florida, stating that taxpayer, an interior decorator, had assigned or intended to assign one or more accounts receivable to the bank. Notice of the federal tax lien against taxpayer was filed on November 29, 1963, at the county of his residence. On December 17, 1963, taxpayer entered into a written contract to perform services for a restaurant located in an adjacent county. The bank then made additional advances of $1,570.96 to him, and as security therefor the restaurant contract was assigned to the bank on December 29, 1963. Upon completion of the work, the restaurant, faced with the competing claims of the Government and the bank to the contract price, filed an interpleader suit, depositing the sum of $1,004.70 into court and claiming an interpleader attorney's fee. At the time of the trial, the 1966 Act had not been passed, and the Government relied upon the then federal law which, regardless of state law, entitled it to priority over any security interest for advances made for work done after the federal tax lien filing. It also urged that as a matter of state law the bank did not gain any protected security interest in the contract by virtue of its general notice of lien, but only when the contract was assigned to it. The Government further objected to any interpleader attorney's fee to be paid out of the tax lien fund. The trial court held that the general notice of lien, antedating the filing of the federal tax lien, gave the bank a protected assignment under the Florida statute which met the federal test of a choate lien. It accordingly awarded the sum to the bank, subject to an interpleader attorney's fee of $350 and $30 costs. The court also added, as an alternative ground of decision, that notice of the tax lien had to be filed at the residence of the debtor restaurant and not at taxpayer's residence.

The Government's appeal urged that the trial court had erred under the then-existing law. By the time the case was reached for argument, however, the Federal Tax Lien Act of 1966 was enacted and made applicable to pending appeals. See Section 114. (See also Special Notice, Effective Date of Title I

Amendments of Federal Tax Lien Act of 1966, 14 United States Attorneys Bulletin 506.) The Government accordingly filed a supplemental memorandum in which it pointed out that the Federal Tax Lien Act required the Government to abandon its contention that the federal tax lien was superior to the assignment of future accounts receivable, regardless of state law. The new Act, it was pointed out, amends Section 6323 of the 1954 Code to provide that certain specifically defined interests, though arising after the notice of a federal tax lien has been filed, shall nevertheless have priority over such federal tax liens. Specifically, the Act deals with the so-called "factor's lien" or a commercial financing security agreement of the type involved in this case. The new Act permits the financing party to make loans against new accounts receivable for 45 days after the federal tax lien is recorded, but it contains the crucial proviso that in order to come within the provisions of the new law, the security interest in question must be protected under state law against a judgment lien arising as of the time of the federal tax lien filing. Section 6323(c)(2). The Government further pointed out that, as its original brief demonstrated, under the then-existing Florida law, the bank did not have a valid lien against a private creditor's judgment lien arising as of the time of the federal tax lien filing. The District Court of Appeals has accepted the Government's argument on this issue, holding that the new Act affords the bank no relief because its claim was not protected by state law until the assignment of the contract.

The appellate court also upheld the Government's contention that the Federal Tax Lien Act of 1966, though not applicable to the earlier filing, confirmed the prior settled law that the situs of a debt for federal tax lien purposes is at taxpayer's residence. Having held that the federal tax lien was superior to the bank's assignment, the court then had to consider whether the interpleader attorney's fee could be awarded out of the tax lien fund. Here, too, the court accepted the Government's argument that the 1966 Act had not changed prior law, which treated such a claim as an inferior, later arising interest. While the court's opinion does not discuss the new statute on this point, it apparently accepted the Government's argument that Section 6323(b)(8) only protects the attorney who procures a judgment or settlement of the taxpayer's claim which is to be applied to the tax debt, while Section 6323(e) only protects the attorney's fee incurred in the collection of a senior lien, neither of which embraces the interpleader attorney's fee.

Staff: Joseph Kovner, Donald W. Williamson, Jr., and Stuart A. Smith (Tax Division)

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