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United States v. Marin Independent Service Station Assn. (N. D. Calif., Cr. 41349; April 26, 1967; DJ File 60-57-192).

On April 26, 1967, a federal grand jury in San Francisco, California, returned two indictments charging Section 1 violations in the retail gasoline business.

Criminal No. 41348 named three service station associations and four of their executives. In a single count the indictment asserts that beginning in the fall of 1966 the defendants conspired in the counties of Alameda and Santa Clara, California to fix the price of gasoline, fix the dealers' margin, eliminate the giving of trading stamps, eliminate the posting of price signs, and to harass and annoy service stations which continued giving stamps or posting price signs. The defendants are California Shell Dealers Association, Inc. and its president, John A. Mullins of San Leandro, California; Southern Alameda County Retail Petroleum Dealers Association, and its president and vice-president, Joseph Chandler and John Macchitelli, both of Fremont, California; and Santa Clara County Shell Dealers Association, and its president, Earl C. Schweizer, of Santa Clara, California.

Criminal No. 41349 named the Marin Independent Service Station Association as defendant. This indictment asserts that beginning in the fall of 1966 the defendant-association conspired in Marin County, California to eliminate the giving of trading stamps and to harass service stations which continued giving them. The effect of eliminating trading stamps, the indictment asserted, was to suppress the granting of discounts and to fix the price of gasoline. Seventy per cent of the service stations in Marin County are owned and operated by members of the defendant association.

On April 26, 1967, District Judge Oliver J. Carter directed that for both indictments summons be issued, returnable May 17, 1967.

Staff: Lyle L. Jones, Gilbert Pavlovsky, Luzerne E. Hufford and James E. Figenshaw (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Carl Eardley

COURT OF APPEALS

GOVERNMENT EMPLOYEES

REVIEWING COURT HELD BOUND TO SUSTAIN RATIONALLY-BASED SEPARATION FROM GOVERNMENT SERVICE.

Wilfred Handler v. Secretary of Labor (C. A. D. C., No. 20,219; April 7, 1967; DJ File 35-16-252).

The Department of Labor decided to decentralize one of its divisions in Washington, and thereafter directed one of the division's employees to report for duty in an area field office where his services were required. The employee refused to accept his reassignment for the reason "that he unlawfully had been denied the right to work in Washington." Following his discharge, he sued for reinstatement to his former position, but the district court sustained the validity of his discharge. The Court of Appeals affirmed "since there was a rational basis for the" discharge, and appellant had not been denied any "procedural rights." It observed that it was "most reluctant to disturb agency action where, as here, the record discloses an adequate basis for the result reached."

Staff: United States Attorney David G. Bress, and Assistant United States Attorneys Frank Q. Nebeker, Carol Garfiel and Gil Zimmerman (D. C.)

SOCIAL SECURITY ACT

IN MAKING DEDUCTIONS FROM BENEFITS BECAUSE OF EXCESS EARNINGS, NET INCOME TO "SILENT" PARTNER IS INCLUDIBLE IN SUCH EARNINGS IF INDIVIDUAL HAS PERFORMED SUBSTANTIAL SERVICES DURING PERTINENT PERIOD IN CARRYING ON ANY TRADE OR BUSINESS.

Frederick F. Tyndall v. John W. Gardner, Secretary of Health, Education, and Welfare (C. A. 4, No. 11,084; May 2, 1967; DJ File 137-54-50).

After plaintiff was awarded old age insurance benefits, the Secretary ruled that the payments were subject to deductions under 42 U. S. C. 403 because of excess earnings, i. e., earnings in excess of the then statutory maximum of $1,200 per year. During the pertinent periods, claimant had

carried on a small farming operation on leased land from which he received net earnings from self-employment of less than $1,200 per year; at the same time, he received a one-third distributive share of net income from a partnership farming operation. The two incomes totalled more than $1,200. Claimant maintained that he had performed no substantial services for the partnership, and for this reason his distributive share of its income was not includible for deduction purposes. The Secretary ruled, in accordance with his consistent interpretation of the deduction provisions of the Act, that the partnership income was earnings from self-employment within the statutory definition, and that it was includible for deduction purposes, irrespective of whether claimant had performed substantial services in the partnership, since he had in fact carried on a trade or business during the pertinent period. The district court reversed the Secretary, accepting claimant's interpretation of the statute.

On appeal, the Court of Appeals reversed the district court. It held that the Secretary's interpretation was reasonable, and that when it was undeniable that claimant was not completely retired, there was nothing inequitable in treating his share of partnership earnings as self-employment income for purposes of computing deductions, just as it was included in earlier years in computing his eligibility. The Court found persuasive the Third Circuit's decision in favor of the Secretary in Bernstein v. Ribicoff, 299 F. 2d 248, the one case decided on this question.

Staff: Kathryn H. Baldwin and Florence Wagman Roisman (Civil Division)

FACT THAT CLAIMANT IS WORKING DOES NOT NECESSARILY SUPPORT FINDING OF CAPACITY FOR SUBSTANTIAL GAINFUL ACTIVITY.

Leftwich v. Gardner (C. A. 4, No. 11,015; May 1, 1967; DJ File 137-84-474).

In this disability case, claimant was a 52 year-old former coal miner who had been seriously injured in the mines. The medical evidence indicated that he had considerable limitation of motion, and a psychiatric report indicated that he suffered moderately severe psychoneurotic symptoms. After he was unable to work in the mines because of his impairments, he obtained work as a dishwasher in a sanitarium, and continued at such job for five years. At first, he worked 10 hours a day, 240 hours a month, earning $130 a month; in 1965, he worked 8 hours a day, 184 hours per month, earning $150 a month. His job consisted of washing dishes with a dishwasher and scrubbing pots and pans. Claimant's supervisor indicated that claimant could not have obtained this job without political influence and that many of the sanitarium's employees could not handle jobs in private industry.

The Secretary concluded that while claimant could not engage in heavy manual labor, he could engage in light work. After evaluating his performance as a dishwasher, the nature of his work, earnings, etc., the Secretary determined that claimant's job was substantial gainful activity and that his successful performance of his duties showed that he was not disabled.

The district court reversed on the authority of Hanes v. Celebrezze, 337 F. 2d 209 (C. A. 4), in which it was held that earnings in excess of $100 per month would not, in and of themselves, show that a person was not disabled. The Secretary appealed, contending that he had not relied solely upon the earnings of the claimant in determining disability, and that his determination that claimant was not disabled was based upon substantial evidence.

The Fourth Circuit, however, affirmed the decision of the district court. The Court of Appeals was persuaded that claimant's medical history showed that he was disabled. As it did in Hanes, the Court rejected the idea that benefits may be denied "when a claimant's earnings reach a magic mark," and stated that the test is not whether the claimant "by willpower can stay on his feet yet another day--but whether objectively and in the totality of circumstances, including especially his afflictions, he is disabled within the meaning of the Social Security Act."

The Fourth Circuit has, therefore, reaffirmed the position taken in Hanes that the Secretary must look beyond a claimant's earning and consider the objective medical facts, and that the severity of a claimant's impairments may reduce the significance of his employment activities.

Staff: William Kanter (Civil Division)

SECRETARY MUST CONSIDER ECONOMIC REALITIES IN GENERAL AREA IN WHICH CLAIMANT LIVES IN ORDER TO FIND THAT THERE ARE OTHER KINDS OF WORK ACTUALLY AVAILABLE TO CLAIMANT.

Fred Boyd v. Gardner (C. A. 4, No. 11,014; April 4, 1967; DJ File 137-80-168).

Fred Boyd, a 46 year-old illiterate former coal miner with a verbal IQ of 70, applied for social security disability benefits, alleging inability to work on account of a back injury. The Secretary determined that although claimant could not return to the heavy labor which he had previously performed, he could still perform various sedentary and light jobs. On the basis of the testimony of a vocational counselor, the Secretary found that such light jobs were available in Virginia, where claimant resided, and in other states as well. On petition for review, the district court sustained the Secretary's denial of benefits. The Court of Appeals, however, reversed and directed entry of judgment for claimant.

The Fourth Circuit determined that the Secretary had failed to discharge his burden of showing "that there are other kinds of work actually available, for which a man with the claimant's impairments may be considered reasonably suited." The Court observed that the vocational expert failed to evaluate the skills and movements necessary for the occupations he listed, or to show that claimant's skills were transferable to such jobs, and it rejected the expert's reliance on the Census Report and directories showing employment in industries in various states. The Court found it "unrealistic to expect this particular claimant, having a wife and nine children, to offer his services" in a place over 200 miles from his residence (in a remote mountain region) "on no more than the speculative chance of employment suggested by the witness." In addition, the Court held that "[m]erely having a vocational consultant read from a book that in the State of Kentucky there are 72 slaughtering plants or 62 woodworking companies in which some of the jobs listed in the United States Dictionary of Occupational Titles could be found, does not suffice to meet the Secretary's burden of showing that 'types of work within the background and residual capacities of the claimant exist within this area'." Finally, the Court noted that a person such as Boyd, who was physically disabled, illiterate, unskilled, and low and impaired mentally, was virtually unemployable, especially in a depressed area such as Appalachia. The Court therefore ruled that the Secretary's inquiry must be "what are the 'economic realities' in the general area in which claimant lives, for persons with his combination of disabilities."

Staff: Assistant United States Attorney William C. Breckinridge (W.D. Va.)

SECRETARY NOT BOUND BY STATE TRIAL COURT'S EX PARTE ORDER (ENTERED AFTER WAGE-EARNER'S DEATH) PURPORTING TO VOID AB INITIO DIVORCE OBTAINED BY CLAIMANT PRIOR TO DEATH.

Edna U. Cain v. Secretary of Health, Education and Welfare (C. A. 4, No. 10, 997; April 21, 1967; DJ File 137-67-90).

The Secretary appealed from a district court reversal of his decision that claimant was not entitled to benefits for herself as a widow or for her children by fathers other that the wage-earner, Cain. In February 1961, she obtained a decree of divorce from Cain in a county court. Cain died the following month, and claimant then applied for benefits as a "former wife divorce." Her application was denied because she had not been receiving one-half of her support from Cain. No appeal was taken. In December 1962, she obtained an ex parte order from the county court purporting to set aside the divorce decree as "void ab initio," upon her petition alleging that the decree had been entered prior to the expiration of the South Carolina waiting

period. She then filed a new application for benefits as a widow, which the Secretary denied. However, the district court held that recognition of the ex parte decree was required of the Secretary and entered judgment for claimant.

The Fourth Circuit reversed the district court, finding that the divorce was valid under South Carolina law, and that the Secretary, under the statutory mandate to determine whether the state courts "would find" claimant married (42 U. S. C. 416(h)) was not required--in the absence of a state supreme court ruling--to act solely upon the ex parte order of a trial court.

The Fourth Circuit also ruled that the voiding decree of the county court was additionally defective under the South Carolina doctrine of "laches," since "the decree of divorce was not challenged until after the former spouse's death," "the sole motive for challenge was to acquire pecuniary gain," and acceptance of the challenge would prejudice the rights of others. See Jannino v. Jannino, 234 S. C. 352, 108 S. E. 2d 572.

Staff: J. F. Bishop (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

DISTRICT COURT

CONTEMPT

STATE CONTEMPT PROCEEDING AGAINST FBI SPECIAL AGENT REMOVABLE TO FEDERAL COURT UNDER 28 U.S.C. 1442; REFUSAL OF SPECIAL AGENT, ACTING PURSUANT TO ATTORNEY GENERAL'S ORDER, TO TESTIFY IN STATE COURT AS TO INFORMATION OBTAINED BY HIM IN COURSE OF OFFICIAL INVESTIGATION, NOT CONTEMPT OF COURT.

North Carolina v. Carr (W.D. N.C., No. 2178, 264 F. Supp. 75; February 15, 1967; D.J. 145-12-976).

A subpoena duces tecum was served on FBI Special Agent Carr by a litigant in a local civil action in North Carolina which involved a matter under investigation by the FBI. The Attorney General, pursuant to Department Order 324-64, 28 C.F.R. part 16, instructed Carr to appear in court but to respectfully refuse to testify about, produce, or disclose information or material contained in Departmental or United States Attorney files.

After the Government's motion to quash the subpoena duces tecum was denied, Carr appeared in court and answered responsively all questions put to him, but when asked to disclose official information, he asserted the Department Order, and declined to answer. He was summarily held in contempt, but capias and commitment were held in abeyance pending the conclusion of the original civil case.

Immediately following the contempt citation, removal to Federal court was sought under 28 U.S.C. 1442 and a temporary restraining order was issued. North Carolina filed a motion to remand on the ground that a citation for contempt is neither a "civil action" nor a "criminal proceeding" and, therefore, not removable under Section 1442.

The District Court denied the motion to remand and held that "it would . . . appear as settled that a contempt of the type and character under investigation here is one wholly criminal in nature and falls within the act of Congress as set out in Title 28 U.S.C. 1442." The Court

further held the contempt order void and of no effect.

The Court reasoned that Department Order 324-64, the specific instructions issued to Carr prohibiting disclosure of information obtained in his official capacity, and Carr's conformity thereto were lawful. Therefore, the contempt order was "improperly and improvidently entered".

North Carolina has filed a notice of appeal.

Staff: United States Attorney William Medford and Assistant United States Attorney Joseph R. Cruciani (W.D. N.C.)

FRAUD

CASES INVOLVING APPARENT FRAUD IN SECURING BENEFITS UNDER SOCIAL SECURITY ACT, SUBCHAPTER XV, 42 U.S.C. 1361 ET SEQ.; TEMPORARY UNEMPLOYMENT COMPENSATION ACT OF 1958, AS AMENDED, 42 U.S.C. 1400a ET SEQ.; AREA REDEVELOPMENT ACT, 42 U.S.C. 2501 ET SEQ.; AND MANPOWER DEVELOPMENT AND TRAINING ACT OF 1962, 42 U.S.C. 2571 ET SEQ.

In the July 24, 1964 issue of the Bulletin (Vol. 12, No. 15, pp. 369-70) the Criminal Division detailed the agreement between the Department of Justice and the Department of Labor concerning the prosecution of cases involving apparent fraud in the securing of benefits under the captioned statutes.

By mutual agreement the referral procedure discussed therein has again been modified to increase the cut-off figure from $300 to $1,000. In all other respects the policy on referral of such cases outlined in that Bulletin item remains in full force and effect.

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

UNITED STATES ATTORNEYS

The nomination of Lawrence A. McSoud as United States Attorney for the Northern District of Oklahoma has been submitted to the Senate for confirmation.

The nominations of the following United States Attorneys for appointment to new four-year terms have been submitted to the Senate for confirmation:

New Hampshire - Lewis M. Janelle
New York, Southern - Robert M. Morgenthau

ASSISTANTS APPOINTED

Florida, Middle - SAMUEL FORMAN, ESQ.; University of Miami, J.D., and formerly a Special Agent with Internal Revenue Service.

Oklahoma, Northern - HUBERT BRYANT, ESQ.; Howard University, LL.B., and formerly an Assistant City Prosecutor, City Prosecutor, and in private practice.

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT

BANKRUPTCY

TRUST FUND TAXES INCURRED DURING OPERATION OF CHAPTER XI ARRANGEMENT NOT ENTITLED TO PRIORITY OVER ADMINISTRATIVE EXPENSES OF ARRANGEMENT AND ENSUING BANKRUPTCY UNLESS TRUST FUNDS CAN BE TRACED INTO HANDS OF TRUSTEE.

In the Matter of George William Green, Individually, and d/b/a S. Adams Packing Co., Adams Packing Co., and Redi-cut Meats (D. Colo., Bkptcy. No. 37429; DJ File 5-13-1348). (CCH 67-1 U.S.T.C. ¶9426).

In this case, the receiver operating a business under a Chapter XI plan of arrangement paid the employees of the business their net wages and failed to segregate into a special trust fund the amount of income and social security taxes withheld from their salaries as is required by Section 7501 of the Internal Revenue Code of 1954. Thereafter, when the proceeding was terminated and the debtor was adjudicated bankrupt, the United States filed a reclamation petition seeking to assert a trust with respect to these trust fund taxes incurred by the receiver, namely, that under Section 7501 these taxes should be accorded a super-priority over the expenses of administration of both the plan of arrangement and the superseding bankruptcy. The Court refused to follow the rationale set forth in City of New York v. Rassner, 127 F. 2d 703 (C.A. 2); In re Airline-Arista Printing Corp., 156 F. Supp. 403 (S.D. N.Y.), affirmed per curiam, 267 F. 2d 333 (C.A. 2); Hercules Service Parts Corp. v. United States, 202 F. 2d 938 (C.A. 6); United States v. Sampsell, 193 F. 2d 154 (C.A. 9) wherein it was held that the United States was entitled to assert and prevail under the trust fund theory even though it could not trace the trust fund taxes withheld by the receiver into the hands of the trustee in bankruptcy. In this, the first case since Nicholas v. U. S., 384 U.S. 677 (1966) in which the Supreme Court indicated that it had some reservations about the correctness of the theory, but did not rule on it, the trial court reasoned that the strong policy of Section 64(a) of the Bankruptcy Act overrode the policy of Section 7501 of the Internal Revenue Code of 1954 and thus, Section 64(a) controls the priority of trust fund taxes unless the Government is able to trace.

The Solicitor General has determined not to take an appeal in this case because he felt that because of a stipulation entered into during the plan of arrangement it could be said that the Government had waived the benefit of

the trust fund theory and consequently, on the facts of this particular case, the United States might not prevail even though its legal theory was correct.

It will, however, be the policy of the Tax Division to continue to assert that trust fund taxes enjoy a super-priority over the expenses of the plan of arrangement and/or the bankruptcy in accord with the decisions of the Second, Sixth and Ninth Circuits.

Staff: United States Attorney Lawrence M. Henry and Assistant United States Attorney Donald E. Cordova (D. Colo.); Stephen G. Fuerth (Tax Division)

INJUNCTION

MOTION TO ENJOIN CONVEYANCE OF REAL PROPERTY SEIZED AND SOLD BY INTERNAL REVENUE SERVICE DENIED.

United States v. Joseph Casner, Jr., et al. (D. Conn.; March 29, 1967; D. J. File 5-14-2704). (CCH 67-1 U.S.T.C. Par. 9351).

The United States brought suit against the taxpayer to foreclose federal tax liens upon certain real property located in Madison, Connecticut. Prior to the institution of the suit the Internal Revenue Service, pursuant to Section 6331, Internal Revenue Code of 1954, seized a parcel of real property owned by taxpayer in West Haven, Connecticut. Pursuant to Section 6335, Internal Revenue Code of 1954, the property was sold at public auction. A few days short of one year after the sale of the West Haven property, taxpayer sought to temporarily enjoin the District Director from deeding the property to the persons who purchased the property at the public sale. At the hearing, taxpayer also made various complaints to the Court regarding alleged improprieties in the sale of the property. The Court found that the sale was conducted properly and held that taxpayer had failed to show the absence of an adequate legal remedy in that he failed to exercise his right to redeem the property within one year after the sale as provided by Section 6337(b), Internal Revenue Code of 1954. Furthermore, the Court, citing inter alia, Section 7421, Internal Revenue Code of 1954, had no power to restrain the Government from collecting revenue.

Staff: Ronald A. Ginsburg (Tax Division)

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