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UNITED STATES DEPARTMENT OF JUSTICE

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TABLE OF CONTENTS

ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

MEMOS & ORDERS

The following Memoranda and Orders applicable to United States Attorneys offices have been issued since the list published in Bulletin No. 23, Vol. 15, dated November 9, 1967:

MEMOS	DATED	DISTRIBUTION	SUBJECT
542	10/19/67	U.S. Marshals	Correspondence of Sentenced Prisoners Held in Nonfederal Institutions Pursuant to Writs of Habeas Corpus
544	10/27/67	U.S. Attorneys	Military Selective Service Act of 1967 Non-Possession of Registration Certificate (SSS Form No. 2) and Notice of Classification (SSS Form No. 150)
545	10/24/67	U.S. Marshals	Place where Process Is Returnable after Service

ORDERS	DATED	DISTRIBUTION	SUBJECT
385-67	10/30/67	U.S. Attys. & Marshals	Transfer of Functions Relating to Gifts and Bequests to U.S. to Civil Division

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

DISTRICT COURT

SHERMAN ACT

MOTIONS TO SUPPRESS EVIDENCE AND TO DISMISS INDICTMENTS DENIED.

United States v. American Radiator & Standard Sanitary Corp., et al. (W. D. Pa.; Cr. 66-295; October 23, 1967; D. J. 60-3-154)

United States v. Plumbing Fixture Manufacturers Association, et al. (W. D. Pa.; Cr. 66-296; October 23, 1967; D. J. 60-3-153)

On October 23, 1967, Judge Louis Rosenberg entered an opinion and an order dismissing the defendants' joint motions to suppress evidence and to dismiss the indictments in the above cases. The motions, centered around certain tape recordings obtained by the Government and used during the grand jury investigation, were based upon allegations that the tape recordings were illegally made and were unlawfully obtained and used by the Government in violation of the defendants' constitutional rights.

The Court found that the tape recordings in question were made by William E. Kramer, former executive secretary of the Plumbing Fixture Manufacturers Association (PFMA), a trade association to which most of the corporate defendants belong. While acting as secretary for PFMA, Kramer recorded telephone conversations that he had with members of the association and a meeting of PFMA members in a hotel room in Chicago. None of these recordings were made with the knowledge or consent of any of the association's members. In August 1963, Kramer disappeared without warning or explanation and it was discovered shortly thereafter that considerable sums of money were missing from various PFMA accounts. When he was later located in the Bahamas, and confronted by PFMA representatives by phone, Kramer warned them that he had in his possession certain tape recordings which evidenced price-fixing activities by PFMA members. Shortly thereafter the Internal Revenue Service commenced an investigation of Kramer's income tax liability. In this investigation PFMA cooperated by providing the IRS agents with a great deal of information and materials including three reels of tape recordings obtained from Kramer's former desk at PFMA headquarters. The Court found that IRS obtained these tapes with the consent of PFMA. (On August 16, 1967, Judge Rosenberg denied defendants' motions for a hearing on the manner in which

the tapes were obtained by the Government, ruling that there was no genuine controversy as to any of the operative facts.) The Court also found that three additional tapes were obtained by IRS from the home of Kramer's sister, and that after the grand jury investigation began, Kramer's wife voluntarily turned over to the Department the remainder of the tape recordings.

The defendants claimed that the phone conversation tapes were illegally made in violation of §605 of the Federal Communications Act and certain state laws because they were made and divulged without the knowledge and consent of the other party to each of the telephone calls. Judge Rosenberg rejected this contention, holding that the telephone recordings and their subsequent divulgence by Kramer, who was a party to each conversation, did not constitute an illegal "interception" within the meaning of §605.

With respect to the charges that the telephone and meeting tapes were made in violation of state laws, the Court ruled that "it is well established that evidence obtained in violation of state laws is nevertheless admissible in Federal Court." Coupled with the finding that no Government representative, federal or local, knew of or participated in the making of the tapes, Judge Rosenberg ruled that the controlling authority is Burdeau v. McDowell, 256 U.S. 465 (1921). Defendants had argued that Burdeau was outdated and no longer good law, contending that by its decision in Elkins (repudiating the so-called "silver platter doctrine"), the Supreme Court itself had impaired the validity of Burdeau. Judge Rosenberg disagreed and observed that the Third Circuit, whose decisions are binding upon him, had recently reaffirmed the rule of Burdeau and declared that evidence illegally obtained by private individuals was nevertheless competent in federal courts. He concluded that there was nothing illegal or improper in the Government having accepted and used this evidence under the circumstances.

With respect to the seizure of three reels of tapes by IRS, the Court concluded that there had been no unconstitutional taking on the part of Government officials. Judge Rosenberg noted that the evidence was undisputed that permission had been given to the IRS agents for the taking of the tapes and that this permission was consistent with the acts and resolutions of PFMA which undertook a policy of full and complete cooperation with IRS and "any other government agency", and that it had done so after having been forewarned of the existence of incriminating tape recordings. The Court also concluded that there had been no improper conduct on the part of law enforcement officials and that

> * * * no illegal processes were here used to procure evidence. The evidence as it came to the Government came either by means of the controllable functions of the defendants themselves

or from a formerly trusted representative and business associate of their own appointment.

The defendants also charged that the Government had displayed leniency toward Kramer and bestowed favor upon him in exchange for his cooperation in the antitrust investigation, claiming that in doing so it was aiding and abetting a thief. The Court swept aside these claims as being groundless. Judge Rosenberg found that there had been no promises or any other inducement on the part of the Government to prompt Kramer's cooperation with the antitrust investigation. In ruling that the Government had acted properly in this matter Judge Rosenberg stated:

> I see nothing censurable on the part of the Government or its agents in procuring these tapes in the manner in which they were procured and in getting whatever information they could from Kramer. . . . I do not here concern myself with the merits of the case as they existed between Kramer and his former employers, except to say that if the former employers misplaced their trust in their executive secretary, and he violated that trust, both by stealing their money and by divulging secrets between them the error of the employee's ways, at this juncture, cannot prevent the Government from using the evidence supplied by Kramer. As stated in Hoffa v. United States, supra, at page 302, "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."

Judge Rosenberg noted that it has been long established that the Government may utilize informers in prosecuting criminal actions. The Court quoted the following from On Lee v. United States, 343 U. S. 747, 756 (1952): "Society can ill afford to throw away evidence produced by the falling out, jealousies, and quarrels of those who live by outwitting the law."

The defendants sought not only the suppression of the tape recordings as evidence, but also to have the indictments dismissed on the ground that the use of the tapes tainted the entire grand jury investigation. They claimed that by pursuing this antitrust prosecution the Government ratified the illegal conduct of Kramer. They concluded that under the doctrine of the McNabb case the Court in the exercise of its supervision over the

administration of criminal justice must, in the interest of fairness, bar the present prosecutions. Judge Rosenberg rejected these claims in toto.

Staff: John C. Fricano, Rodney O. Thorson, Joel Davidow and S. Robert Mitchell (Antitrust Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURT OF APPEALS

SECURITIES FRAUD

FRAUD IN SALE OF SECURITIES: EXEMPTION FROM REGISTRATION.

United States v. Schwenoha and Suess (C. A. 2, September 28, 1967; D. J. 113-51-155)

The defendants were convicted for violations of the Securities Act of 1933 in connection with the sale of worthless unregistered stock. In 1956, Schwenoha purchased a paper corporation that had ceased doing business in 1924. The corporation's name was changed to Belmont Oil Corporation, and the fraudulent sales were commenced. On appeal, the defendants contended that the stock was exempt from the registration requirements of the securities Act of 1933 because it was issued originally in 1919. Section 3(a)(1) of the Act (15 U. S. C. 77c(a)(1)) exempts from registration "any security which prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public..." The Court of Appeals found that this argument ignores the remaining portion of the sentence which states, "but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days". The Court stated that it was undisputed that the sale of Belmont stock to the public was a new offering, and there is little question that the defendants were issuers or underwriters. The evidence was overwhelming that they and others controlled Belmont Oil and knew that the stock they sold to brokers would be resold to the public.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Frederick F. Greenman, Jr. (S. D. N. Y.)

DISTRICT COURT

POSTAL OFFENSES -- MONEY ORDERS

PROHIBITION OF ISSUANCE OF MONEY ORDERS WITHOUT HAVING PREVIOUSLY RECEIVED OR PAID FULL AMOUNT OF MONEY PAYABLE THEREFOR, 18 U. S. C. 500, PAR. 5, APPLIES ONLY TO POSTMASTERS, THEIR ASSISTANTS AND EMPLOYEES.

United States v. Frederick R. Pettee (D. Mass., September 15, 1967; D. J. 48-51-2600)

Defendant was charged in count one of a three count indictment with retaining two United States postal money orders with intent to convert them to his own use, knowing them to have been stolen, and in counts two and three he was charged with issuance of one of the money orders without having previously paid the full amount of money payable therefor. Defendant was acquitted on count one after trial by the court. Counts two and three were dismissed by Judge Frank J. Murray. The Court entered a memorandum opinion in which he ruled that paragraph 5 of section 500, Title 18 U. S. C., is applicable only to postmasters, their assistants, clerks and employees and cannot be utilized against nonemployees. A review of the legislative history clearly supports the opinion. Only persons who may properly issue a United States money order should be charged under paragraph 5 of section 500.

Staff: United States Attorney Paul F. Markham and Assistant United States Attorney Thomas R. O'Connor (D. Mass.)

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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

APPOINTMENTS

UNITED STATES ATTORNEYS

The nominations of the following United States Attorneys have been confirmed by the Senate:

Indiana, Southern - K. Edwin Applegate

Mr. Applegate was born July 21, 1923, in Cicero, Indiana, is married and has four children. He received his B.S. (1946) and LL.B. (1948) degrees from Indiana University, Bloomington, Indiana. He was admitted to the Bar of the State of Indiana in 1949. Mr. Applegate served as U.S. Commissioner for the Southern District of Indiana from 1951 to 1958; as Deputy Prosecutor, Monroe County, Indiana in 1959; as City Judge in Bloomington, Indiana from 1960 to 1963, and was a member of the Indiana House of Representatives from 1965 to 1966. Until his court-appointment as United States Attorney for the Southern District of Indiana, he was in private practice.

Iowa, Northern - Asher E. Schroeder

Mr. Schroeder was born May 12, 1925 at Maquoketa, Iowa, is married and has three children. He received his B.A. (1949) and J.D. (1950) degrees from the University of Iowa, and was admitted to the Bar of the State of Iowa in 1950. From 1942 to 1943 he was with the Iowa State Highway Commission, and from 1943 to 1945 he served in the Army Engineers. Mr. Schroeder was employed in private industry from 1950 to 1952, and from 1956 to 1962, was County Attorney in Jackson County, Iowa. From 1950 until his appointment as United States Attorney, Mr. Schroeder was in private practice.

ASSISTANTS

Alabama, Middle - JACK B. PATTERSON; University of Alabama, LL.B., and formerly an attorney in private practice.

Connecticut - J. DANIEL SAGARIN; Yale Law School, LL.B., and formerly law clerk U. S. District Court and in private practice.

Illinois, Northern - EUGENE ROBINSON; Chicago Kent College of Law, J.D., and formerly with the Internal Revenue Service.

Indiana, Southern - DAVID L. CASTERLINE; Indiana State University, J. D.

Louisiana, Eastern - GEORGE P. HAND; Loyola School of Law, LL. B., and formerly in private practice.

New Jersey - THOMAS J. ALWORTH; George Washington Law School, LL. B., and formerly law clerk U. S. District Court.

New York, Southern - PATRICIA M. HYNES; Fordham Law School, LL. B., and formerly law clerk U. S. District Court.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

COURT OF APPEALS

IMMIGRATION

NINTH CIRCUIT RULES IT HAS NO JURISDICTION TO ENTERTAIN PETITION FOR REVIEW OF ORDER DENYING A VISA PETITION.

Isao Yamada, Mitsu Yamada, Katsumi Yamada and Three Star Products, Ltd. v. INS (C. A. 9, No. 21,049, October 17, 1967; D. J. 39-1788)

The above proceeding involved a petition under Section 106(a) of the Immigration and Nationality Act (8 U. S. C. 1105a(a)) to review an order for an alien's deportation and an order by the District Director of the Immigration and Naturalization Service denying the visa petition to classify the alien as a first preference quota immigrant.

The issue before the Court was whether it had jurisdiction under Section 106(a) to review the order denying the visa petition. Section 106(a) provides only for judicial review by courts of appeal of final orders of deportation but has been interpreted by the Supreme Court in Foti v. INS, 375 U. S. 217 (1963), to include review of all determinations made in a deportation hearing. The Court here was urged to exercise jurisdiction under Section 106(a) on the ground that the order denying the visa petition in behalf of the alien affected the execution or suspension of the deportation order and was therefore ancillary to that order. The Ninth Circuit noted that a divergence of opinion existed among the circuits as to the jurisdiction of courts of appeals to review determinations made outside the deportation hearing which had the effect of nullifying or delaying the execution of the deportation order. After consideration of the legislative history of Section 106(a) the Court ruled that Congress intended that jurisdiction under Section 106(a) was to be limited to determinations made in the deportation hearing. In the Court's view the issue of jurisdiction could be resolved if by regulation provision were made that all issues that might effect deportability were to be decided in the deportation hearing. The petition for review was dismissed for want of jurisdiction.

Staff: United States Attorney Cecil F. Poole
Assistant United States Attorney Charles Elmer Collett (N. D. Cal.)

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LAND AND NATURAL RESOURCES DIVISION

Acting Assistant Attorney General J. Edward Williams

COURTS OF APPEALS

INDIANS

CONSENT JUDGMENT; FAILURE OF CONSIDERATION; NECESSITY TO PLEAD DEFENSE OF RES JUDICATA.

Crowe v. Cherokee Wonderland, Inc. (C.A. 4, 1967, 379 F.2d 51, D.J. 90-2-1-2415)

A project was undertaken to create a public historical and amusement park on the Cherokee Indian Reservation in North Carolina. Land owned by Nettie Crowe and Meletia Sneed was leased to the company as part of the project. Before completion, difficulties were encountered, due partially from the harassing activities of Crowe and Sneed. A suit by Wonderland was settled by a consent judgment whereby, inter alia, the company agreed to pay Crowe and Sneed $37,500 in three installments and they were not to interfere with construction or operation of the project. Two installments were paid but harassment continued, and for this and other reasons the project failed.

The United States, on behalf of the Cherokee Indians, sued to cancel the contract and to recover damages of $64,000. This included $11,250 remaining unpaid under the consent judgment. Wonderland counterclaimed for damages totalling $250,000 and crossclaimed against Crowe and Sneed for the $26,500 it had paid them under the judgment. The district court cancelled the contract and leases, and denied all damages except that it awarded Wonderland $26,500 in its crossclaim against Crowe and Sneed. Appeal was taken only as to this crossclaim judgment.

The Court of Appeals affirmed. It sustained the trial court's findings of fact that there was a failure of consideration, saying that the consent judgment was simply a contract. It held that the consent judgment was not res judicata because Crowe and Sneed had not affirmatively pleaded it in answer to the crossclaim. Rule 8(c), F.R.Civ.P. In any event, the Court said the judgment simply finalized an amendment to the lease and it was "no more than a judicially approved contract".

Staff: Roger P. Marquis (Land and Natural Resources Division)

CONDEMNATION

TAXES: PRORATION FOR YEAR OF ACQUISITION; LIABILITY OF UNITED STATES IN DISTRICT OF COLUMBIA.

District of Columbia v. Sussman (C. A. D. C. 1965, 352 F. 2d 683, D. J. 33-9-623-19 and 33-9-623-21)

Condemnation proceedings and a declaration of taking were filed on July 26, 1963, to condemn land in Washington, D. C. Taxes for 1963 became a lien on the land on July 1. The District of Columbia sought distribution of a full year's taxes, but the trial court ordered them prorated. On appeal by the District, in which the United States took no part, the judgment was reversed. An opinion of Judge McGowan said that the issue was not controlled by whether the taxes had become a lien. It held the District was entitled to a full year's taxes and then suggested that such tax liability might be shown by the former owner as bearing on just compensation. Chief Judge Bazelon joined in Judge McGowan's opinion, on the ground that the District of Columbia tax law contemplated payment of those taxes to the District. Judge Washington dissented on the ground that the United States could not be made to pay part of the taxes. On rehearing, the United States pointed out the reasons why the dissenting opinion was clearly right and that it had been heard on the issue because, as briefed by the parties, the issue had been purely one of distribution. Rehearing was denied.

It was determined that certiorari should not be sought because, while wrong as to federal condemnation law, the decision was complicated by the element of District of Columbia taxation problems which would not arise elsewhere. Also, it was final since, on the facts, the United States probably would not have to pay more because the amount of compensation had been stipulated. A better case would then be presented for the Supreme Court if the opinion should be followed outside the District of Columbia.

Staff: Roger P. Marquis (Land and Natural Resources Division)

PUBLIC LANDS

POTASH LEASE; COMPUTATION OF ROYALTIES; ADMINISTRATIVE AUTHORITY OF SECRETARY OF INTERIOR.

United States v. Southwest Potash Corporation (C. A. 10, 1965, 352 F. 2d 113, cert. den., 383 U.S. 911; D. J. 90-1-18-534)

Potash deposits on public lands were leased on the basis of a royalty upon the gross value of the output, to be paid in cash or kind, at the option of

the United States. Customarily, the extraction under this and other leases crushed the ore and processed it in varying degrees at the mines. The products were sold in various forms f. o. b. the mine, and royalties were paid on the gross value of the particular products sold. A special situation arose whereby another producer needed high-grade ore to blend with low-grade ore from its mine. As a result, a unique sale of crude ore was made. Prior to consummation thereof, the Secretary of the Interior had ruled that the contract price in this sale should not control the federal royalty, which should be computed on the same basis as other production. The parties proceeded with the contract agreeing to share the increased expense, if the Secretary's position as to royalty were sustained. The lessee refused, upon demand, to pay that royalty, and this suit was brought for the amount unpaid and for cancellation of the contract. The trial court granted summary judgment for the lessee.

The Court of Appeals reversed. This Court said:

> We start with the proposition about which there is no dispute, namely that the Secretary's construction of the lease contract in the light of the applicable statute and implementing regulations is entitled to great respect. Indeed, if the Secretary's interpretation is an "admissible one", we are bound to honor it, even though we would have initially entertained a different view of it. See Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616, and cases cited.

The Court then referred to other cases and concluded that the Secretary's construction here was an admissible one.

Staff: Roger P. Marquis (Land and Natural Resources Division)

DISTRICT COURT

DISTRICT OF COLUMBIA HIGHWAYS

ADMINISTRATIVE LAW; JUDICIAL REVIEW; STANDING TO SUE.

D.C. Federation of Civic Associations, Inc., et al. v. Thomas F. Airis, et al. (D.C., October 24, 1967, D.J. 90-1-23-1295)

Within the past year, the District of Columbia Highway Department has planned, and the National Capital Planning Commission has approved, a number of interstate highway projects for the District of Columbia, including the so-called Missouri Avenue Expressway, the East Leg, the North Central Freeway and the Three Sisters Bridge. These projects, particularly the

Three Sisters Bridge and the North Central Freeway, are highly controversial projects. They were approved by the National Capital Planning Commission primarily on the basis of votes of ex officio members serving on that Commission.

The captioned action was instituted by 14 D.C. citizens' associations, a political organization and a number of individual landowners. Named as defendants were various officials of the District of Columbia, the members of the National Capital Planning Commission, the Director of the National Park Service and the Secretary of Agriculture. Plaintiffs sought a declaration that all of the projects had been illegally planned or approved and an order restraining the District defendants from proceeding with construction. The complaint purported to raise some 20 separate legal issues. As far as the National Capital Planning Commission was concerned, the plaintiffs contended that all of the projects had been approved at meetings where some of the ex officio members of the Commission were illegally represented by alternates, that the ex officio members of the Commission had entered into prior agreements with respect to their voting in the Commission and that the ex officio members had been subjected to pressures from Congress and other sources. The complaint also alleged that the defendants Director of the National Park Service and Secretary of Agriculture were illegally planning to transfer park lands in the District of Columbia for highway use.

Following the filing of cross-motions for summary judgment, the Court (Judge Holtzoff) first heard arguments relating to issues that applied to all four of the projects and later heard arguments concerning the numerous issues that applied only to separate projects. In its decision pertaining to the general issues, the Court held that only those plaintiffs suing as taxpayers of the District of Columbia had standing to sue and that they could maintain the action only as against the District of Columbia defendants. In effect, then, the case was dismissed as against all the federal defendants on the standing to sue issue. The Court, however, went on to rule that the use of alternate representatives by ex officio members of the Commission was authorized and that there was no evidence of any improper action on behalf of the ex officio members. Following the second hearing, the Court also ruled, despite an indication of dismissal on the basis of standing to sue, that the transfer of park lands within the District of Columbia was specifically authorized by the provisions of 40 U.S.C. 122.

Staff: Thos. L. McKevitt (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

SUPREME COURT -- CRIMINAL CASES

EVIDENCE

SPECIAL AGENT MAY PROPERLY INTERVIEW TAXPAYER WITHOUT ADVISING OF RIGHT TO COUNSEL.

We have recently noted several instances in which courts of appeals have refused to apply the rule of the Miranda case to Internal Revenue Service investigations. The Supreme Court has recently acted on petitions for certiorari in some of these cases.

Your attention is particularly directed to the denial, on October 22, 1967, of the petition for certiorari in Schlinsky v. United States, 379 F. 2d 935 (C. A. 1), which was noted in the Bulletin for August 4, 1967, at p. 960. In that case the applicability of the Miranda rule was squarely presented.

The Supreme Court also denied certiorari, on October 16, 1967, in United States v. Maius, 378 F. 2d 716 (C. A. 6), likewise noted in the Bulletin for August 4, 1967, p. 462. Maius had, however, been tried before the decision in Miranda, and the Supreme Court's refusal to make Miranda retroactive in the normal case provided another basis for denial of the petition.

On October 16, 1967, the Court denied a petition for certiorari in Selinger v. Bigler, 377 F. 2d 542 (C. A. 9), a summons case in which enforcement was resisted on the basis of Miranda. This decision, like Schlinsky, meets the issue squarely.

The Court, on October 16, 1967, granted certiorari in Mathis v. United States, 376 F. 2d 595 (C. A. 5). The circumstances were exceptional since the taxpayer, when interviewed by the revenue agent, was serving time in a state prison for a violation of state law.

DISTRICT COURTS - CIVIL CASES

LIENS

FILING OF LIEN AND SERVICE OF LEVY UPON TAXPAYER'S CREDITOR EFFECTIVE AS TO CASHIER'S CHECK SUBSEQUENTLY ISSUED TO CREDITOR.

United States v. Plez Lewis & Son, Inc., et al. (E.D. Mo., No. 66 C 112(3), June 27, 1967; D.J. 5-42-1098) (CCH 67-2 U.S.T.C. Par. 9611)

The taxpayer, Plez Lewis & Son, Inc., had performed certain construction work for the Adair Motel Corp. On April 14, 1965, after the work was completed, a notice of levy was served upon the creditor Adair Motel Corp. attaching all property rights in its possession belonging to the taxpayer. A notice of lien was filed on May 3, 1965. On May 11, 1965, an involuntary petition in bankruptcy was filed against the taxpayer and the taxpayer was adjusticated bankrupt on September 2, 1965.

In August of 1965, Adair Motel Motel Corp. sold its motel; a cashier's check in the sum of $33,000 was held in escrow by the attorneys for Adair Motel Corp. An interpleader action was begun by the attorneys respecting the cashier's check because of the competing claims of the United States, the trustee in bankruptcy for the taxpayer, and the Division of Employment Security, State of Missouri, to whom the taxpayer was also indebted for taxes.

The interpleader action was dismissed and the United States filed an independent suit to foreclose its tax liens on the cashier's check. The Court held that the indebtedness of Adair to the taxpayer had been seized by virtue of the levy served upon it on April 14, 1965, prior to the petition in bankruptcy. Consequently, the trustee in bankruptcy could not claim the proceeds of the check as an asset subject to the bankruptcy court, citing United States v. Eiland, 223, F. 2d 118 (C.A. 4). In addition, the Court ruled that the notice of lien having been filed May 3, 1965, the tax judgment of the State of Missouri was not entitled to a preference as a lien because no attachment had issued against the holders of the cashier's check before that date.

Staff: United States Attorney Veryl L. Riddle;
Assistant United States Attorney Harold F. Fullwood (E.D. Mo.);
Louis F. Lombardo (Tax Division)

PAYMENT

TAXPAYER CANNOT COMPEL GOVERNMENT TO ACCEPT DESIGNATED PERSONAL PROPERTY IN PAYMENT OF TAX LIABILITY, SINCE TAXES ARE TO BE PAID IN UNITED STATES COINS AND CURRENCIES.

Stanley G. Calafut v. Commissioner of Internal Revenue (M.D. Pa., October 4, 1967; 67-2 U.S.T.C. par. 9692; D.J. 5-63-471)

Plaintiff, Stanley G. Calafut, brought suit to compel the Internal Revenue Service to accept his several years old automobile at original purchase value as the mode of payment for his outstanding tax liability of about $205.

Although not clear from the complaint, the difference between the original purchase value of the automobile and the tax liability would presumably be paid by the Government to the plaintiff.

The tax liability arose from a disallowance of a claimed medical expense under Section 213 of the Internal Revenue Code for depreciation on the automobile. For a period of years, the plaintiff had claimed such depreciation on his tax return because the automobile was used to transport his daughter to a clinic for treatment, but the Tax Court sustained the Commissioner's disallowance. Because of this determination, plaintiff argued that the Government should be forced to accept the automobile in satisfaction of the tax liability at a value consistent with that upon which the tax was determined, i.e., at original purchase value. In addition, any tax liens against his property should be removed and all seized property should be returned.

The Government moved to dismiss the complaint for lack of jurisdiction, and the Court granted the motion. The basis for this holding was that the plaintiff, in effect, sought mandatory injunctive relief as regards the assessment and collection of his tax liability, which is prohibited by Section 7421 of the Internal Revenue Code, and also sought a declaratory judgment with respect to the assessment and manner of payment, which is prohibited by 28 U.S.C. 2201. Moreover, under 31 U.S.C. 392 only coins and currencies of the United States are legal tender for tax liabilities owed, and thus, the Government could not be compelled to accept the automobile as payment.

Staff: United States Attorney Bernard J. Brown; Assistant United States Attorney Thomas J. Hanlon (M.D. Pa.); and Donald J. Gavin (Tax Division)

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