United States Attorneys

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UNITED STATES DEPARTMENT OF JUSTICE

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POINTS TO REMEMBER

SMOKEY BEAR ACT

Arrangements are being made with the Federal Bureau of Investigation and the Department of Agriculture concerning the handling of matters involving possible violations of 18 U.S.C. 711. Prior to an investigation or consideration of criminal prosecution, the Department of Agriculture will endeavor to obtain compliance with standards administratively established and will thereafter refer to the Criminal Division only those matters which cannot be resolved without consideration of criminal prosecution. Those matters brought to its attention by the Department of Agriculture which the Criminal Division agrees cannot be resolved without criminal prosecution will be referred by the Criminal Division, as necessary, to the Federal Bureau of Investigation or to the appropriate United States Attorney.

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COMMENDATIONS

Assistant U.S. Attorney Berg E. Sergent (W.D. Va.) was commended by Inspector General Nathaniel E. Kossack, Department of Agriculture, for the prosecutive results in U.S. v. N.C. Buckner.

U.S. Attorney Joseph O. Rogers and Assistant U.S. Attorney Thomas P. Simpson (D. S.C.) were commended by the Department of the Navy for their personal attention and presentation re Hampton Bradley v. U.S.

Assistant U.S. Attorneys Richard M. Olsen and Daniel J. Markey (E.D. La.) were commended by Commissioner Randolph Thrower, Internal Revenue Service, for their performance re Leslie B. Ponder.

Assistant U.S. Attorney Arthur Greenwald (C.D. Calif.) was commended by Chief Counsel, IRS, for his excellence of discovery and preparation in the Van Bernard Productions, Inc. v. U.S. case.

Assistant U.S. Attorneys Jerry Lowe and Rodney Sager (E.D. Va.) were commended by Superintendent Hobart Cawood for their cooperation with the Department of the Interior.

Assistant U.S. Attorneys Barnet D. Skolnik and Charles Bernstein (D. Md.) were commended by Special Agent in Charge, FBI, Baltimore, Maryland, for their handling of the bank robbery case of Roger L. Epps & Lovic M. Ingram.

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

TRUCKING FIRMS IN PUERTO RICO INDICTED FOR VIOLATION OF ACT.

United States v. Federacion de Transporte de Puerto Rico, et al. (Cr. 8-70, D. P.R.)

On February 4, 1970, a Federal grand jury sitting in San Juan returned an indictment charging a conspiracy to fix trucking rates among four associations of trucking companies, their federation, their principal officers and a Teamster Union official.

The indictment charges that since 1968 the defendants have fixed and maintained trucking rates, required and coerced members of the defendant associations to charge the rates set, and boycotted and otherwise coerced customers to pay the higher rates. The commerce affected by the conspiracy is the overland movement within Puerto Rico of more than 200,000 trailers and containers per year which are transported between points in Puerto Rico and points in the continental United States.

The defendants were arraigned on February 13, 1970 before Judge Fernandez-Badillo and all entered pleas of not guilty.

Staff: Steven M. Charno and Stephen J. Weinstein
(Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

NATIONAL SERVICE LIFE INSURANCE

EVIDENCE WAS CLEAR AND CONVINCING THAT INSURED MANIFESTED A SUFFICIENT INTENT TO CHANGE BENEFICIARY OF HIS NATIONAL SERVICE LIFE INSURANCE POLICY.

Eva Prince Smith v. United States (C.A. 5, No. 28091; decided January 14, 1970; D.J. 146-55-4032)

The insured, Frank Smith, had purchased two $5,000 policies of National Service Life Insurance while in the Armed Services during World War II. When originally issued both policies named as principal beneficiary the insured's then wife, Mary G. Smith. In 1953, the insured executed a change of beneficiary form in which his mother-in-law, Mrs. Trulock, was named principal beneficiary and his son was named contingent beneficiary. In July 1954, Frank Smith married Eva Prince Smith with whom he and his son lived until the insured's death in 1965. No formal change of beneficiary notice was ever executed naming Eva Prince Smith as beneficiary. She argued, however, that she was entitled to the proceeds because the insured manifested such an intent and took the necessary affirmative action to effectuate a change of beneficiary. The evidence disclosed that shortly after the marriage, Frank Smith and his wife, Eva Prince Smith, agreed to make each other the beneficiaries of their insurance policies. Mrs. Smith carried out this agreement with respect to her own insurance. In August of 1954, Frank Smith went to the air force base near his home and executed a "Record of Emergency Data" form in which he designated his wife as beneficiary for certain servicemen's benefits. Thereafter he represented to his wife and others at various times that his wife had been designated as beneficiary under the insurance policies.

The jury found in favor of the wife, Eva Prince Smith, and the Court of Appeals affirmed. The Fifth Circuit held that, while the "Record of Emergency Data" form did not operate as a change of beneficiary for his National Life Insurance, there was evidence in the record from which the jury could have found that Frank Smith thought the form had such a purpose and that this was the basis for his representing that the beneficiary had been changed. The Court stated: "In those cases /such as that here/ where the proof of intent is clear and convincing, the rationale is that a lesser quantum of proof is required to show the affirmative act to carry out the intent to make the change. See Hawkins v. Hawkins, 5 Cir., 1959, 271 F.2d 870.

Staff: United States Attorney William J. Schloth and
Assistant U.S. Attorney Walker P. Johnson (M.D. Ga.)

PATENTS

GOVT. HAS NOT CONSENTED TO BE SUED IN DIST. CT. TO REVIEW DETERMINATION BY COMMISSIONER OF PATENTS THAT GOVT. IS ENTITLED TO A ROYALTY-FREE LICENSE IN ITS EMPLOYEE'S INVENTION; ADMINISTRATIVE PROCEDURE ACT CANNOT SERVE AS AN INDEPENDENT BASIS FOR JURISDICTION.

Zimmerman v. United States (C.A. 3, No. 18002; decided February 19, 1970; D.J. 27-7277)

Appellant is a Federal civil service employee assigned as a chemical engineer to the Department of the Army. Following his invention of a waterproof combustible cartridge case, the Army determined that "pursuant to paragraph 1(b) of Executive Order 10096, *** the entire right, title and interest in the invention be left with the inventor subject to a non-exclusive, irrevocable, royalty-free license to the Government with power to grant licenses for all Government purposes". The Commissioner of Patents affirmed this decision, and twice denied reconsideration. Appellant then filed his complaint in the court below "demand/ing/ that he alone be assigned exclusive rights" in the invention, and seeking declaratory and injunctive relief. Prior to the institution of this action, appellant filed an application for a patent which is still pending.

The district court dismissed appellant's complaint for want of jurisdiction. The Third Circuit affirmed. The Court of Appeals held that the present action is a suit to which the Government has not consented, and therefore, "the doctrine of sovereign immunity applies with full force". The remedy conferred by 28 U.S.C. 1498(a), i.e., a suit for damages in the Court of Claims, is a Government employee-patentee's exclusive remedy in which to challenge the interest of the Government in his invention. First, the Court of Claims action "is the only remedy created in an area in which the government traditionally has been completely immune from suit. Second, closely related cases in which non-government employees have sought compensation from the United States through patent infringement suits in district courts have held that section 1498 establishes the sole avenue for relief. *** The respective rights of the government and the inventor may be judicially determined, not on review, but de novo in that court in an action for compensation after a patent has issued."

The Court also held that the Administrative Procedure Act, 5 U.S.C. 701 et seq., cannot serve as an independent basis for jurisdiction. The Third Circuit stated: "In an earlier case * * * this court characterized the A.P.A. as being 'clearly remedial and not jurisdictional' and stated that there 'is nothing in . . . the Act which extends the jurisdiction of either the district courts or the appellate courts to cases not otherwise within their

competence.' Local 542, International Union of Operating Engineers v. N.L.R.B., 328 F.2d 854 (3 Cir. 1964), cert. denied, 379 U.S. 826 (1964). * * * No Supreme Court decision holds that section 10 of the A.P.A. is a grant of jurisdiction. We therefore adhere to this court's reasoning in Local 542, International Operating Engineers, supra."

Staff: Ronald R. Glancz (Civil Division)

RESERVIST CALL TO ACTIVE DUTY

(1) HEALTH CONDITION NO BAR, PENDING PRE-ACTIVE-DUTY PHYSICAL EXAMINATION.
(2) ORIGINAL PERIOD OF ENLISTMENT NO CONSTITUTIONAL BAR TO STATUTORY EXTENSION OF TIME IN INTEREST OF NATIONAL SECURITY.

Karpinski v. Resor, etc. et al. (C.A. 3, No. 18233; decided December 23, 1969; D.J. 25-62-2132)

Appellant, an Army reservist, challenged his call to active duty on two grounds. (1) He alleged a condition of ulcerative colitis of which the Army was aware at the time of the active duty orders. The Court of Appeals, upon representation of Government counsel that appellant would be given a physical examination upon reporting for active duty, sustained the district court in its holding that appellant had failed to exhaust his remedies, since he had refused to report for active duty, but remanded with instructions to the district court to condition its denial of relief upon appellant's being given a physical examination.

(2) Appellant contended that his enlistment in the Reserve would expire before the end of the period of active duty. The Court held this to be no denial of constitutional rights on the ground that while enlistments have some attributes of a contract, they are subject to change in the interest of the national security. The Court cited several decisions and 10 U.S.C. 673a, which provided a longer total service upon call to active duty.

Staff: Morton Hollander (Civil Division)

SOCIAL SECURITY ACT

"HIREABILITY" AS STANDARD OF DISABILITY UNDER 1967 AMENDMENTS TO SOCIAL SECURITY ACT, REJECTED.

William Gentile v. Finch (C.A. 3, No. 18030; decided February 3, 1970; D.J. 137-64-139)

Plaintiff brought an action in the district court to overturn a determination by the Secretary of Health, Education and Welfare denying his application for disability benefits under the Social Security Act. The Secretary had determined, after hearing, that while plaintiff suffered from anthrasilocosis and a mild depression, he was capable of performing light and sedentary jobs which exist in the national economy. The district court reversed the Secretary's decision, ruling that plaintiff was disabled within the meaning of the Act because, in the court's opinion, no employer would hire him for light, sedentary work which he could perform. The Secretary appealed, and the Third Circuit reversed.

The Third Circuit held that, under the 1967 Amendments to the Social Security Act, which applied to plaintiff's case, the standard of disability is whether a claimant "can perform" substantial gainful work that exists in significant numbers in the national economy, and that it is "irrelevant to determine whether or not the claimant would be hired". The Third Circuit stated that its decision was based upon the "plain language" of the 1967 Amendments, its legislative history, and the Seventh Circuit's similar decision in Wright v. Gardner, 403 F.2d 646.

Staff: Leonard Schaitman (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURT OF APPEALS

NARCOTICS AND DANGEROUS DRUGS

CODEFENDANT'S STANDING TO REQUIRE DISCLOSURE OF INFORMANT'S IDENTITY.

TRIAL JUDGE'S POWER TO EXERCISE DISCRETION TO MAKE ADVANCE RULING LIMITING USE OF PRIOR CONVICTION WHERE DEFENDANT TAKES STAND.

United States v. Robert Costa and Melvin Elliott (C.A. 2, December 15, 1969; D.J. 12-51-1573)

Defendants were convicted of selling heroin to an undercover agent in violation of 21 U.S.C. 174. The transaction took place in a hotel room registered to the informant. Delivery of the narcotics was made by Elliott. Upon receipt of payment therefor he was followed to a night club where he was observed by agents turning the money over to Costa.

Both defendants moved for disclosure of the informant's identity although he dealt only with Elliott and not Costa. The trial judge denied the motion since sufficient grounds for such disclosure were not made by either defendant. On the second day of trial, defense counsel obtained the identity of the informant from the hotel records where he had registered under his true name. Elliott's counsel unsuccessfully demanded that the Government produce him and sought a continuance, both of which were denied.

While the Second Circuit agreed with these rulings it took issue with the Government's contention that Costa had no standing to require disclosure of the informant's identity. It pointed out that if the informant played a sufficiently substantial role for Elliott to be entitled to have his identity revealed, Costa, who was on trial for the same substantive offense arising out of the same transaction, was equally entitled to have the information even though the informant had not seen him. The Court also observed that, were it not for the representation made by the Government during argument that it had no reason to believe the informant had registered at the hotel under his true name, it would have been tempted to reverse the conviction since a prosecutor should not place "needless and pointless roadblocks in the path of the defense".

After the close of the prosecution's case, counsel for Costa moved for an advance ruling precluding the Government from questioning him, in the event he took the stand, concerning prior convictions unless they related to crimes bearing on credibility. When asked for authorities, counsel said he had none and the Government took the position it would cross-examine him on any convictions he had.

The Court expressed concern that neither defense counsel nor the prosecutor had been of any aid to the trial judge, noting that it had been held in United States v. Palumbo, 401 F.2d 270 (C.A. 2, 1968), cert. denied, 394 U.S. 947 (1969), decided some seven months before instant trial, that a judge had the power, in the exercise of sound discretion, to make such an advance ruling if he found that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice.

Although denial of the motion was upheld in light of the factual situation present, a cautionary note was injected in the opinion with respect to cases where, as in prosecutions under 21 U.S.C. 174, the Government relies on the inferences contained in the statute. It was observed that, while this does not mean that a defendant must take the stand in order to explain the possession of narcotics to the satisfaction of the jury, it may be, as a practical matter, the only way to accomplish it. Thus, such cases may warrant more severe limitations on the Government's use of prior convictions for impeachment although not relieving the defense of the need to invoke the judge's discretion in a proper way.

Staff: Former U.S. Attorney Robert M. Morgenthau; Assistant U.S. Attorneys John W. Nields, Jr. and Paul B. Galvani (S.D. N.Y.)

DISTRICT COURTS

FEDERAL TORT CLAIMS ACT

GOVT. LIABLE FOR INJURIES INFLICTED UPON SPECIAL EMPLOYEE OF I.R.S. BY CRIMINAL DEFENDANT AGAINST WHOM SPECIAL EMPLOYEE HAD PROVIDED INFORMATION.

Jessee E. Swanner v. United States (M.D. Ala., January 26, 1970)

Swanner, a "special employee" of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, assisted in the undercover investigation of illicit whiskey operations in Giles County, Tennessee. As a result of the investigation, indictments were returned against several persons, including one McGlocklin, a man with a reputation and history

of violence who earlier had announced that he would kill anyone who informed on him. After discovering that Swanner was an informant, McGlocklin stated that Swanner would never testify against him. Swanner advised IRS agents of the threat, but did not request protection. The agents told Swanner that if he remained in his home state he would be safe from McGlocklin. Thereafter, Swanner's home was bombed, causing property damage and personal injuries to Swanner and his family. Swanner filed suit for damages against the Government under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, et seq., on the ground that the Government, after imparting to him a false impression of safety, had breached a duty to protect him.

The district court found that the Government was liable under the Federal Tort Claims Act for failure to provide protection to Swanner and his family, determining that the decision not to provide such protection was made by agents of the Government acting within the scope of their employment, and that the decision not to provide protection was not made in the exercise of a discretionary function within the meaning of 28 U.S.C. 2680(a). The court held that under the circumstances the Government was under a special duty to use reasonable care to protect Swanner and his family, since there was reasonable cause to believe that they were endangered as a result of Swanner's providing the Government with information; that the Government's duty arose without the necessity of a formal request by Swanner, since the Government was in possession of facts which should have created a reasonable belief that Swanner and his family were in danger; that it was immaterial whether the information concerning the danger was received directly from Swanner or from some other source; and that it was immaterial that Swanner was a "special employee" and received compensation for the information he supplied. The court further held that Swanner had sutained his burden of proving by a preponderance of the evidence that the Government's negligence was the proximate cause of the injury, ruling that the absence of any evidence placing McGlocklin or his associates at the scene at the time of the bombing was not dispositive of the issue, and pointing out that the Government had failed to adduce any evidence to support an alternative theory more plausible than that of the plaintiff. (An earlier decision of the district court, reported at 275 F. Supp. 1007, holding for the Government on the issue of probable cause only, was reversed by the Court of Appeals. Swanner v. United States, 406 F.2d 716 (C.A. 5, 1969).)

Staff: Former U.S. Attorney Macon L. Weaver and
Assistant U.S. Attorney E. Ray Acton (N.D. Ala.)

FIREARMS

TITLE VII OF OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 HELD CONSTITUTIONAL AS APPLIED TO FELON IN POSSESSION OF FIREARM.

United States v. Earthia B. Wiley (D. Minn., No. 4-69-Cr-101; February 3, 1970; D.J. 80-39-26)

The district court for the District of Minnesota adopted the Criminal Division's position that, despite its unartful wording, Title VII makes criminal the mere possession of a firearm by a convicted felon. The court went on to uphold Title VII against constitutional attacks on grounds that Congress lacked the power to pass such a statute, that the classifications adopted by the statute denied the defendant due process and equal protection, and that the statute violated the constitutional right of the people to bear arms under the Second Amendment.

It should be noted, however, that two district courts in Tennessee recently have granted motions to dismiss indictments under Title VII ruling that mere possession of firearms by convicted felons was not covered by the somewhat ambiguous language of the statute. United States v. Francis (E.D. Tenn., Cr. 12684, December 12, 1969); United States v. Phelps (M.D. Tenn., No. 14465, February 10, 1970); and United States v. Winston (M.D. Tenn., No. 14468, February 10, 1970).

Despite the decisions in the district courts in Tennessee, the Criminal Division is maintaining the position, approved in Wiley, that Title VII applies to mere possession of a firearm by a convicted felon. In view of the rapidly developing law in this area, it is recommended that the Weapons Control Unit of the General Crimes Section be contacted whenever questions as to the interpretation and/or constitutionality of Title VII are raised. Prior authorization of all Title VII prosecutions continues to be required.

Staff: United States Attorney Robert G. Renner and
Assistant U.S. Attorney Joseph T. Walbran (D. Minn.)

IMMIGRATION AND NATIONALITY ACT

VALIDITY OF 29 C.F.R. 69.6(j) UPHELD.

Lui Pui Kwong and Queens Joy Teang, Inc. v. Shultz and Farrell (S.D. N.Y., 69 Civil 4933; December 31, 1969; D.J. 39-51-3381)

The court entered an opinion which upheld the authority of the Secretary of Labor to promulgate regulations to enforce Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14), that "carry out the

mandate" of Congress. Specifically, the ruling held valid 29 C.F.R. 60.6(j), which allows the Secretary of Labor to deny required labor certifications to aliens seeking permanent entry into this country when the petitioning prospective employer has been found to have hired an alien within the prior three years, who either entered without inspection, or who was in violation of his nonimmigrant status. The court found that the Secretary of Labor was properly preventing aliens from working here without prior permission.

The alien in question entered this country with a 29-day permit as a crewman. He was subsequently located after overstaying his permit and found deportable. Queens Joy Teang, in the interim, had hired Lui Kwong as a kitchen helper. The restaurant sought a Sixth preference visa for the alien as a kitchen helper who speaks Chinese. The Secretary of Labor has determined that there is no shortage of kitchen helpers in this country, disregarding the language requirement by the employer as unnecessarily restrictive. The court agreed that the Secretary of Labor's exercise of his authority was not an abuse of discretion.

Staff: Former U.S. Attorney Robert M. Morgenthau and Special Assistant U.S. Attorney Daniel J. Riesel (S.D. N.Y.)

IMMIGRATION AND NATIONALITY ACT

ALLOCATION SYSTEM FOR IMMIGRANT VISAS UPHELD.

Carmelo Tomasello v. Rogers and Farrell (S.D. N.Y., 69 Civil 4505; December 5, 1969; 306 F.Supp. 705; D.J. 39-51-3369)

The Immigration Act sets a yearly ceiling of 170,000 immigrants from outside the Western Hemisphere, with a maximum per year of 20,000 from any one country. Within the limits for each country, visas are then issued on the basis of preference categories, as well as by date of approved application. The preference categories are set forth in Section 203(a) of the Act, 8 U.S.C. 1153(a). The court here held that the Secretary of State was properly allocating the total number of visas to the high priority categories where such applicants were sufficient to exhaust the available visas and that Congress did not intend a pro rata assignment of visas to the various preference categories. The court also held that issue was so insubstantial as to not justify a stay of deportation pending adjudication and appeal of the matter. The Court of Appeals for the Second Circuit and the U.S. Supreme Court subsequently refused to stay deportation pending appeal.

Staff: Former U.S. Attorney Robert M. Morgenthau and Special Assistant U.S. Attorney Daniel J. Riesel (S.D. N.Y.)

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

CONDEMNATION

RES JUDICATA: RECOVERY FIXED FOR TEMPORARY TAKING IS NOT RES JUDICATA IN SUBSEQUENT TEMPORARY TAKING.

United States v. H. R. Johnson & John B. Johnson (C.A. 9, No. 22,937; January 28, 1970; D.J. 33-5-1281)

In 1953, the Government brought an action condemning land for a term of years beginning July 1, 1953 through June 30, 1954, extendible through June 30, 1960. A jury fixed compensation for the taking at $2700 per year plus $18,000 for restoration costs for buildings and equipment destroyed. In 1960, the Government brought a second action to condemn the same property from July 1, 1960 through June 30, 1965. The parties executed a consent judgment fixing the annual rental at the same figure in the first action, $2700. On June 30, 1965 the Government brought a third action to condemn the same property from July 1, 1965 until June 30, 1970. The district court (Hon. Peirson M. Hall) granted the landowners' motion for summary judgment, holding that the fair compensation fixed in the prior actions was res judicata in the third action.

The Court of Appeals reversed and remanded, holding that each term taking is a different cause of action; that the value of property condemned is to be ascertained as of the date of taking (that evidence of a prior award would not be even admissible in an action for a subsequent taking); hence compensation must be redetermined in each temporary taking.

Staff: Jacques B. Gelin (Land & Natural Resources Division)

FRUSTRATION OF OIL PURCHASE CONTRACT IS NOT COMPENSABLE TAKING OF PROPERTY INTEREST WITHIN FIFTH AMENDMENT; LEGAL ISSUE IN CONDEMNATION IS NOT FOR RULE 71A(h) COMMISSION TO DECIDE, BUT FOR CT.

United States v. 677.50 Acres of Land in Marion County, Kansas; Katherine E. Vogel, et al. (Clear Creek) (C.A. 10, No. 95-68; January 13, 1970; D.J. 33-17-224-14, 33-17-224-93, 33-17-224-95)

Clear Creek, Inc., a pipeline company, had a contract to buy and resell all the oil produced from certain lands. Clear Creek's obligation

was irrevocable until four and one-half million barrels had been purchased. Before the quota had been fulfilled, the Government acquired the lands. Clear Creek sought to intervene in the condemnation proceeding on the ground that it had an interest in the land amounting to an equitable servitude for which the Fifth Amendment required payment of compensation. The district court referred this issue to a Rule 71A(h) commission, which agreed with Clear Creek, permitted intervention, and made an award.

The Court of Appeals reversed and remanded, holding, on the authority of Omnia Commercial Co. v. United States, 261 U.S. 502 (1923), and a long line of other cases, that Clear Creek's contract had not been taken, that it had sustained a consequential loss only. The frustration of contracts or loss of business opportunities are not compensable in Federal condemnation.

The Court of Appeals also held, first, that awarding Clear Creek compensation above that fixed for the owners of interests in the land violated the unit rule, Bogart v. United States, 169 F.2d 210 (C.A. 10, 1948), and, second, that the district court violated Rule 71A(h) by referring the legal issue of compensability to the commission.

Staff: Jacques B. Gelin (Land & Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

DISTRICT COURT

INJUNCTION

SUIT TO ENJOIN ASSESSMENT OF DEFICIENCY RESULTING FROM DISALLOWANCE OF TENTATIVE LOSS CARRYBACK ADJUSTMENT DISMISSED UNDER SECTION 7421 OF I.R.C. OF 1954 FOR LACK OF JURISDICTION.

Nalley, Jr. v. Ross (N.D. Ga., No. 12,986; December 16, 1969; 70-1 U.S.T.C., par. 9195; D.J. 5-19-953)

The taxpayer filed his Federal income tax return for the taxable years 1962 and 1965. The 1965 return was a joint return filed with his wife and reflected a net operating loss of $124,881.65. On December 30, 1966, an application for tentative carryback, form 1045, was filed requesting that the 1965 operating loss be carried back to the taxable year 1962. It was claimed that this carryback would result in an overpayment of $53,028.79, for the taxable year 1962. Accordingly, the taxpayer filed a claim for refund form 83, in connection with the application for testative carryback, claiming the $53,028.79, as an overpayment for the taxable year 1962. On February 20, 1967, the taxpayer was given a "quickie refund" of taxes for the taxable year 1962, in the amount of $53,028.79, pursuant to Section 6411 of the Internal Revenue Code of 1954.

Subsequent to the refund, an official audit of the taxpayer's 1965 income tax return resulted in the disallowance of the claimed net operating loss. Therefore, the tentative loss carryback adjustment resulting in the refund for the over assessment of the taxes for 1962 was disallowed. Accordingly, the refund, was deemed erroneous and on August 8, 1969, the District Director assessed it as a deficiency as if it were due to a mathematical error appearing on the return under Section 6213(b)(2) of the I.R.C. of 1954.

The taxpayer brought this action seeking an injunction claiming that before an assessment could be made the District Director was required to send him a notice of deficiency to allow him 90 days in which to file a petition with Tax Court of the United States in order to litigate the issue of the 1962 deficiency. The taxpayer, in effect, was asserting that he fell within the provisions of Section 6212(a) which is an exception to Section 7421 of the I.R.C. of 1954 and which provides that a notice of deficiency must be sent to the taxpayer when a determination of a deficiency of any tax has been made by the District Director.

The Government moved to dismiss the complaint on the ground that the court lacks jurisdiction by reason of the provisions of Section 7421 which prohibit generally the maintenance of a suit to restrain the assessment or collection of any tax. The Government's position was that Section 6213(b)(2) gives the District Director the power to assess as a deficiency the amount refunded pursuant to the allowance of a tentative loss carryback adjustment as if it were due to a mathematical error and that in such circumstances Section 6213(b)(1) provided that a deficiency notice not be given to the taxpayer and that he had no right to litigate the amount of the refund in the Tax Court. His remedy is to pay the tax and sue for a refund in the district court. The court sustained the Government's position and dismissed the suit.

Staff: United States Attorney John W. Stokes, Jr. (N.D. Ga.); George F. Lynch and John M. Dowd (Tax Division)

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