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TABLE OF CONTENTS

		Page
COMMENDATIONS		639
POINTS TO REMEMBER		
Compromises in Civil Cases		640
Theft of Government Property		640
Cases and Matters Involving Terrorist Activities (Memorandum No. 731)		641
ANTITRUST DIVISION		
SHERMAN ACT		
Consent Judgment Entered in Real Estate Case	U. S. v. The Cleveland Real Estate Board	643
CRIMINAL DIVISION		
CIVIL FORFEITURES - JURISDICTION		
Attorney General's Denial of Bank's Claim For Remission Held Unreviewable	U. S. v. One 1970 Buick Riviera Bearing Serial No. 494870H910774 and National American Bank of New Orleans (C.A. 5)	644
IMMUNITY (18 U.S.C. 2514)		
The Effect of Transactional Immunity On A Prior Conviction	U. S. v. Jon Joseph Kelly (C.A. 5)	645
NARCOTICS		
"Exigent Circumstances" and Probable Cause For Warrantless Search	U. S. v. Aubrey Westley Miller, et al. (C.A. 10)	646
FALSE DECLARATION (18 U.S.C. 1623)		
Jury Conviction Under 18 U.S.C. 1623 For Making False Declaration In A Verified Petition For Post-Conviction Relief Under 28 U.S.C. 2255	U. S. v. Peter Alexander Makres	648

Page

FALSE PERSONATION (18 U.S.C. 915)
Impersonation of Foreign Consul — U. S. v. Agustin Marrero De Ibern — 648

INTERNAL SECURITY DIVISION
FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED — 650

LAND AND NATURAL RESOURCES DIVISION
ENVIRONMENT
Corporate Probation For Criminal Violation Of The 1899 Refuse Act — U. S. v. Atlantic Richfield Co. (C.A. 7) — 652

TAX DIVISION
INTERNAL REVENUE CODE OF 1954 - TERMINATION OF TAXABLE YEAR
Government's Motion To Dismiss Pursuant to 26 U.S.C., Section 7421(a) Granted; Authority Of District Director, Internal Revenue Service To Terminate Taxpayer's Taxable Year, Make Early Assessments And Collect Tax Without Deficiency Notice Upheld — Clifford Irving, et al. v. Elliott Gray, District Director, Internal Revenue Service, et al. — 653

INTERNAL REVENUE CODE OF 1954 - 28 U.S.C. 2410(a)
Taxpayer's Action To Quiet Title To I.C.C. and N.Y.P.S.C. Certificates Dismissed; I.C.C. and N.Y.P.S.C. Certificates Are Property Subject To Federal Tax Lien and Levy — Fidler v. U. S. — 654

FEDERAL RULES OF CRIMINAL PROCEDURE
RULE 7(c): The Indictment and the Information
Nature and Contents — U. S. v. Clifford Branan; Fred Jackson Fritts; Olen Lee Hendon (C. A. 6) — 657

		Page
RULE 10: Arraignment	U. S. v. Eugene M. Hart (C.A. 10)	659
RULE 16(b): Discovery and Inspection; Other Books, Papers, Documents, Tangible Objects or Places	U. S. v. Theodore Roosevelt Harris, et al. (C.A. 5)	661
RULE 18: Venue; Place of Prosecution and Trial	U. S. v. Clifford Branan; Fred Jackson Fritts; Olen Lee Hendon (C.A. 6)	663
RULE 24(b): Trial Jurors; Peremptory Challenges	U. S. v. Dennis O'Brien Coleman, Jr., and John Martin Swords	665
RULE 29: Motion for Judgment of Acquittal	U. S. v. Maurice Highfill and Robert Noe	667
RULE 29(c): Motion for Judgment of Acquittal; Motion Before Submitting to Jury	U. S. v. Ronald Earl Blattel	669
RULE 33: New Trial	U. S. v. Maurice Highfill and Robert Noe	671
RULE 35: Correction or Reduction of Sentence	U. S. v. Ernest M. Hall (C. A. 5)	673
RULE 35: Correction or Reduction of Sentence	U. S. v. Fred Louis Bell and Charles Lavern Beasley (C. A. 5)	675
RULE 41(c): Search and Seizure; Issuance [of Warrant] and Contents	U. S. v. Stuart Birdsey Smith	677

Page

RULE 46: Release on Bail — U. S. v. Ralph Hubert Barger, Jr. (C.A. 9) — 679

LEGISLATIVE NOTES

COMMENDATIONS

Assistant U. S. Attorney John B. Wlodkowski, District of Maine, was commended by William J. Cotter, Assistant Postmaster General for his diligent research which enabled him to conduct a brilliant cross examination in a mail fraud case concerned with land development. The case involved voluminous records dealing with interconnecting state corporate action and resulted in conviction.

Assistant U. S. Attorney Peter J. Kelley, Eastern Dist. of Michigan, was commended by Special Treasury Agent James J. Burke for his handling of United States v. Gene Kline. He was praised for his common-sense thought and ability throughout the two weeks of the trial.

POINTS TO REMEMBER

Compromises In Civil Cases

Delegated authority to compromise certain civil cases is discussed in Civil Division Memorandum 374 reprinted in the Appendix to Subpart Y following 28 C.F.R. 0.172, and also at pages 26-31 of Title 3 of the United States Attorneys Manual. Cases which do not fall within an express delegation of compromise authority, or which exceed the dollar figure specified on cases for which delegated authority has been granted, require Department approval. United States Attorneys should not take a favorable agency recommendation as authorizing them to compromise a case which would otherwise require Department approval. Once a matter has been referred to the Department for litigation the agency loses such compromise authority over the case as it may have had. Thus, even if the agency's recommendation is couched in terms of "We have accepted the offer of compromise" or "You may accept the offer", care should be taken to forward the compromise offer to the Department along with your recommendation and that of the client agency in accordance with existing instructions.

(Civil Division)

Theft of Government Property

KNOWLEDGE THAT PROPERTY BELONGED TO FEDERAL GOVERNMENT NOT REQUIRED.

Specific intent to appropriate or injure Government property is not a required element of proof under 18 U.S.C. 641 and 18 U.S.C. 1361. The Fifth and the Ninth Circuits Courts of Appeal in United States v. Boyd, 446 F.2d 1274 (5th Cir., 1971) and United States v. Howey, 427 F.2d 1017 (9th Cir., 1970) have rejected the Tenth Circuit's rationale in Findley v. United States, 362 F.2d 921 (10th Cir., 1966), and have held that the defendant's knowledge that the property in question belonged to the Federal Government was not an essential element of the offense under 18 U.S.C. 641.

Findley remains the only reported decision involving § 641 which reversed a conviction because of the Court's failure to instruct the jury that specific intent to appropriate Government property was an essential element of a § 641 offense.

The Court in Howey pointed out that the language of § 641 does not require such knowledge as an element, that § 641 reflects Congress' effort to codify the common law crimes of larceny and embezzlement and that

such knowledge was not required by the common law, and that the reason for requiring that the property belong to the Government was to state the foundation for Federal jurisdiction.

While there are no cases directly on point under 18 U.S.C. 1361, nevertheless the reasoning of the court in Howey as to 18 U.S.C. 641 should apply equally to § 1361. There is dicta in the Fifth Circuit case of United States v. Young, ___ F.2d ___ (5th Cir., July 7, 1972) that § 1361 does not require proof that the defendant knew that the property belonged to the United States when he acted against it (footnote 6).

Accordingly, the comment in Volume 20 of the United States Attorneys' Bulletin, No. 13, June 23, 1972, on page 481, in discussing the burden of proving intent under the sabotage statute (18 U.S.C. 2153(a)), that the Government must prove in a § 1361 case that the defendant knew that the injured property belonged to the Government is not in conformity with our opinion as expressed above and should be disregarded.

A discussion of this issue may be found on page 23 of the Handbook on the Protection of Government Property.

(Criminal Division)

Cases and Matters Involving Terrorist Activities
(Memorandum No. 731)

Last year, all cases and matters involving terrorists or persons associated with terrorist activities were transferred to the Internal Security Division. At the same time the responsibility for prospective prosecutions of violations of the new explosive statute (18 U.S.C. 844) committed by terrorists or those associated with terrorist activity was assigned to the Internal Security Division.

Coordination and supervision of all cases and matters involving terrorists or persons associated with terrorist activities became the responsibility of the Special Litigation Section of that Division. By memorandum, No. 731, dated February 21, 1971, all United States Attorneys were informed of these changes by Robert C. Mardian, Assistant Attorney General, Internal Security Division. It was pointed out that the Chief of the Special Litigation Section, Guy L. Goodwin, and the personnel of the Section were available to assist in these matters. Since that time, James C. Hise has been appointed Deputy Chief of the Special Litigation Section and, in Mr. Goodwin's absence, he is the individual who should be contacted initially regarding these matters. New telephone numbers for the Special Litigation Section are Area Code 202, 739-4501, 4502.

Centralization of supervisory control over the investigative and prosecutive actions involving terrorists or those persons associated with terrorist activities was required because of numerous instances where such action had been taken without the United States Attorney being aware of all the pertinent facts or of the Department's interest in these matters. In order to effectively supervise and coordinate these investigative and prosecutive activities, it is essential that the Special Litigation Section be notified of all cases and matters involving terrorists or persons associated with terrorist activities.

Prior to initiating any grand jury investigation, or any prosecution of individuals involved in terrorist activities, or prior to declining any such prosecution, you should consult the Special Litigation Section and obtain their approval to proceed. Thereafter, the Special Litigation Section should be kept fully advised of the proceedings on a continuing basis and should be furnished copies of all pleadings which are filed. Moreover, it is also important that you notify the Special Litigation Section of all matters involving terrorists or those associated with such activity now pending and of which the Special Litigation Section has not previously received notice. If you have already instituted investigative or prosecutive actions which are within the jurisdiction of the Special Litigation Section, and without their approval, notice should be given as soon as possible.

Only the continued vigilance of all United States Attorneys and their Assistants will assure the successful implementation of a policy designed to establish a coordinated investigative and prosecutive effort against those persons involved in terrorist activities.

(Internal Security Division)

ANTITRUST DIVISION

Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

CONSENT JUDGMENT ENTERED IN REAL ESTATE CASE.

United States v. The Cleveland Real Estate Board (Civ. 70-731, July 17, 1972; DJ 60-223-22)

On July 17, 1972, Judge Thomas D. Lambros entered a Final Judgment in the above-captioned case. The complaint, filed July 29, 1970, charged the Board with a violation of Section 1 of the Sherman Act by having conspired with its members to raise, fix, and maintain commission rates for the sale, lease, and management of real estate in Cuyahoga County, Ohio, and to have agreed to accept property listings only on an exclusive basis.

Judge Lambros overruled the objections of a private treble-damage plaintiff which were filed on July 3 and which requested, essentially, provisions which would broadly confess judgment on conspiracy and interstate commerce which could be used, prima facie, in the private case. We opposed, relying on United States v. Automobile Mfgrs. Assn., 307 F. Supp. 617.

The judgment prohibits the fixing of brokerage commission rates, forbids the Board from publishing commission fee schedules, from recommending that its members adhere to any suggested fee schedule, and from taking any action against a member who refuses to adhere to any such fees. In addition, the judgment enjoins the Board from adopting or enforcing any rule or regulation that members accept only exclusive rights to sell. It also directs the Board to insert in all its rules, bylaws, regulations, contracts and other forms which previously contained a set commission rate, a provision that commission rates for the sale, lease or management of property are negotiable between the broker and his client.

Staff: Carl L. Steinhouse, Lester P. Kauffmann, Robert S. Zuckerman, William L. Fry, and Charles F. B. McAleer (Antitrust Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Henry E. Petersen

COURTS OF APPEAL

CIVIL FORFEITURES - JURISDICTION

ATTORNEY GENERAL'S DENIAL OF BANK'S CLAIM FOR REMISSION HELD UNREVIEWABLE.

United States, Plaintiff-Appellee v. One 1970 Buick Riviera Bearing Serial Number 494870H910774, Respondent and National American Bank of New Orleans, Claimant-Appellant (C. A. 5, No. 71-2545, May 12, 1972; D. J. 12-32-314)

The Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court, Eastern District of Louisiana, which held that the Attorney General's denial of the Bank's petition for remission of the forfeiture of the respondent automobile incurred under 49 U.S.C. 781-782 was not reviewable and that the failure of the Attorney General to grant remission did not violate the due process and just compensation provisions of the Fifth Amendment.

In affirming the lower Court's decision the Court of Appeals noted that the question of its authority to review the Attorney General's denial of remission of the forfeiture was controlled by the long-standing, judge-made rule that the Attorney General in cases within his jurisdiction has unreviewable discretion over petitions under 19 U.S.C. 1618, citing cases. The Court also noted that judicial control of the Attorney General's remission or mitigation function has been exercised only when administrative officials have refused to entertain a mitigation claim on the erroneous belief that they had no statutory authority to do so, and then only to require the officials to exercise jurisdiction over the claim -- not to review the officials' decisions on the merits.

Staff: United States Attorney Gerald J. Gallinghouse
Assistant U.S. Attorneys John R. Shupp and
Mary Cazalas (E.D. La.)

IMMUNITY
18 U.S.C. 2514

THE EFFECT OF TRANSACTIONAL IMMUNITY ON A PRIOR CONVICTION.

United States v. Jon Joseph Kelly (C. A. 5, July 3, 1972; D. J. 177-73-2)

The Fifth Circuit Court of Appeals on July 3, 1972, in the case of United States v. Jon Joseph Kelly, held that a defendant may be tried, convicted, and sentenced, and then while his appeal is pending, may be compelled to testify pursuant to a grant of transactional immunity under Title 18, U.S.C., section 2514, without requiring a reversal of his substantive conviction and without precluding his retrial in the event of reversal on other grounds.

Kelly was convicted in the Northern District of Texas for violations of 18 U.S.C. 2511 (interception of communications) and was sentenced to three years in prison. After sentencing, but while his appeal to the Fifth Circuit was pending, Kelly was subpoenaed before a Federal Grand Jury in the Northern District of Texas and asked questions concerning the same transactions for which he had been convicted. Kelly subsequently refused to obey the District Court's order to testify after a grant of transactional immunity under section 2514 and was held in contempt and ordered confined.

Kelly appealed to the Fifth Circuit Court of Appeals arguing that, unless the immunity granted operated to reverse his substantive conviction and to bar any subsequent retrial, the immunity was not co-extensive with his Fifth Amendment privilege against self-incrimination.

The Fifth Circuit Court of Appeals vacated the order of contempt and confinement and stated that if Kelly were to testify under the protection of the immunity order then his prior conviction must be set aside and that he could not thereafter by subjected to retrial for any offense growing out of any transaction about which he testified.

Upon further consideration, however, the Fifth Circuit Court of Appeals reversed itself, vacated its own order, and reinstated the District Court's order. In doing so, the court pointed out that the Supreme Court's decision in Kastigar v. United States, 40 U.S.L.W. 4550, upholding the constitutionality of "use" immunity clearly refuted Kelly's contention that he could not be retried should his conviction be reversed on other grounds as long as no use is made of compelled testimony. The court further pointed out that Kelly's other contention that transactional immunity requires that his substantive conviction be set aside had already been precluded by footnote 3 in Katz v. United States, 389 U.S. 347 (1967). Katz had been convicted, his conviction had been affirmed by the Court of Appeals, and he had petitioned the Supreme Court for a writ of certiorari. After affirmance of his conviction, but before the petition for certiorari was filed, Katz was granted transactional immunity under Title 47, U.S.C., section 409, a forerunner of section 2514, and did testify under its

protection. Katz then requested that his conviction be set aside. The Supreme Court answered in footnote 3, holding that section 409 was not designed to confer immunity from punishment pursuant to a prior prosecution and adjudication of guilt, but only to afford adequate protection from future prosecution or conviction.

Staff: United States Attorney Eldon B. Mahon
Assistant United States Attorney Andrew Barr (N.D. Tex.)
James L. Whitten (Criminal Division)

NARCOTICS

"EXIGENT CIRCUMSTANCES" AND PROBABLE CAUSE FOR WARRANTLESS SEARCH.

United States v. Aubrey Westley Miller, et al. (C.A. 10, No. 71-1502, decided May 25, 1972; D.J. 12-49-150)

Defendants were convicted of concealing and facilitating approximately 512 pounds of marihuana in violation of 21 U.S.C. 176a. Five other persons were also indicted along with them, but they later pleaded guilty to similar charges arising from the same series of events. Suspicion was first directed towards the present defendants when they entered the United States from Mexico through a border check point. Customs agents found three marihuana seeds in the front of the pickup truck that they were driving. The defendants were not then detained but the U.S. Border Patrol was informed of the incident. In the meantime, the Border Patrol was already in the process of conducting another investigation concerning the illegal importation of marihuana. Several agents had discovered three duffel bags filled with marihuana in the brush close to the Pancho Villa State Park. These agents then conducted a surveillance-stakeout of the park. About 4:00 p.m. on March 12th, a large, self-contained mobile home drove into the park. Shortly thereafter, appellants' truck entered the park and parked next to the mobile home. Later, four persons left the mobile home and walked towards the Mexican border. After a two-hour wait, four more persons left the mobile home and joined up with four persons coming from the direction of the border. These persons were then seen carrying large bags to the mobile home. Lights were seen on in the mobile home for about another hour and a half. After the lights went out, there was no further activity observed for three hours (from 3:00 a.m. to 6:00 a.m. on the 13th). About 6:30 a.m., the truck, followed shortly by the mobile home, left the park. The agents then stopped both vehicles and conducted an on-the-scene search of them. As a result of the search, six large bags containing 512 pounds of marihuana were found in the mobile home. Appellants, who were in the truck, and

the occupants of the mobile home were then arrested and taken into custody. After appellants' conviction, they appealed to the U.S. Court of Appeals for the Tenth Circuit alleging, inter alia, that: (a) the agents lacked probable cause to have conducted the search of the two vehicles; and (b) that the agents, with prior knowledge of what they intended to search for, could not wait until the vehicles left the park and entered the highway in order to render the warrantless search valid under the exceptions announced in Chambers v. Maroney, 399 U.S. 42 (1970) and Carroll v. United States, 267 U.S. 132 (1925). The Court of Appeals affirmed the convictions.

1. By looking at all the facts and circumstances surrounding the time of arrest, the Court held that there was probable cause to arrest. In particular, the Court pointed out that the agents' surveillance was firmly grounded on the detection of the odor of marihuana coming from the original duffel bags found in the park; that this isolated region of the country was ideal for smuggling; and that the suspicious activities of the appellants in the park met the probable cause requirement justifying the highway arrests and search of the mobile home.

2. Even though there was probable cause to search the vehicles, appellants still claimed that the search was illegal since it had been performed without a search warrant under circumstances which required the obtaining of a search warrant. However, the Court pointed out that the existence of "exigent circumstances" can justify the substitution of police judgment as to probable cause in lieu of that of a magistrate. In upholding the legality of this search, the Court noted the various factors in this case that qualified as "exigent circumstances." In particular, the Court pointed out that this case did not involve the investigation of one specific person, activity, or vehicle; rather, it was "a continuing series of activities" that could have involved any number of persons or vehicles completely unknown to the border agents. Since the stakeout covered the entire perimeter of the park, there was no guarantee that more people and vehicles would not join up with the defendants. Thus, by evaluating the circumstances at the time the events were taking place rather than by hindsight, the Court held that prudent, cautious, and trained police officers could have reasonably believed that a smuggling operation was taking place and that the circumstances were too fluid to require the officers to obtain a search warrant. The fact that there was a three-hour period where no activity was observed could not be used to show that the agents had an opportunity to obtain a search warrant and should have done so.

3. Appellants' other claims concerning the testimony of several witnesses, special jury instructions, and the sufficiency of the evidence were likewise rejected and the Court affirmed the conviction.

Staff: United States Attorney Victor R. Ortega
Assistant United States Attorney Mark C. Meiring (D.N.M.)

DISTRICT COURT

FALSE DECLARATION
(18 U.S.C. 1623)

JURY CONVICTION UNDER 18 U.S.C. 1623 FOR MAKING FALSE DECLARATION IN A VERIFIED PETITION FOR POST-CONVICTION RELIEF UNDER 28 U.S.C. 2255.

United States v. Peter Alexander Makres (72 CR 326, N.D. Ill., June 29, 1972; D.J. 93-1-4222)

The defendant, Peter Alexander Makres, filed a petition for post-conviction relief under oath pursuant to Title 28, United States Code, Section 2255 in a case entitled Makres v. United States, 72 C 128 (N.D. Ill., E.D.). The petition alleged that the special agent of the Federal Bureau of Investigation assigned to investigate the criminal cases to which the defendant pleaded guilty promised the defendant that in exchange for a plea of guilty by the defendant, his co-defendant would be given probation. The Federal Bureau of Investigation agent denied making any promises to the defendant. Judge Hubert L. Will denied the 2255 petition and in his opinion, Makres v. United States, 337 F. Supp. 1125 (N.D. Ill., E.D. 1972) held that the plea was voluntarily entered by the defendant.

An indictment was subsequently returned, charging that the defendant made a false material declaration under oath in his § 2255 petition in violation of Title 18, United States Code, § 1623.

The jury returned a guilty verdict on June 29, 1972, and Judge Philip W. Tone sentenced the defendant to two years to run consecutively with the eight year sentence previously imposed upon the defendant by Judge Will.

Staff: United States Attorney James R. Thompson
Assistant United States Attorney James H. Alesia
(N.D. Ill.)

FALSE PERSONATION
(18 U.S.C. 915)

IMPERSONATION OF FOREIGN CONSUL.

United States v. Agustin Marrero De Ibern (N.D. Ind., June 21, 1972; 72 H Cr 55; D.J. 47-26-32)

On December 23, 1971, the defendant was arrested by Portage, Indiana Police for speeding and driving under the influence of intoxicating liquor. Charges were proffered against him in the City Court of Portage. Defendant claimed and represented to the court that he was a consul for the Dominican Republic and as such was entitled to diplomatic immunity. He was granted this by the Court and the charges were dropped.

When interviewed at a later date, De Ibern admitted that he knew he was not entitled to diplomatic immunity and that his credentials had been refused by the United States Department of State. De Ibern told the Bureau he made the representations to the court, knowing them to be false, in an effort to have the charges dismissed.

De Ibern was subsequently charged in one count with having violated 18 U.S.C. 915. The evidence showed that De Ibern, a citizen of the United States and a resident of Gary, Indiana, was nominated in 1967 by the Dominican Republic as an honorary consul by sending a diplomatic note to the U. S. Department of State notifying the Department of State of the nomination of De Ibern. The Department of State in 1967 disapproved the appointment of De Ibern in this capacity in view of his employment as a deputy prosecutor for Lake County, Indiana.

At the trial of this case the court ruled (1) that obtaining immunity from prosecution is a thing of value contemplated by the statute and (2) De Ibern impersonated a diplomatic officer duly accredited even though as far as the Dominican Republic was concerned, De Ibern's honorary credentials were still in effect. In deciding the second issue, the Court took into consideration procedures set forth in the Vienna Convention on Consular Relations of 1963, TIAS 6820, Article 23(3). Both the United States and the Dominican Republic are parties to the convention. Under the convention, the receiving state has the right to declare that a person appointed to serve as a consular officer in the receiving state is unacceptable before he commences his duties. If such action is taken by the receiving state, the sending state must withdraw the appointment of the individual in question.

Staff: United States Attorney William C. Lee
Assistant United States Attorney J. Frank Kimbrough
(N. D. Ind.)

* * *

INTERNAL SECURITY DIVISION
Assistant Attorney General A. William Olson

FOREIGN AGENTS REGISTRATION ACT

OF 1938, AS AMENDED

The Registration Section of the Internal Security Division administers the Foreign Agents Registration Act of 1938, as amended, (22 U.S. C. 611) which requires registration with the Attorney General by certain persons who engage within the United States in defined categories of activity on behalf of foreign principals.

August, 1972

During the first half of this month the following new registrations were filed with the Attorney General pursuant to the provisions of the Act:

Jamaica Tourist Board of Miami, Florida registered as a Branch Office of the Jamaica Tourist Board, a Statutory Department of the Government of Jamaica, Kingston. Registrant promotes tourism to Jamaica through personal contacts with carriers; the distribution of printed matter, slides, films, etc; and arranges travel and trade shows within its territory of the 11 Southern United States. The following persons filed short-form registration statements in connection with the promotion of tourism to Jamaica: Eddie J. Daccarett; Harry W. Hughes; Marianne Steele Probert; and A. W. Zwernemann, Jr.

Underwood, Jordon Associates, Inc. of New York City registered as public relations counsel and advertising agency for the Mexican National Tourist Council, Mexico City. Registrant's agreement with the foreign principal covers a one year period beginning June 15, 1972 and registrant will formulate, develop and execute public relations and promotional ideas, plans, programs and campaigns to promote tourism to Mexico. For these services registrant is to receive a fee of $7,000 per month which is to include ordinary out-of-pocket expenses; however, unusual expenses not to exceed $2,000 per month are to be reimbursed by the foreign principal. The following persons filed short-form registrations for activities directly connected with the Mexican account: R. Donald Underwood; Thomas R. Jordan; Harry S. Phillips; Donald C. Curry; and Margaret Zellers Lenci. All are regular salaried employees of the registrant corporation.

Audrey D. Wertheim, dba Wertheim & Associates of New York City registered as public relations counsel to the Greek Trade Center. Regis-

trant will execute a public relations and publicity campaign to promote Greek imports into the United States. For these services registrant is to receive a basic fee of $8, 000 plus-out-of-pocket expenses.

Miles R. Grove, Inc. of New York City registered as advertising agency for the Antigua-Barbuda Information Office. Registrant's agreement covered the period March 15 through June 16, 1972 and registrant performed its services for the foreign principal for the standard 15% agency commission plus production expenses. Paul M. Canada, Frank Marciuliano, and Peter Richardson filed short-form registration statements as persons working directly on the Antigua-Barbuda account. All are regular salaried employees of the registrant corporation.

Burson-Marsteller of New York City registered as public relations and publicity counsel for the Government of India Tourist Office. Registrant's proposed agreement with the foreign principal extends to March 31, 1973 and calls for a general public relations and publicity campaign to promote tourism to India. Registrant is to receive a fee of $3, 000 per month plus out-of-pocket expenses. Neil Frank and Victor Emmanuel, Jr. filed short-form statements as persons working directly on the Indian account. Both are regular salaried employees of registrant.

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Kent Frizzell

COURT OF APPEALS

ENVIRONMENT

CORPORATE PROBATION FOR CRIMINAL VIOLATION OF THE 1899 REFUSE ACT.

United States v. Atlantic Richfield Company (C. A. 7, No. 71-1572, July 12, 1972; D. J. 62-23-46)

Atlantic Richfield was found guilty, on a plea of nolo contendere, of leaking oil into the Chicago Sanitary and Ships Canal in violation of the 1899 Refuse Act, 30 Stat. 1152, 1153, 33 U. S. C. secs. 407 and 411. The district court placed the corporation on probation, requiring it to set up and complete a program, within 60 days, to handle oil spillage.

Atlantic Richfield appealed, contending that under the Federal Probation Act, a corporation could not be put on probation. The Seventh Circuit held that a corporation can be put on federal probation, but held the conditions of probation that were imposed unreasonable since the corporation could not know when it was in compliance. The case was remanded for resentencing.

Staff: Carl Strass (Land and Natural Resources Division); Assistant United States Attorney Richard M. Williams (N.D. Ill.)

*   *   *

TAX DIVISION

Assistant Attorney General Scott P. Crampton

DISTRICT COURT

INTERNAL REVENUE CODE OF 1954 - TERMINATION OF TAXABLE YEAR

GOVERNMENT'S MOTION TO DISMISS PURSUANT TO 26 U.S.C., SECTION 7421(a) GRANTED; AUTHORITY OF DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE TO TERMINATE TAXPAYER'S TAXABLE YEAR, MAKE EARLY ASSESSMENTS AND COLLECT TAX WITHOUT DEFICIENCY NOTICE UPHELD.

Clifford Irving, et al. v. Elliott Gray, District Director, Internal Revenue Service, et al. (S.D.N.Y. No. 72-CIV-2110, June 15, 1972; D.J. 5-51-11762)

On February 4, 1972, following the revelation of the "Hughes hoax", the District Director of Internal Revenue notified the plaintiffs by letter that he was immediately terminating their 1971 taxable year pursuant to 28 U.S.C., Section 6851(a) upon a finding that the plaintiffs designed to depart from the United States and/or remove property therefrom, immediately declaring their income tax for 1971 due and payable, requesting immediate payment, and advising the taxpayers of their responsibility to file a return for 1971. Simultaneously, the Internal Revenue Service made an early assessment against the plaintiffs and served a notice of levy upon a brokerage house in which the plaintiffs had accounts and subsequently collected approximately $91,000.

Plaintiffs sued the District Director seeking a permanent injunction, enjoining the Internal Revenue Service from further collecting any monies of the plaintiffs or disposing of any monies pursuant to notice of levy on the grounds that the District Director had no power to terminate their taxable year, to make early assessments against them, or to institute collection on these assessments without first sending a deficiency notice within 60 days after making the assessments.

The Court held that 26 U.S.C., Section 6851(a), empowers the Internal Revenue Service, upon the finding of jeopardy by the District Director (which is presumptive evidence of jeopardy), to make a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year. The Court, disagreeing with the decision in Schreck v. United States, 301 F. Supp. 1263 (D. Md., 1969) relied on the "sensible and sound view" of the unreported Seventh Circuit decision, Williamson v. United States,

No. 17992 (C. A. 7, 1971):

> That the deficiency notice requirement cannot be read into §6851 because the assessment made under that section is not a deficiency as defined in § 6211. That section defines a deficiency as the amount by which the 'tax imposed' exceeds the amount shown on the tax return. The assessment in this case was not an imposed tax, but merely an amount which the I. R. S. believed justified the termination of the taxable year. Since no return had been filed at the date of the assessment, no deficiency was determinable.

The Court concluded that the plaintiffs were directed and certainly permitted to file 1971 returns and to declare under the penalty of perjury the facts and ultimate conclusions they asserted as to their tax liability and, if they claimed a lesser liability than that determined by the Internal Revenue Service, there may be a substantial reason for a speedy notice of deficiency so that plaintiffs may go to the Tax Court. Consequently, Section 7421 of the Internal Revenue Code was applicable to plaintiffs' action as the Court was unable to conclude that the plaintiffs had an inadequate remedy at law and the Court found that the plaintiffs were unable to sustain their burden of showing ultimate success on the merits and irreparable injury as grounds for injunctive relief. Enochs v. Williams Packing Co., 370 U.S. 1 (1960).

Staff: United States Attorney Whitney North Seymour
Assistant United States Attorney Michael I. Saltzman
(S. D. N. Y.) J. Brian Ferrel (Tax Division)

INTERNAL REVENUE CODE OF 1954 - 28 U. S. C. 2410(a)

TAXPAYER'S ACTION TO QUIET TITLE TO I. C. C. AND N. Y. P. S. C. CERTIFICATES DISMISSED; I. C. C. AND N. Y. P. S. C. CERTIFICATES ARE PROPERTY SUBJECT TO FEDERAL TAX LIEN AND LEVY.

Fidler v. United States (N. D. N. Y., No. 72-CV-150, April 20, 1970; D. J. 5-50-2725)

The Internal Revenue Service levied upon and seized plaintiff's I. C. C. and N. Y. P. S. C. certificates of public convenience and necessity for nonpayment of delinquent federal taxes. The Court held that it had no jurisdiction over plaintiff's quiet title action under 28 U. S. C., Sections 1331, 1340, 1346(a)(b), 2201 and 2463, relying on Falik v. United States, 343 F.2d 38 (C. A. 2, 1965); 26 U. S. C., Section 7421 and Enochs v. Williams Packing Co., 370 U.S. 1 (1960), distinguishing Benson v. United States,

442 F.2d 1221 (C.A. D.C., 1971). In addition, the Court held that I.C.C. and N.Y.P.S.C. certificates of public convenience and necessity are property or rights to property subject to a federal tax lien and levy. United States v. Bess, 357 U.S. 51 (1958); In re Rainbo Express, Inc., 179 F.2d 1 (C.A. 7, 1950); Eighth Avenue Coach Corporation v. City of New York, 286 N.Y. 84 (1941); Escrow v. Frontier, (W.D.N.Y., 1971) aff'd. ____ F. 2d ____ (C.A. 2, 1972) and any other conclusion would fly in the face of reality. United States v. Berkshire, 219 F. Supp. 861 (D. Mass., 1963); Sandri v. United States, 266 F. Supp. 136 (D. Mass., 1967) were distinguished.

In a related action, Fidler v. United States and Liegel (N.D.N.Y., No. 72-CV-81, April 20, 1971; D.J. 5-50-2715), the taxpayer's action to quiet title to real property was dismissed.

The action by taxpayer to quiet title to real property levied upon, seized, and sold by the United States was dismissed on the ground that the Court lacked jurisdiction under 28 U.S.C., Sections 1331, 1340, 1346(a)(b), 2201, 2410 and 2463. Falik v. United States, 343 F.2d 38 (C.A. 2, 1965). The Court held that the plaintiff failed to state a claim with respect to alleged misrepresentation by Internal Revenue Service revenue officer regarding the 120-day redemption period provided by 26 U.S.C., Section 6337, where plaintiff did not tender the redemption price until after the 120-day period expired. A trial on the merits with respect to alleged misrepresentation by the purchaser resulted in a decision in favor of the purchaser.

Staff: J. Brian Ferrell (Tax Division)

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