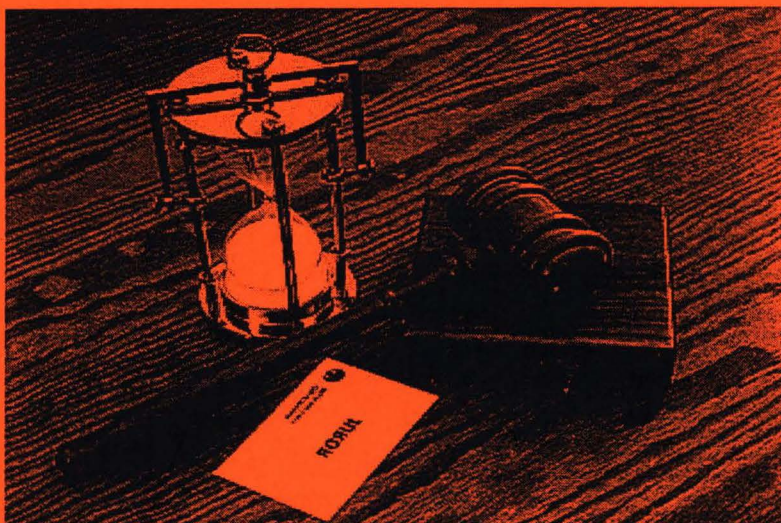


LEGAL FICTIONS

What is a Legal Fiction?



It's time to learn how to destroy Legal Fictions.

What's the difference between a Legal Fiction and a lie?

Why is our society so full of Legal Fictions?

How do I spot a Legal Fiction?

Volume 15, May/June 2003

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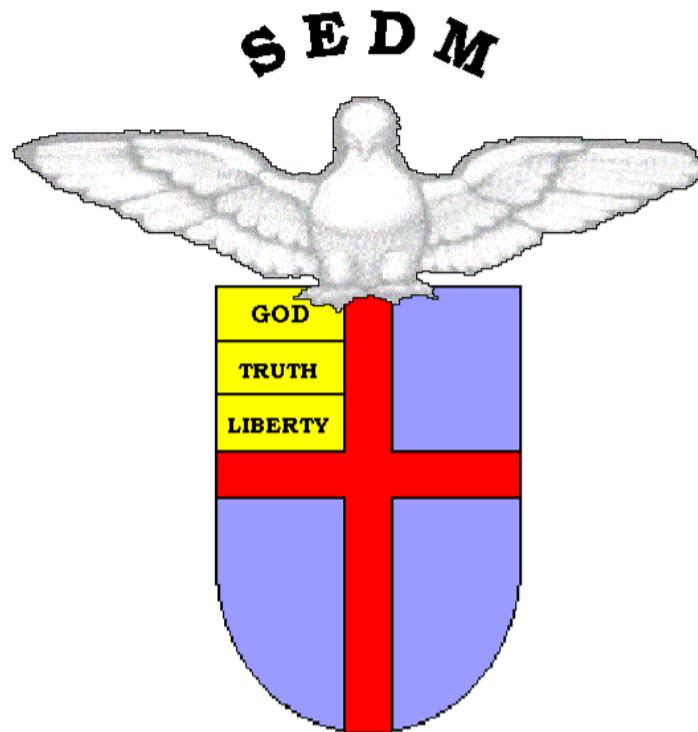




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Fictions in the Law (fictio juris)

- A. Fictions in the law (fictio juris) are a special means of the law technique by means of which declared as true is that what is untrue and for what one knows that is untrue, that is, that something is not true although one knows that it is true. Fictions are fabricated law facts, which the law order takes to be true, that is, untrue regardless of their imaginary contents.
1. The law fiction consists of a conscious and deliberate equalizing something, which is known to be unequal, and in equalizing something which is known to be similar. Fictions are used in the law to consciously distort reality and deviate from it and that is why these law facts are characteristic and differ from other law facts. Certain facts in the law fictions are deliberately falsely represented and the real life facts are deliberately distorted. This is dictated by the practical needs of the life and the social and human reasons taken into account by the law.
 2. Resorting to the fictions in the law occurs when the usual law technique instruments and the known and recognized law categories cannot provide an acceptable solution of a law problem to be resolved, regardless of the fact if it was generated in the procedure of legislative norming certain law relations or during the interpretation of a law norm in its practical application. As an instrument of the law technique, the law fiction can be a part of the law and a part of the law reality.
 3. Fabrication of facts is a means used in the law only in exceptional cases in order to achieve some, for the law important goal or to accomplish certain law values in the social relations such as, for example, order, peace, freedom, justice, human dignity, equality, confidence relations, protection of interests of certain categories of persons, etc.
- B. Fictions in the law are, as well as the law presumptions, a special kind of law facts.
1. Facts are, as one knows, elements of a factual state of the law norm the existence of which should be established by the organ which applies the law and without which, as a rule, stipulated law consequences cannot result. Sometimes, the law norm maker is neither sure nor can be sure if a certain fact he stipulates as a condition for occurrence of a certain law consequence exists in reality. Since the law norm maker tries his norming of a certain social relation to be effective and practical, he uses special methods of the law technique in creating law facts, which should create a factual state of the law norm. Making every effort to accomplish a certain goal, the law norm maker sometimes assumes certain facts the existence of which need not be proved and in certain cases he goes further because he imagines or fabricates certain facts.

2. The law fictions differ from the law presumptions although they belong to the same group of the law technique means. Both with one and the other "there is a certain part of artificialness".
3. Fictions are differentiated from mistakes. A fiction is a fact created by that subject which creates a legal norm, while a mistake is a wrong idea about the reality or some of its actions, which results from ignorance or incapability to recognize the truth.
4. A fiction is a law-technical means by means of which that which is positively untrue and which is known to be untrue is proclaimed true. It is quite obvious with fictions that the law sanctions an imaginary, untrue state. Each fiction, as a fabricated law fact, has a certain really existing, that is, indisputable law fact as its grounds.
5. Presumptions occur when the lawmaker (or a judge) cannot be sure if a certain fact exists. In that case, it is supposed to exist and is established as if it existed. Presumptions are a means of the law technique by means of which the maker or the interpreter of the law norm is satisfied with the premonition and probability and based upon that takes as true only that probable.
6. There occurs uncertainty with the presumptions if anything exists, while with fictions there occurs certainty that something does not exist, but anyway is considered to exist. Fictions are contradictory to the truth, correctness, while the presumptions are the result of understanding and that which is supposed is true. In case of fictions, it is obvious that the law sanctions an imaginary state, while in case of presumptions, for practical reasons, a certain fact is presumed due to a high degree of probability, thus unburdening law subjects from excess labour and efforts in achieving and protecting their rights.
7. In contrast to certain law presumptions, however, fictions cannot be refuted, that is, something contrary to that which is considered to exist or does not exist cannot be proved.

C. The juridical fictions have different functions. In view of that, fictions in law can be: a means of the law normative technique, a means in interpreting a law norm, a means in explaining a verdict and a means used in science.

1. The purpose of the legal fictions is to use a certain law rule stipulated for a certain factual state for some other factual state. It is clear with the legal fictions that a special manner of referring to the consequence stipulated for some other law situation from the very language formulation used by the lawmaker ("considered as") is in question.
2. Different reasons force the lawmaker to make use of law fictions in the norming procedure. The lawmaker sometimes makes use of a fiction because it is more suitable than a definition. The fiction is sometimes, due to the short-form expression, that is, formulation of a certain rule, a suitable technical means of reference to the similar situation or to the same law consequence.

3. Although fictions are considered to be a means of the law technique by means of which certain permissible goals are most easily accomplished when legal norming is done, there are also authors who think that they are often unnecessary in legal texts and that by means of careful revision and precise legal formulations they can be completely eliminated.
 4. In the process of interpretation, fictions are intended to enable a fact from the established state of things to be subsumed under the factual state of a law norm under which it otherwise could not be subsumed. To achieve this aim, fabricated law facts are deliberately created so that something is added to or subtracted from the fictions or something is represented in a different way or as a similar thing. As a law and technical instrument, fictions enable essentially different law situation to be treated in an equal way and subsumed under the same law regime.
 5. In the court practice, fictions are sometimes used as a means in giving reasons and motives for the verdict. Fictions in giving reasons and motives are most frequently the consequence of failures or nonchalance of the judge who has not worthily done his assignment. Giving reasons and motives has the character of an account on the established state of things and should be, as an adequate realization, correct and true. A fiction in giving reasons and motives for the verdict means that the judge takes something to exist although he knows that it is not true. That practically means that the judge consciously wraps the nontruth with the veil of truth, that is, that he obscures the facts. In that case, a verdict has illusory reasons and motives – has only seeming reasons and motives.
 6. The law science, as well as any other science, should scientifically work out the contents of the law. To conceptually work out the law, the law science also utilizes categories which have a fictive character in the sense that they have not their immediate substrate in the factual life relations. When scientific, doctrinaire working out in studying law is in question, in addition to other, described also are the law norms as valid (or as historical) law and the contents of the normative ideas are presented. In addition, when reporting the contents of the law in the law system, the science discovers fictions in the law norms, analyses them, finds out the reasons of their existence and provides scientific explanations because of which the law resorts to fictions.
 7. When fictions are in question, our general theory of law has not demonstrated a somewhat stronger interest in this law phenomenon.
 8. "A fiction in the law resembles of auxiliary hypotheses to be made up when physical theories do not sufficiently take reality into account, which can be dispensed with when they are replaced by theories better suited to the practice. Also, when the theory is changed, when the law reality turns different, resorting to a fiction becomes needless".
- D. In the law literature, it is mainly considered that only the lawmaker have the right to use fictions in the law as a means of the law technique and to explicitly or indirectly stipulate them under the law. Certain law writers point to the fact

that fictions are dangerous means of the law technique ("the most unnatural technical means in the law") and that it is unreasonable the fictions to be created by the lawmaker, who can always enact new regulations by means of which a certain relation or a certain right shall be regulated without fictions or shall, by a careful revision of the legal text, if possible, directly avoid the use of fictions.

1. In the court practice, fictions are generally used to accommodate the obsolete law to the newly generated changes. Since a court itself cannot change a law, it uses fictions in interpretations and thus, adapting the law rules by means of fictions, makes new law rules.
2. When application of the law in the court activities is in question, the usage of fictions is considered to be a method of distorting and evading legal regulations. The usage of fictions in the court practice is conditioned by the historical and cultural circumstances and is a product of times when symbols and forms featured thinking. In addition, it is a consequence of the human spirit inclination to use personifications. If, according to the valid law and in line with the separation of power principle, the judge applies the law, but does not create it, it is not necessary in the interpreting process to resort to fictions, particularly because new methods are available to a modern lawyer and because interpreting the law is much more free.

E. Fictions are a means of the law technique, which has played a significant role in the Roman law. Examples of numerous fictions are encountered in the Roman law. The Romans used to resort to fictions, which made a Roman citizen equal to a foreigner that they could apply *ius civile* to him. Or, that a person could designate an authorized person, he had to seemingly transfer his property to that other person. Also, fictions were used when a slave was treated as a thing, when fabrications were made to continue *de cuius* persons in his heirs, when seeming law jobs were explained.

1. Fictions in the Roman law were a means frequently used by praetors that they could overcome sternness of the positive law, which did not meet new needs occurring in the law life during the development of social relations. However, that is why fictions in the Roman law have found the best use in the court proceedings.
2. The English law, like the Roman law, was in the similar position when fictions were in question. Thus, for example, the English law featured fabrications that the owner himself was his own sharecropper that he could do those authorizations recognized to lessees.
3. In the theory of law, the examples of the Roman and English laws are considered to demonstrate that fictions were a means of the law technique usually used in those law systems which were conservative, which were not easy to change and which were too strict and stern.

- F. Fictions, as a law phenomenon, are also encountered nowadays in different branches of the modern law: constitutional, criminal, civil (real, obligation, hereditary), administrative, international, etc.
1. Typical and a generally known law fiction is contained in the rule according to which anybody who violates any law norm is deemed to know its contents. In addition to that, fictions are also encountered in the rules which, for example, stipulate that people perform legislative power although deputies, as their representatives, pass laws in the assemblies, that the conceived but unborn child is already born at the moment of delation, that ships represents a part of a state's territory, that an instigator and accomplice in a criminal act are treated like the criminal act performer himself and are punished as if they have committed the crime, etc.
 2. Fictions, as a means of the law technique, are also encountered in the civil procedure both in the field of the procedural statics and in the field of the procedural dynamics. A great number of procedural norms with its stylization of the law norm factual state, its linguistic expression and linguistic form clearly expresses a fictive nature of certain facts being the component parts of the disposition ("it is considered", "as if it is" and the like).
 3. In the field of civil procedure, the lawmaker has, for example, provided that all persons having the role of unique colitigants are considered one person (Art. 201 of the Statute on Litigation Procedure, that in the case of the colitigious intervention the party and the interferer who joined it are considered one person (Art. 209 of the Statute on Litigation Procedure), that in certain situations it is considered that summon has been done (Art. 144 of the Statute on Litigation Procedure), etc.
 4. In view of the nature of the lawsuit actions themselves and in view of the circumstance that they are the most important procedural and law facts which represent the basic element of the legal procedure and which produce their effects in the lawsuit, fictions, as a means of the law technique, are considerably rarely used in the field of the procedural dynamics.
 5. In the process of normative creation of the functional procedural rules, when lawsuit actions are in question, considerably limited is the space to the lawmaker for their conscientious fabrications. It is, surely, the consequence of their law nature because they are, in their essence, active bodily behaviour, but is also the consequence of the disposition principle, as the fundamental procedural principle and the basic methodical principle dominating the civil procedure. In addition to that, in legal texts, fictions relative to certain dispositional lawsuit actions, first of those having initiating character, are also encountered.
 6. The lawmaker, motivated by different law and political or law and technical reasons, has explicitly or indirectly stipulated fictions on bringing or withdrawing the complaint.

7. Fictions on institution of proceedings are a relatively new law phenomenon in our procedural law, which causes a series of basic and concrete law dilemmas, but a series of law consequences as well, which have not been sufficiently registered so far by the court practice or on which an attitude has only to be assumed.
8. Fictions on withdrawing the complaint are a means of the law technique frequently used by the lawmaker for different law and political reasons. Legal texts, by a series of provisions, stipulate situations in which the complaint is deemed to have been withdrawn although it is certain that the plaintiff, like dominus litis, have not made such a statement.
9. When an appeal, as a regular law means, is in question, which, by the course of its law nature, is a dispositional party lawsuit action by means of which a court of appeal procedure is regularly instituted, the lawmaker has not explicitly stipulated fictions on its statement. However, in a specific procedural situation, although the party has neither stated the appeal nor has through it instituted the secondary procedure, the appeal is deemed to have been stated because there exists a fiction on the statement of the appeal. This fiction is encountered in the legal procedure, during the appellation proceedings in a specific situation arising due to a possible cumulation.

G. In a series of events, the law explicitly or indirectly stipulates fictions on institution of proceedings. For example:

1. When the voluntary jurisdiction court, until the decision has been made in that voluntary jurisdiction matter, establishes that the proceedings should be carried out according to the rules of the litigious procedure, because a lawsuit matter is in question, it will decide to suspend the voluntary jurisdiction proceedings and to cede the legal matter to the lawsuit court. According to the effectiveness of this decision, the proceedings will be continued with the lawsuit court, competent for that legal matter, and be carried out according to the rules of the legal proceedings before that competent court although the legal proceedings in that legal matter was neither instituted by the complaint nor it was brought.
2. When the plaintiff alters the complaint, the altered complaint shall be deemed to have been brought at the moment the former has been brought.
3. When one of the petitioners gives up the common proposal for divorce, and the other sticks to the request their marriage to be divorced, the divorce procedure shall be deemed to have been instituted.
4. When, during the divorce procedure, the petitioner dies, the marriage shall cease in a natural way. Since it is possible that the heirs of the plaintiff have a legal interest the outlived accused spouse/wife to be established to have lost the right to the heritage, the procedure shall be deemed to have been instituted to establish that the outlived spouse/wife have lost the right to the heritage because the divorce complaint has been

legally instituted if the heirs only declare to "go on with the procedure" although they have not instituted the constitutive complaint. The lawmaker has, in some other cases, indirectly stipulated fictions on institution of proceedings. In practice, a fiction on institution of proceedings in a particular situation is deemed to exist. If the plaintiff at the same appearance in court, when he made a statement on withdrawing the complaint, and then declares to give up the withdrawal of the complaint, he is considered to have brought a new complaint of the same contents.

H. Possible cumulation of complaints is a form of an objective cumulation of the complaints cumulated so that the plaintiff points out two or more demands being mutually connected and proposes the court to adopt the next of those demands in the case it finds out that the previously pointed out demand is groundless (Art. 188 of the Statute on Litigation Procedure).

1. Possible cumulation differs from the common cumulation in that the plaintiff does not require the court to adopt all cumulated demands against the same defendant, but only one of more cumulated demands. The plaintiff had the possibility of pointing out each of the possibly cumulated demands in a particular proceedings. Since it is not possible the court to adopt all the demands pointed out because they are, in view of the material law rules, mutually excluded, the plaintiff points them out simultaneously and requires the court to adopt one of the demands pointed out – that one which proves to have grounds. For example, if the plaintiff requires the court to give orders to the defendant to meet the contractual obligations, and if, during the proceedings, the contract is found out null and void, he requires the court to sentence the defendant to bring back the selling price.

I. Possible cumulation is a form of the objective cumulation of the demands representing a certain advantage for the plaintiff. The plaintiff who, at the moment of bringing the complaint, is not certain of the grounds of his pretensions against the same defendant, can require the law protection by simultaneously pointing out all of his pretensions, not running an obvious risk to fail with any of the demands if pointing them out successively in different lawsuits. The dilemmas with the plaintiff at the time of his decision to require the law protection may also be caused by the circumstance that at the moment he needs the law protection he is not fully acquainted with the state of things, that he is not sure of his own law grounds, that he cannot predict what the defendant's behavior will be as well as that he cannot prognosticate the law understanding and the court decision and his possible prospects for success in each of the lawsuits he would have to institute.

J. Possible cumulation is a procedural institution by means of which, in addition to economy, efficacy and concentration principle, the law safety principle is also accomplished. Simultaneously pointing out more demands, in a sequence determined by the plaintiff, the possibility that the court, in two different

lawsuits, will reject both demands due to differences in the law estimation and law understanding is prevented in advance.

- K. Differentiated with a possible cumulation are: basic demand and possible demand. The earliest pointed out demand is a basic demand, while the others, subsequent demands are auxiliary or possible demands. The sequence of decision-making on the cumulated demands is determined in the complaint by the plaintiff himself.
- L. Possible cumulation may be simultaneous (or initial), when the demands were cumulated way back in the complaint and subsequent (or successive), when the possible demand is pointed out during the lawsuit (altered complaint).
1. In case of the initial possible cumulation, the litispence and all its effects occur simultaneously for all simultaneously cumulated demands; the lawsuit on all cumulated demands is simultaneously instituted as well.
 2. If possible cumulation occurs additionally, during the proceedings, the litispence on each additionally pointed out demand begins from the moment when the defendant is advised on its pointing out.
 3. The effect of the litispence is demonstrated in that bringing of the new complaint is not permitted with the demand identical to any of the possibly cumulated demands, either the principal or the possible.
- M. Possible cumulation is permitted under certain conditions. First of all, there should be mutual connection between the cumulated demands (that principal and possible). Connection between the principal and possible demands may be real and legal. Mutual connection is demonstrated either in that the demands have the same factual and law grounds or in that they are directed to the accomplishment of the identical law or economic goal.
1. Possibly cumulated demands are most frequently mutually excluded and because of that only one of them can possibly be adopted.
 2. Possible cumulation is also permitted when the same court is really and locally competent for the cumulated demands. In addition, possible cumulation is also permitted when the same kind of proceedings is prescribed for all cumulated demands because decision-making on demands for which the same law method is stipulated is in question.
- N. The Statute on Litigation Procedure of the Federal Republic of Yugoslavia of 1977 does not include particular rules according to which the court should proceed in investigating and making decisions when included in the complaint

are possibly cumulated demands although there is a need that this procedural phenomenon as well shall explicitly be regulated in view of the different law understandings generated both in literature and in practice.

1. When investigating the state of things in a lawsuit in which the demands are possibly cumulated, the court shall not be bound to the order of the states of things by means of which the plaintiff explains his demands. The court shall establish the facts in the order it deems the most suitable to it.
- O. The specifics of the decision making-procedure on the possibly cumulated demands are in that the procedure on one of the possibly cumulated demands cannot be separated from the other because there is a danger two contradictory decisions to be made.
1. The decision-making order on the cumulated demands shall be determined by the plaintiff himself in a way that he shall point out one demand as the principal and the other, subsequent, as the possible. Because of that the court too shall investigate the groundedness of that demand which was given priority. Decision-making on the possible demand is possible and permitted only when the court finds out that the principal demand is groundless.
 2. Possible cumulation of the demands may result in a situation where the principal demand has grounds or not. In that case two different situations are possible.
 3. When the court concludes that the principal demand has grounds to be pointed out, it then pronounces a verdict by means of which the demand is adopted. Having adopted the principal demand the court has thus provided the plaintiff with the law protection, but the lawful condition to make decisions on the groundedness of the possibly pointed out demands has not been met. When the court adopts the principal demand, decision-making on the possibly cumulated demands has become unnecessary. All the demands cumulated in the case of possible cumulation mutually exclude each other and, adopting one of them, the plaintiff has achieved the desired goal and has obtained the required law protection. The court should include a conclusion into the verdict reasons and motives that it is unnecessary to make a decision on the possibly pointed out demand.
 4. There are different opinions in literature on how the court should proceed.
 5. According to one opinion, the court of first instance should, in addition to the verdict, make a decision by means of which it will establish that the lawsuit on the possibly pointed out demand shall be discontinued when the verdict, by means of which the principal demand has been adopted, becomes effective.
 6. According to another, contrary opinion, it is deemed that by making a decision the lawsuit shall be discontinued regarding the possibly pointed out demands and that

presumption should be made that the plaintiff has at that moment withdrawn the charges on the possibly pointed out demands.

7. This second opinion can seriously be objected to, being a specific law construction. First of all, in the hereinbefore mentioned case there would be no presumption in question but a fiction on the complaint withdrawal. On the other hand, the fiction on withdrawing the complaint regarding the possibly pointed out demand would be contrary to the clearly expressed procedural will of the plaintiff and his interests. In addition to that, this would bring the plaintiff into an exceptionally unfavourable situation in case that the court of appeal would repeal the verdict of first instance and bring back the case for retrial or adopt the appeal and reject the demand. In that case, the plaintiff would be forced to additionally alter the appeal by the repeated pointing out the possible demand, which the defendant can object to, or again to institute the new lawsuit, which would, in addition to other, incur certain costs on him.

P. When the court establishes that the principal demand is groundless, legal conditions are met a decision on the pointed out possible demand to be made. However, the court does not make an outright decision on the principal demand groundlessness, but investigates groundedness of the possibly pointed out demand. The court can make a decision only when it concludes that the possible demand has been groundedly pointed out (that is, one of more possibly pointed out demands) or when it concludes that all possibly joined demands (both the principal and the possible) are groundless. In that case the court, by the same verdict, makes a decision on the groundedness or ungroundedness of all cumulated demands. Accordingly, should the principal demand be rejected, the court must, by the same decision, make a decision on the possible demand as well.

1. If the court has decided that the principal demand is groundless, it must reject it explicitly as groundless because it is a lawful condition to make decisions on the possibly pointed out demand. With the same decision, by means of which it rejects the principal demand as ungrounded, the court makes a decision on the groundedness or ungroundedness of the possible demand to follow. The court must simultaneously make a decision both on the principal and on the possible demand because separate decision-making on the cumulated demands shall not be allowed. Since demands which exclude each other are in question, partial verdict shall not be allowed because in that case it could result in contradictory decisions. Besides, the plaintiff has only required the court to adopt only one of more cumulated demands.

Q. Possible cumulation causes a specific situation in the instance procedure if the appeal would be possibly stated. In the procedure relative to the legal remedy regarding the decision on the possibly joined demands, questions are being raised concerning authorizations for stating the appeal, the scope of refuting and the limits of the court decision-making. Under the provisions of the Statute

on Litigation Procedure, the lawmaker has not stipulated particular rules on investigating the complaint and on the decision-making of the court of appeal if there occurs a law situation which hereinafter will be dealt with.

1. The specifics of the appellation proceedings concerning the complaint to the decision by means of which a decision has been made on the possibly joined demands is in that the lawmaker has failed to regulate certain specifics characteristic of the procedure. Because of that the court has been brought into the position to create fictions on the statement of the appeal.
- R. If, during the decision-making procedure concerning the possibly cumulated demands, the court has adopted the principal demand of the plaintiff, he has no rights to an appeal because he has succeeded in the lawsuit – the court has adopted his demand. However, if the court has rejected the principal demand adopting the possible one, there is opinion that the plaintiff has legal interest to refute such verdict. It goes without saying that the plaintiff has the right to file a complaint if the court has rejected all possibly joined demands (both the principal and the possible) as groundless.
- S. If the court has adopted the demand of the plaintiff (the principal or the possible), the defendant has the right to the legal remedy. If, however, the defendant has stated an appeal, there occurs a specific situation in the appellation proceedings, depending on that if the court has adopted the principal or the possible demand.
1. If the court has adopted the principal demand and has concluded that decision-making on the possibly pointed out demands is unnecessary, the defendant has only the right to file an appeal against that verdict because it represents a meritorious decision on the demand. The defendant may require the decision of first instance to be repealed or altered. If the court has rejected the principal and adopted the possible demand, defendant has the right to state an appeal against the decision on adopting the possible demand because he has a law interest. If the defendant has stated an appeal against the decision by means of which the principal demand has been rejected and the possible one adopted, a decision on the principal demand against which no appeal has been stated cannot become effective because joined demands are in question.
- T. In the appeal procedure against the verdict by means of which the principle demand has been adopted, the court of appeal is authorized to repeal or to alter the refuted decision. If the court of appeal repeals the verdict of first instance, it is possible to simultaneously repeal the decision made regarding the possibly pointed out demand as well. In that case, it has the possibility of making a decision on the possible demand too, if it is mature for decision- making and

thus to alter the decision of first instance by adopting the possibly pointed out demand. There are, however, opinions that a higher court cannot at all make a decision on the auxiliary demand because a meritorious decision has not been made on it in the procedure of first instance.

U. A specific situation in the appellation proceedings occurs if the court of first instance has rejected the principal but adopted the possible demand. As we have already said, the plaintiff has no right to state a legal remedy because he has no legal interest in that since the requested legal protection has been provided to him by adopting one of his demands. The right to file an appeal is that of the defendant only, upon the disposition of which it depends if he would use the law means and institute the proceedings to control the legality of the decision of first instance.

1. If the defendant states an appeal against the verdict by means of which the possibly pointed out demand is adopted, there occurs a specific situation in which a fiction on the statement of an appeal is encountered. This specific situation may be interpreted in two ways.
2. In the first case, the court has rejected the principal demand as groundless adopting the possible one. The defendant has no law interest to state an appeal against the verdict by means of which the court has rejected the principal demand as groundless because in that part of the verdict he has succeeded in his demand for verdict because the court has rejected the principal demand. The defendant, however, can file an appeal against the verdict of the court on adopting the possibly pointed out demand. If the defendant states an appeal, and should an extensive interpretation be applied, the defendant may be deemed to have stated an appeal against the complete verdict. In that case, there exists a fiction that the defendant has filed an appeal against the verdict as well on which he could not state this law means.
3. When the defendant has stated an appeal against the verdict by means of which the possible demand has been adopted, in that case there may exist one fiction more on the statement of the appeal. Namely, the plaintiff may also be deemed to have stated an appeal against the refuted verdict in that part in which the court has rejected his principal demand as groundless. Although it is evident that there are no appeal actions of the defendant, it is considered in the court practice as if the appeal has been stated.
4. Although the appeal has not been stated in the hereinabove cases because the appeal proceedings action has not been undertaken by means of which a certain court decision is being attacked, it is deemed in practice, by the natural course of things, that the appeal has been stated.

V. A fiction on the statement of an appeal causes certain basic and practical implications.

1. An appeal is, as it is well-known, a proceedings action which, according to the law, has a certain stipulated form and contents. As for the appeal, a written form is explicitly stipulated under the law.
2. A written form which contains an appeal legal proceedings action should have definite contents. When a fiction on the statement of the appeal is in question, not only that there is no an action, but there is neither a motion which should contain definite formal elements. It is evident, and that need not be particularly stressed, that a fabricated appeal contains neither the reason nor the volume of refutation.
3. Although the fabricated appeal in this specific situation does not contain either the reason or the volume of refutation, that will not prevent the court to proceed with the fabricated appeal in view of the procedural rules existing relative to the appellation proceedings.
4. When the appeal does not contain the reasons of refutation, the court, based on the explicit legal provision and in official duty, takes care only of the material and law violations and of certain procedural violations, those which are, according to the law itself, of essential importance. Should any doubt be raised relative to the correctness of the state of things found out, it may repeal the decision being refuted by the fictive appeal.
5. On the other hand, the law stipulates that the verdict being refuted, if the volume of refutation cannot be seen from the appeal, is deemed refuted in the part in which the party has not succeed in the proceedings.

W. In the appeal procedure against the verdict reached after the complaint which contained the possibly joined demands, the court of appeal has a special assignment and different authorizations as regards the limits of investigation of the decision being refuted.

1. If the court of appeal in the procedure of second instance repeals the verdict of the court of first instance by means of which it has made a decision on the principal demand, it will decide to bring the law matter back to the court of first instance for repeated decision-making.
2. If the defendant has stated an appeal against the verdict by means of which the possible demand has been adopted, the court of appeal must, on the whole, investigate the decision of first instance being refuted, which means to investigate it in the part in which the principal demand has been rejected, but not only in the part in which the possible demand has been adopted and to which the appeal has been stated.
3. The court of appeal can, depending on the proceedings results, adopt the appeal and make a decision on rejecting the possible demand or to repeal the verdict of first instance on the whole and bring back the law matter to repeated trial.

X. In the appellation proceedings regarding the appeal against the decision by means of which a decision has been made on the possibly joined demands, encountered are fictions on the statement of the appeal resulting as a consequence of the legal gap which should have been filled with the interpretation. The court practice has in that situation resorted to creating fictions on the statement of the appeal, thus practically contributing to the court to participate in the law order elaboration.

1. Fictions on the statement of an appeal, as a law phenomenon which has appeared in the court practice due to the failures of the lawmaker to norm a procedural situation, represents a phenomenon which should be investigated and analysed in details. This law phenomenon, which has not attracted the processualists' attention, deserves not only to be the subject of a particular analysis, due to basic and concrete law dilemmas it causes, but to be lawfully normed as well.

The Legal Definition of Legal Fiction

- A. Let's go first to the LEGAL THESAURUS and read the corresponding term for "Legal" (Exhibit A, 1 of 3).
1. Next look at the "associated concepts" and look at what is missing? The concept for "Legal Fiction" (Exhibit A, 2 of 3).
 2. Now go to Exhibit A, 3 of 3 and read the definition of Fiction. What is interesting is that the "Foreign Phrases" of that definition for fiction all deal with fictions of law.
 3. The second statement is interesting because it says; "A fiction of law will not exist where the fact appears."
 4. Fact: A deed, an act, that which exists, that which is real, that which is real, that which is true, an actuality, that which took place, not that which might or might not have occurred. From Ballentine's Law dictionary.
 5. Many times a judge will tell a jury, "You are to decide the fact and I will give you the law." Simple version - The trouble is the jury is not told what a fact is and they are easily confused because of all the legal fictions that they believe are true.
- B. Blacks Law Dictionary, seventh Ed. Exhibit B, 1 of 2 we find the definition for Legal Fiction (Exhibit B, 2 of 2).
1. Read the last little section by Cohen, Law and Social Order 126(1933). Now, reread that definition several times so it sinks in.

LEGAL THESAURUS

Second Edition

William C. Burton

MACMILLAN LIBRARY REFERENCE USA
Simon & Schuster Macmillan
NEW YORK

Simon & Schuster and Prentice Hall International
LONDON · MEXICO CITY · NEW DELHI · SINGAPORE · SYDNEY · TORONTO

Exhibit A 1 of 3

contract for use and occupation, convey for a designated period, convey real property for a specified period, demise, engage, engage premises for a designated period, grant exclusive possession for a designated period, grant use and possession, lend on security, let, let premises for a designated period, *locare*, rent, rent out, sublet, subrent

ASSOCIATED CONCEPTS: assignment of a lease, cancellation of a lease, commencement of a lease, extension of a lease, forfeiture of a lease, joint lease, lease at will, lease for years, lease of premises, month to month tenancy, perpetual lease, renewable lease, sublease, tenancy, tenancy at sufferance, tenancy at will, term of a lease, termination of a lease, voidable lease

LEASEHOLD, noun estate for a fixed term, estate for a fixed term of years, estate in realty, freehold, interest in real estate, interest of a lessee, land held by lease, land leased, property leased, real property subject to a lease, tenure by lease

LEAVE (Absence), noun absention, break, *commeatus*, departure, freedom from duty, furlough, holiday, inactivity, interlude, intermission, interval of rest, leisure, liberty, nonappearance, nonattendance, parting, pause, recess, recreation time, relaxation, removal, repose, respite, rest, retirement, retreat, suspension of work, vacation

ASSOCIATED CONCEPTS: leave of absence, sick leave

LEAVE (Permission), noun accordance, acquiescence, agreement, allowance, approbation, approval, assent, authorization, certification, concurrence, consent, countenance, dispensation, endorsement, exemption, favor, grace, grant, imprimatur, indorsement, indulgence, legalization, liberty, license, *licentia*, *permissio*, permittance, sanction, sufferance, tolerance, vouchsafement, warrant

ASSOCIATED CONCEPTS: leave of court

LEAVE (Allow to remain), verb cease, deposit, desist, discard, disuse, drop, forbear, forget, give up, let be, let continue, let go, let stand, neglect, permit, relinquish, renounce, repudiate, set aside, shun, stop, supersede, surrender, suspend, waive

ASSOCIATED CONCEPTS: leave no issue, leave the scene of an accident

LEAVE (Depart), verb abandon, abdicate, abjure, abscond, be off, bid farewell, break away, decamp, defect, desert, disappear, *discedere*, drop out, embark, emigrate, escape, evacuate, *excedere*, exit, flee, fly, forsake, go, go away, go forth, migrate, move on, part, *proficisci*, pull out, quit, resign, retire, retreat, run away, secede, set out, slip away, take leave, tergiversate, vacate, vanish, withdraw

LEAVE (Give), verb accord, allot, apportion, assign, award, bequeath, bestow, confer, consign, demise, devise, donate, endow, entrust, give by will, grant, hand down, impart, *legare*, make a bequest, make a testamentary disposition, present, *relinquere*, settle upon, transmit, will

LECHEROUS, adjective addicted to lewdness, bawdy, concupiscent, corrupt, debauched, depraved, desirous, dissipated, dissolute, erotic, erotical, fleshly, gluttonous, goatish, immoral, inclined to lewdness, lascivious, lewd, libertine, libidinous, licentious, lickerish,

loose, lubric, lubricous, lustful, profligate, prurient, rakish, reprobate, ruttish, salacious, sexually indulgent, unbridled, unchaste, unregenerate, unrestrained, unspiritual, wanton

LEDGER, noun account book, account of transactions, accounts, balance sheet, bankbook, book of accounts, book of records, books, calculation, cashbook, *codex accepti et expensi*, computation, daybook, diary, entries, file, index, log, logbook, passbook, profit and loss statement, record, record book, record of credits and debits, record of money transactions, register, registry, running account, statement

LEERY, adjective afraid, apprehensive, careful, cautious, chary, circumspect, distrustful, doubtful, doubting, dubious, entertaining suspicion, frightened, guarded, heedful, hesitant, hesitating, in doubt, mistrustful, questioning, shy of, skeptical, suspect, suspecting, suspicious, unbelieving, uncertain, unconvinced, unsure, vigilant, wary, watchful, without belief, without faith

LEGACY, noun bequeathal, bequest, bestowal, conferment, dispensation, disposition, disposition of personalty, dotation, endowment, gift by will, gift of property by will, grant, heritage, impartment, inheritance, *legatum*, testamentary gift

ASSOCIATED CONCEPTS: absolute legacy, alternate legacy, charitable legacy, conditional legacy, contingent legacy, cumulative legacy, demonstrative legacy, general legacy, indefinite legacy, lapsed legacy, pecuniary legacy, residuary legacy, special legacy, specific legacy

LEGAL, adjective according to the law, allowable, allowed, approved, authorized, authorized by law, cognizable in courts of law, constitutional, decreed, enforceable in a court of law, established by law, good and effectual in law, governed by law, in conformity with law, lawful, legalized, legitimate, *legitimus*, licit, permissible, permitted by law, prescribed, prescribed by law, proper, *quod ex lege*, recognized by the law, required by law, rightful, sanctioned, *secundum leges fit*, statutory, sufficient in law, valid, warranted, within the law

ASSOCIATED CONCEPTS: legal action, legal age, legal arrest, legal beneficiaries, legal capacity to sue, legal cause, legal claim, legal consideration, legal damages, legal detriment, legal disability, legal duty, legal entity, legal heir, legal notice, legal obligation, legal presumption, legal proceedings, legal process, legal remedy, legal representative, legal tender, legal title

FOREIGN PHRASES: *Id possumus quod de jure possumus*. We may do only that which we are able to do lawfully.

LEGALITY, noun accordance with law, allowableness, authorization, conformity to law, conformity with the law, constitutionality, lawfulness, legalism, legitimacy, legitimacy, permissibility, permissibleness, rightfulness, sanction, sanctionableness, validity, warrantableness

ASSOCIATED CONCEPTS: legality of consideration, legality of contract, legality of obligation, legality of purpose

LEGALIZATION, noun affirmation, approval, authorization, codification, confirmation, legislative sanction, legitimatization, passing into law, ratification, regulation by statute, sanction, validation

Exhibit A 2013

ASSOCIATED CONCEPTS: felonious act, felonious arson, felonious assault, felonious homicide, felonious intent, felonious purpose, feloniously taking

FELONY, noun capital crime, crime graver than a misdemeanor, criminal activity, criminal offense, gross offense, heinous crime, heinous misconduct, illegality, indictable offense, misdeed punishable by imprisonment, offense, offense punishable by imprisonment, transgression, violation of law, wrongdoing

ASSOCIATED CONCEPTS: assault with intent to commit felony, capital felony, common law felony, compounding a felony, felonious intent, felony conviction, felony murder, substantive felony

FOREIGN PHRASES: *Felonia, ex vi termini significat quodlibet capitale crimen felleo animo perpetratum.* Felony by force of the term, signifies any capital crime perpetrated with a criminal mind. *Felonia implicatur in qualibet proditione.* Felony is implied in every treason.

FENCE, noun buyer of stolen goods, buyer of stolen property, disposer of stolen goods, purchaser of stolen goods, purchaser of stolen property, receiver, receiver of stolen goods, receiver of stolen property, recipient of stolen goods, recipient of stolen property, vendor of stolen goods, vendor of stolen property

ASSOCIATED CONCEPTS: burglary, robbery, theft

FEOFFEE, noun acceptor, assignee, devisee, donee, donee of a corporeal hereditament, grantee, legatee, one to whom a fee is conveyed, one to whom seisin passes, one to whom title is passed, one who is enfeoffed, receiver, recipient of a fee, transferee

FEOFFMENT, noun assignation of title, cession of a fee, conferral of a fee, conferment of title, conveyance of realty, conveyancing, conveying title, delivery of title, gift of a freehold interest, investiture of title, livery of seisin, passing of seisin, transfer of property, transmission of title

FEOFFOR, noun assignor, bequeather, bestower, devisor, donor, giver, grantor, one who enfeoffs another, one who gives a corporeal hereditament, one who transfers property by deed, one who transfers real property to another, person making a feoffment, person who conveys a fee, transferor

FERRET, verb bring to light, dig out, discover, disinter, elicit, find, fish out, hunt, look for, *rimari*, root out, search, seek, trace, track down, unearth

ASSOCIATED CONCEPTS: ferret out a crime

FERTILE, adjective arable, bearing offspring freely, creative, fecund, *fecundus*, feracious, *ferax*, *fertilis*, flowering, fructiferous, fructuous, fruitful, imaginative, ingenious, inventive, lush, luxuriant, original, originative, parturient, philoprogenitive, procreant, procreative, productive, profitable, progenerative, prolific, rank, rich, yielding

ASSOCIATED CONCEPTS: fertile octogenarian rule, presumption of fertility

FERVENT, adjective active, animated, *ardens*, ardent, avid, devoted, eager, earnest, enthusiastic, excited, feeling, *fervens*, fervid, *fervidus*, fierce, fiery, hearty, impassioned, intense, keen, passionate, prefervid, sincere, spirited, vehement, zealous, zestful

ASSOCIATED CONCEPTS: testator's fervent desire

FETTER, noun bond, bridle, *catena*, chain, check, *compes*, confinement, constraint, control, curb, detention, deterrence, deterrent, disadvantage, encumbrance, gyve, hamper, handicap, hindrance, impediment, imprisonment, incarceration, inhibition, interference, iron, limitation, lock, manacle, means of restraint, obstacle, obstruction, prevention, prohibition, rein, repression, restraint, restriction, shackle, strap, suppression, tie, trammel, *vinculum*, yoke

FETTER, verb bind, *catenas*, chain, check, confine, curb, enchain, enclose, entrammel, gyve, hamper, handcuff, handicap, hinder, immobilize, impede, *impedire*, impose restraint, inhibit motion, inhibit movement, keep in check, lock up, make captive, make prisoner, manacle, paralyze, prohibit, put in irons, put under restraint, restrain, restrain motion, restrain movement, restrict, secure, secure with chains, shackle, shut in, suppress, tie, tie down, trammel, *vincula*

FEUD, noun alienation, altercation, animosity, animus, antagonism, bitterness, breach, clash, conflict, contention, controversy, difference, disaccord, disagreement, discord, dispute, dissension, enmity, estrangement, faction, grudge, hereditary enmity, hostility, ill will, incompatibility, inimicality, *inimicitia*, intolerance, inveterate hatred, inveterate strife, malevolence, mutual aversion, odds, open breach, open quarrel, opposition, private war, quarrel, rancor, rupture, *simultas*, split, strain, strife, tension, variance, vendetta

FIAT, noun authoritative order, authorization, command, decree, decree having the force of law, dictate, direction, directive, edict, enactment, hest, *imperium*, imposition, injunction, instruction, *iussum*, judgment, mandamus, *mandatum*, order, prescript, prescription, pronouncement, regulation, rescript, rule, sanction, ukase, warrant

FICTION, noun canard, *commentum*, concoction, fable, fabrication, *fabula*, false statement, falsehood, falsification, fancy, fantasy, feigned story, figment, invention, legend, lie, myth, perjury, prevarication, product of imagination, *res ficta*, untruth, untruthful report

FOREIGN PHRASES: *Fictio legis inique operatur alieni damnum vel injuriam.* Fiction of law is wrongful if it works loss or harm to anyone. *Fictio juris non est ubi veritas.* A fiction of law will not exist where the fact appears. *Les fictions naissent de la loi, et non la loi des fictions.* Fictions arise from the law, and not law from fictions. *Fictio cedit veritati. fictio juris non est ubi veritas.* Fiction yields to truth. where truth is, fiction of law does not exist.

FICTITIOUS, adjective apocryphal, arbitrarily invented, artificial, chimerical, *commenticius*, concocted, counterfeit, deceiving, delusive, erroneous, fabled, fabricated, fake, faked, false, fancied, fanciful, feigned, fictional, fictive, *fictus*, figmental, forged, founded on fiction, illusive, illusory, imaginary, imagined, invented, legendary, make-believe, mendacious, misleading, misrepresentative, mythic, mythical, mythological, nonexistent, notional, phony, pretended, sham, spurious, trumped-up, unfounded, unhistorical, unreal, untrue

ASSOCIATED CONCEPTS: fictitious address, fictitious claims, fictitious corporation, fictitious debts, fictitious name, fictitious parties, fictitious payee, fictitious person, fictitious statements

Exhibit A 3 of 3

Black's Law Dictionary[®]

Seventh Edition

Bryan A. Garner
Editor in Chief



ST. PAUL, MINN., 1999

legalese (lee-gə-leez). The jargon characteristically used by lawyers, esp. in legal documents <the partner chided the associate about the rampant legalese in the draft sublease>. Cf. PLAIN-LANGUAGE MOVEMENT.

legal estate. See ESTATE.

legal estoppel. See ESTOPPEL.

legal ethics. 1. The standards of minimally acceptable conduct within the legal profession, involving the duties that its members owe one another, their clients, and the courts. — Also termed *etiquette of the profession*. 2. The study or observance of those duties. 3. The written regulations governing those duties. See MODEL RULES OF PROFESSIONAL CONDUCT.

legal evidence. See EVIDENCE.

legal excuse. See EXCUSE.

legal fact. See FACT.

legal father. See FATHER.

legal fence. See LAWFUL FENCE.

legal fiction. An assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates. • The constructive trust is an example of a legal fiction. — Also termed *fiction of law*; *fictio juris*.

"I ... employ the expression 'Legal Fiction' to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.... It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present." Henry S. Maine, *Ancient Law* 21-22 (17th ed. 1901).

"Legal fiction is the mask that progress must wear to pass the faithful but blear-eyed watchers of our ancient legal treasures. But though legal fictions are useful in thus mitigating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion." Morris R. Cohen, *Law and the Social Order* 126 (1933).

legal force. See *reasonable force* under FORCE.

legal formalism, n. The theory that law is a set of rules and principles independent of other political and social institutions. • Legal formalism was espoused by such scholars as Christo-

pher Columbus Langdell and Lon Fuller. — **legal formalist, n.** Cf. LEGAL REALISM.

legal fraud. See *constructive fraud* (1) under FRAUD.

legal heir. See HEIR (1).

legal holiday. A day designated by law as exempt from court proceedings, issuance of process, and the like. • Legal holidays vary from state to state. — Sometimes shortened to *holiday*. — Also termed *nonjudicial day*.

legal impossibility. See IMPOSSIBILITY.

legal inconsistency. See *legally inconsistent verdict* under VERDICT.

legal injury. See INJURY.

legal-injury rule. The doctrine that the statute of limitations on a claim does not begin to run until the claimant has sustained some legally actionable damage. • Under this rule, the limitations period is tolled until the plaintiff has actually been injured. — Also termed *damage rule*.

legal innocence. See INNOCENCE.

legal insanity. See INSANITY.

legal interest. See INTEREST (2).

legal intromission. See INTROMISSION.

legal investments. See LEGAL LIST.

legalis homo (lə-gay-lis hoh-moh). [Latin "lawful man"] *Hist.* A person who has full legal capacity and full legal rights; one who has not been deprived of any rights in court by outlawry, excommunication, or infamy. • A *legalis homo* was said to stand *rectus in curia* ("right in court"). A lawful man was able to serve as a juror and to swear an oath. Pl. *legales homines* (lə-gay-leez hom-ə-nee-z). — Also termed *legal man*; *lawful man*; *lageman*; *liber et legalis homo*. See RECTUS IN CURIA.

legalism, n. 1. Formalism carried almost to the point of meaninglessness; an inclination to exalt the importance of law or formulated rules in any area of action.

"What is legalism? It is the ethical attitude that holds moral conduct to be a matter of rule following, and

Legal Fictions

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Legal Fictions from Illinois Law Review

Volume XXV 1930 - 1931

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LEGAL FICTIONS*

By L. L. FULLER†

INTRODUCTION

Probably no lawyer would deny that judges and writers on legal topics frequently make statements which they know to be false. These statements are called "fictions." There is scarcely a field of the law in which one does not encounter one after another of these conceits of the legal imagination. Sometimes they take the form of pretenses as obvious and guileless as the "let's play" of children.¹ At other times they assume a more subtle character and effect their entrance into the law under the cover of such grammatical disguises as, "the law presumes," "it must be implied," "the plaintiff must be deemed," etc. Nor is it true, as is sometimes tacitly assumed, that fictions are to be found only in court decisions, where they are the product of the peculiar situation of the judge, who must, or feels that he must, to some extent conceal the true nature of his activities. Fictions are to be found not only in the opinions of judges, but in critical treatises written by men free from any of the influences which supposedly restrain the judge and warp his expression. Even the austere science of Jurisprudence has not found it possible to dispense with fiction. The influence of the fiction extends to every department of the jurist's activities.

Yet it cannot be said that this circumstance has ever caused the legal profession much embarrassment. Laymen frequently complain of the law; they very seldom complain that it is founded upon fictions. They are more apt to express discontent when the

*Further installments of this article will appear in subsequent issues of this Review.

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1. Cf. Pound "Interpretations of Legal History" p. 4. "From time to time they make the inevitable readjustments . . . by fictions often comparable to the 'let's play' this and that of children . . ."

law has refused to adopt what they regard as an expedient and desirable fiction. Perhaps, too, the fiction has played its part in making the law "uncognoscible" to the layman. The very strangeness and boldness of the legal fiction has tended to stifle his criticisms, and has no doubt often led him to agree modestly with the writer of Sheppard's Touchstone, that "the subject matter of law is somewhat transcendent, and too high for ordinary capacities."²

Within the profession itself there has been for a long time a consciousness of the importance of the legal fiction, and some attempt has been made to evaluate it critically. The prevailing opinion has been that suggested in Ihering's statement, "It is easy to say, 'Fictions are makeshifts, crutches to which science ought not to resort.' So soon as science can get along without them, certainly not! But it is better that science should go on crutches than to slip without them, or not to venture to move at all."³ The fiction has generally been regarded as something of which the law ought to be ashamed, and yet with which the law cannot, as yet, dispense.

Bentham was almost unremitting in his attacks. He detected everywhere "the pestilential breath of fiction."⁴ "In English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness."⁵ "Fictions of use to justice? Exactly as swindling is to trade."⁶ "The most pernicious and basest sort of lying."⁷ "It affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed."⁸ "It has never been used but with bad effect."⁹ These quotations will serve to show his temper. And yet even Bentham could not escape making the cautious admission that, "With respect to . . . fictions, there was once a time, perhaps, when they had their use."¹⁰

Blackstone might be expected to stand at the opposite pole. He does refer to fictions as being "highly beneficial and useful."¹¹

2. Preface, xviii.

3. "Geist des römischen Rechts" III,¹ p. 297. [In this and all subsequent quotations from German and French treatises (except where the citation is to a published English translation) the translations are my own, and in some cases are rather free.]

4. "Works" Browning's Edition, i, p. 235.

5. Ibid, v, p. 92.

6. Ibid, vii, p. 283.

7. Ibid, vi, p. 582.

8. Ibid, ix, p. 77.

9. Ibid, ix, p. 77.

10. Ibid, i, p. 268. It should be said that Bentham was here speaking of the fiction of the Social Compact, and not of legal fictions in the stricter sense.

11. "Commentaries" III, p. 43.

And yet even he is not blind to the other side of the picture. In one place in particular he is inclined to be apologetic. In speaking of the fictions and pretenses involved in the common recovery he says, "To such awkward shifts, such subtile refinements, and such strange reasoning were our ancestors obliged to have recourse . . . while we may applaud the end, we cannot admire the means."¹² At another place the only defense he can find is the doubtful one of recrimination, when he points out that the common-law fictions were no worse than the numerous fictions of the Roman law.¹³

One finds frequently the criticism that a certain doctrine of the courts is based on a fiction. This is assumed, without demonstration, to furnish an argument against the doctrine. And yet frequently we find the same critics passing over one fiction after another without the slightest animadversion; occasionally with commendatory remarks. What is even more significant, it is seldom that the authors of such criticisms are able to avoid occasional resort to fiction in the formulation of their own views. I take as an example one of our best writers; I choose him simply because he is one of our best. This writer rejects the notion that "implied conditions" in contract rest upon the intent of the parties, on the ground that "it is an obvious fiction" and adds the warning, "It is better to state the law in terms of reality, for misapprehension is sure to be caused by fiction."¹⁴ Yet the same writer in another place in the same work, in commenting on the rule that a judgment in favor of the principal when he is sued by the creditor in certain cases bars the creditor from proceeding against the surety—a rule which involves a departure from the ordinary principles of *res adjudicata*—does not hesitate to make the suggestion, "The solution for the difficulty is this . . . the creditor must be deemed at fault for having suffered judgment to go against him, and . . . like a creditor who has released the principal, he will lose his right against the surety."¹⁵ Truly, "the bogey of the fiction revenges itself often bitterly on those who would track it down!"¹⁶

12. *Ibid.*, II, p. 360.

13. *Ibid.*, III, p. 107.

14. 2 *Williston* on "Contracts" p. 825.

15. 2 *Williston* on "Contracts" p. 1255. Professor Williston includes certain qualifications in his statement which modify, but do not destroy, its fictitious character. For example, he would make the inference of "fault" on the part of the creditor only when the principal debtor "did not have on the actual facts a defense to the action against him." But does absence of a defense on the part of the principal debtor conclusively show "fault" on the part of the creditor who loses the suit?

16. *Ihering* "Geist des römischen Rechts" III,¹ 310, note 425.

What should we do about the fiction? Should we attempt to restate the law "in terms of reality?" Could we succeed in such an attempt? Are there good and bad fictions? If so, how are we to tell the one from the other? These are the questions which I shall attempt to answer. I propose that this skeleton in the family of the law be taken from its closet and examined thoroughly. After that examination we may decide what we ought to do with it. At any event I am convinced that keeping it in the closet is both dangerous and unbecoming.

WHAT IS A LEGAL FICTION?

It is obvious that a critical evaluation of the fiction as a device of legal thought and expression cannot be undertaken until one has at least attempted an answer to the question: What is a fiction? It scarcely need be said that this question is not an easy one. To anyone who has thought about the matter questions like the following must at sometime have occurred. "This doctrine which I have criticized as a fiction, is it not simply a figurative expression of a truth? If I recast the expression of it, and emasculate it by removing the metaphorical elements from it, have I really accomplished anything of importance? I have called this other statement 'a fiction.' Do I not simply mean that it is a plain falsehood, rendered harmless by its utter incapacity to deceive? At other times when I use the word 'fiction' do I mean anything more than 'bad reasoning'?" The possibility of questions such as these suggests that the word "fiction," like most words, may not always mean the same thing.

And yet, however difficult it may be at times to draw the line, a fiction (if the word is to retain any utility) is neither a truthful statement, nor a lie, nor an erroneous conclusion. In attempting to draw the line a little more clearly, it will be convenient to start with a discussion of the problem.¹⁷

A FICTION DISTINGUISHED FROM A LIE

Ihering once called fictions the "white lies" of the law.¹⁸ This statement is probably more clever than accurate, unless we inter-

17. It would perhaps be well to remind the reader that I am concerned not merely with what we may call the typical legal fiction, i. e., the procedural pretense by means of which rules of law are changed, (e. g., the bill of Middlesex; the fictions involved in ejectment, trover, and the other actions). I am also dealing with the more subtle and less obvious kinds of fictions. If the discussion were confined to procedural pretenses, the distinctions about to be discussed would be so obvious as to render extended discussion of them unnecessary.

18. "Geist des römischen Rechts" III,¹ p. 305.

pret "white lies" to mean falsehoods which are not meant to be believed. For a fiction is distinguished from a lie by the fact that it is not intended to deceive.

It may be objected that as to that large class of fictions which we call historical fictions this generalization does not hold. Maine's classical definition of the historical fiction as "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified,"¹⁹ seems to leave room for the intent to deceive. The English courts were in the habit of pretending that a chattel, which might in fact have been taken from the plaintiff by force, had been *found* by the defendant.²⁰ Why? In order to allow an action which otherwise would not have lain. If this fiction does not deceive, of what purpose is it?

The answer is that the fiction, *as such*, was not intended to deceive and did not deceive anyone. No one believed that the chattel had been found by the defendant simply because the pleadings said so; the fact was known to be otherwise. The deceit, if any, consisted in the concealment by the court of the exercise of legislative power under the guise of this pretense. Or, perhaps more accurately stated—since it is hardly conceivable that those living contemporaneously with the development of this fiction could have been unaware that the law was changing—the deceit consisted in the representation that an expansion of the action of trover under this pretense was legitimate. This representation, however, was probably as heartily believed by the authors of the fiction as anyone else. It is easy to conclude uncharitably that the judge who enlarges his jurisdiction or who changes a rule of law under cover of a fiction is very coolly and calculatingly choosing to hide from the public the fact that he is legislating. What is usually overlooked is that he himself is often acting under the influence of some half-articulate philosophy of law which seems to him to justify the change if it takes place under the apparent sanction of old formulas, when it would not be justified otherwise.

Conceding, however, that this may not always be the case, and that the fiction may at times have been implicated in a process of deceit that was not simply self-deceit, the fact remains that the pretense or assumption involved in the fiction itself (e. g., that the

19. *Maine* "Ancient Law" ch. II. Cf. "the authorities . . . distinctly admit that fiction is frequently resorted to in the attempt to conceal the fact that the law is undergoing alteration in the hands of the judges." *Smith* "Surviving Fictions" (1917) 27 *Yale L. Jour.* 147, 150.

20. *Blackstone* "Commentaries" III, p. 152.

defendant found the plaintiff's chattel) has never been made with the intention of producing belief in its truth. The fiction, *as such*, is not intended to deceive. It may, perhaps, be held accountable as accomplice in a process of deception, but not as principal.

A FICTION DISTINGUISHED FROM AN ERRONEOUS CONCLUSION

A fiction is generally distinguished from an erroneous conclusion (or in scientific fields, from a false hypothesis) by the fact that it is adopted by its author with knowledge of its falsity. A fiction is an "expedient, but *consciously false* assumption."²¹

Taking this as a criterion, if a statement is believed by its author it is not a fiction. But what is "believing"? How many of us, in discussing a legal problem, have had the experience of making a statement with a vague feeling in the back of our minds that our expression was in some unexplained way inadequate, inaccurate—even fictitious—without being able at the time to formulate the precise nature of this inadequacy? On such occasions, lacking the time or the mental energy for a more complete analysis, we are apt to rush on with the devout hope that the half-consciously-felt defect in our expression could be shown not to affect the validity of the statement in its context. We trust that our statement is at least metaphorically true. When we do this, however, we must be prepared to have someone else attach the epithet "fiction" to our statement.

The line between belief and disbelief is frequently blurred. The use of the word "fiction" does not always imply that the author of the statement positively disbelieved it. It may rather imply the opinion that the author of the statement in question was (or would have been had he seen its full implication) aware of its inadequacy or partial untruth, although he may have believed it in the sense that he could think of no better way of expressing the idea he had in mind. We have a fiction, then, when the author of the statement either positively disbelieves it, or is partially conscious of its untruth or inadequacy.

21. *Vaihinger* "Die Philosophie des Als Ob" p. 130. Cf. *Kornfeld* "Allgemeine Rechtslehre und Jurisprudenz" p. 54. "It is incorrect to call only those conceptions fictions which are propounded by their authors with consciousness of their unreality. That an erroneous belief is mistakenly held to be true does not alter in the slightest its objective unreality or fictitiousness." Of course it is true that a false statement remains false even when it is believed by its author. But the real question is, what is the most profitable delimitation of the concept "fiction"? If "fiction" means simple "false assumption" the word ceases to have any special utility.

But even with this qualification it may be questioned whether current usage confines the concept "fiction" within the limits suggested. Reference has already been made to the question of "implied conditions" in contract. The earlier view was that these conditions were dependent upon the actual intent of the parties, and that courts in laying down these conditions were really interpreting and construing the contract.²² This view has been criticized as a fiction.²³ What we are at present interested in is, why is the word "fiction" used here? Does it imply the opinion that the statement was not believed by those who made it? This is questionable. Sergeant Williams, who gave the "intent theory" currency, may have been at least partially aware that he was dealing with an imputed or fictitious intent; but those who apply the term "fiction" to his theory do not give any indication that they are led to a choice of that word because of any conjecture concerning the subjective mental processes of the learned Sergeant. They call his theory a fiction because it is false; what he thought of it is not regarded as material.

Then why is the word "fiction" used here? Why not "erroneous reasoning," or "false assumption"? The most probable explanation is that the choice of the word "fiction" here implies a recognition that the statement under discussion, although erroneous, had a certain utility. A court by proceeding *as if it were* determining the intent of the parties will normally reach a result which is in accord with the "good sense of the case." The word "fiction," then, may sometimes mean simply a false statement having a certain utility, whether it was believed by its author or not. A fiction may be an *expedient* but false assumption.

To sum up the results of our discussion, and to attempt a definition of the fiction which will at least approximate current usage, we may say: A fiction is either, (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.

This definition seems on the face of things to embrace two entirely discordant elements. In the first alternative the criterion is "consciousness of falsity"; in the second, "utility." Yet current usage probably permits of this alternative definition. What is the explanation for this apparently unreasonable linguistic development?

22. *Sergeant Williams'* note to the case of *Pordage v. Cole* (1669), 1 *Williams'* "Saunders" p. 319; *Harriman* on "Contracts" (2d ed.) p. 315.

23. *Costigan* "Performance of Contracts" p. 8; 2 *Williston* on "Contracts" p. 825.

There is often underlying the seemingly illogical usages of language a penetrating comprehension which does not find expression in any other way. That is the case here. In practice, it is precisely those false statements which are realized as being false which have utility. A fiction taken seriously. i. e., "believed", becomes dangerous and loses its utility. It ceases to be a fiction under either alternative of the definition given above.

The "half-conscious" insight into the falsity of an assumption, which is discussed above, will normally be a sufficient guard against a harmful application of it. The now-discarded theory which conceived of conditions in contract as dependent upon the intent of the parties was workable probably because there existed this partial awareness of the untruth of its fundamental postulate. But the danger of the fiction varies inversely with the acuteness of this awareness. A fiction becomes wholly safe only when it is used with a complete consciousness of its falsity.²⁴

A FICTION DISTINGUISHED FROM THE TRUTH

Everyone who has dealt with legal problems must, at one time or another, have had the experience of feeling that a certain doctrine of the law was expressed in terms of fiction, and yet have found himself, to his complete dismay, unable to restate the doctrine without resort to fiction. At such moments one is apt to succumb to the feeling that, "A fiction that we needs must feign is somehow or another very like the simple truth."²⁵

A fiction is frequently a metaphorical way of expressing a truth. The truth of any given statement is only a question of its adequacy. No statement is an entirely adequate expression of reality, but we reserve the label "false" for those statements involving an inadequacy which is outstanding or unusual. The truth of a statement is, then, a question of degree. But we do not solve a problem by saying that it is a question of degree; what we want to know is, what factors affect this "degree" upon which the question depends? More particularly, stating the thing in a form ap-

24. Cf. "Seeking the intention of the parties as the sole governing principle led Sergeant Williams to declare a promise independent if one performance or part of it might by the terms of the contract under some circumstances precede the performance of the counter promise; and a few unjust decisions have been made in consequence," 2 *Williston* on "Contracts" p. 826.

25. 3 *Maitland* "Collected Papers" p. 316. Cf. *Salcilles* "De la personnalité juridique" (2d ed.) p. 613, "Indeed, what is a fiction which becomes indispensable if not a reality?"

plicable to our present problem, we are interested in an analysis of the different reasons why, in a given case, doubt may arise whether a statement is fictitious or true.

THE FICTION AS A LINGUISTIC PHENOMENON

Ihering once said that the History of the Law could write as a motto over her first chapter the sentence, "In the beginning was the Word."²⁶ Students of the legal fiction might also take this motto to heart. For certainly it is a truth commonly overlooked that the fiction is "a disease or affection of language."

Anyone who has thought about the legal fiction must be aware that it presents an illustration of the all-pervading power of the word. That a statement which is disbelieved by both its author and his audience can have any significance at all is evidence enough that we are here in contact with the mysterious influence exercised by names and symbols. In that sense the fiction is a linguistic phenomenon.

But we are interested in another aspect of the thing. The fiction is further a phenomenon of language in the sense that the question whether a given statement is a fiction is always, when examined critically, a question of the proprieties of language. A statement must be false before it can be a fiction. Its falsity depends upon whether the language used is inaccurate as an expression of reality. But the inaccuracy of a statement must be judged with reference to the standards of language usage. Simple as this truth is, nothing has so obscured the subject of legal fictions as the persistent failure to recognize it.

In the law we speak of the *merger* of estates, of the *breaking* of contracts, of the *ripening* of obligations. Vivid and inappropriate are the literal connotations of these expressions—yet they are usually not even felt as metaphors. These words, and many others like them, have become naturalized in the language of the law. They have acquired a special legal significance which comes to the mind of the lawyer when they are used, so instinctively, indeed, that he is usually unaware that they have a more vivid sensual connotation.

In the action of trover the defendant is alleged to have *found* a chattel he may really have taken by force.²⁷ In actions arising

26. Ihering expresses in this fashion the exaggerated respect shown by early law for the written and spoken word. "Among all primitive peoples the word appears as something mysterious; a naïve faith ascribes to the word a supernatural power." "Geist des römischen Rechts" II,² p. 441.

27. Blackstone "Commentaries" iii, p. 152.

under the "attractive nuisance doctrine" the defendant is alleged to have *invited* children (of whose very existence he may have been ignorant) to visit his premises.²⁸ These statements are felt as fictions. Is this because there is any inherent reason why the words used could not acquire a special sense which would make them true? Could not "finding" mean, in a technical legal sense, "taking"?²⁹ Could not "inviting" be extended to include "attracting"?³⁰ Neither of these things is impossible. But the fact simply is that these possible changes in meaning have not occurred. Since they have not, the statements remain fictions.

Most of what has been written about the supposedly profound question of corporate personality has ignored the possibility that the question discussed might be one of terminology merely. No one can deny that the group of persons forming a corporation is treated, legally and extralegally, as a "unit." "Unity" is always a matter of subjective convenience.³¹ I may treat all the hams hanging in a butcher shop as a "unit"—their "unity" consists in the fact that they are hanging in the same butcher shop. Certainly there is a more easily explained "unity" in a corporation than there is in such everyday concepts as "the 9:10 train for Chicago." It is also clear that the corporation, taken as a unit, must be treated by the courts and legislatures in that somewhat complex fashion which we epitomize by saying that legal rights and duties are attributed to the corporation.³² It is further clear that this treatment of the corporation bears a striking (though not complete) resemblance to that accorded "natural persons." It then follows that natural persons and corporations are to some extent treated in the same way in the law; they form a "class." There are only two questions left for discussion. The first is, is it worth while having

28. *Smith* "Liability of Landowners to Children Entering without Permission" (1898) 11 Harv. L. Rev. 349, 434.

29. Of course the word "finding" has not escaped metaphorical extension. For example, we speak of a jury "finding" the facts of the case.

30. I do not mean to imply in this discussion that the proper basis of liability in the "attractive nuisance cases" is to be found in the notion of "attracting." My attention is directed solely toward the linguistic question.

31. *Mallachow* "Rechtserkenntnistheorie und Fiktionslehre—Das Als Ob Im Jus" p. 67.

32. Bülow, in an article on the procedural fictions of German law ("Civilprozessualische Fiktionen und Wahrheiten" 62 Archiv. f. d. Civilistische Praxis, 1, 10) says that a proper understanding of fictions ought to bring us to realize "that the incorporeal center of legal interests which we designate as a 'legal person' possesses a substantiality and independence which cannot, and need not, be created for it by an act of imagination." This "substantiality," however, need not include any such supernatural elements as a "common will."

a name for this class? It should be remembered that many classes remain nameless. The class of left-handed Irishmen still suffers from the lack of an appropriate term to separate it from the world of the right-handed, the ambidextrous, the non-Irish.³³ Assuming, however, that it is worthwhile having a name for this common class formed by natural persons and corporations, the other question is, is the word "person" the most desirable name? Would "legal subject" be better? Or "right-and-duty-bearing-unit"?³⁴

LIVE AND DEAD FICTIONS

There are live and dead fictions. A fiction dies when a compensatory change takes place in the meaning of the words or phrases involved, which operates to bridge the gap which previously existed between the fiction and reality.

This is a process which is going on all the time. A striking example is to be found in Roman constitutional law. The *comitia* (assembly of citizens) had, originally, only a power of *authorizing* constitutional changes proposed to them by the king. Their legislative function was originally essentially negative—a power of veto. Gradually, however, they gained the power of initiating and commanding. With this constitutional development came an interesting change in language:

"The evolution which led from the right of approval in the *comitia* to their right to command is reflected in the parallel evolution in the sense of the word *jubere* (in the formula *velitis jubetis quirites*) which has equally passed from the sense of accepting to that of ordaining."³⁵

The statement that the *comitia* merely accepted proposals was originally true; it became a fiction through a change in practice. But this fiction was in turn cured—or to change the figure, became dead—through a change in language usage.³⁶

33. "We do not often have occasion to speak, as of an indivisible whole, of the group of phenomena involved or connected in the transit of a negro over a rail-fence with a melon under his arm while the moon is just passing behind a cloud. But if this collocation of phenomena were of frequent occurrence, and if we did have occasion to speak of it often, and if its happening were likely to affect the money market, we should have some name as 'wousin' to denote it by. People would in time be disputing whether the existence of a wousin involved necessarily a rail-fence and whether the term could be applied when a white man was similarly related to a stone wall." *A. Ingraham* "Swain School Lectures" (1903) p. 121, quoted from *Ogden and Richards* "The Meaning of Meaning" p. 46.

34. The article on "Legal Personality" by Bryant Smith in (1928) 37 *Yale L. Jour.* 283 offers a penetrating analysis of the problem.

35. *Girard* "Manuel élémentaire de droit romain" (8th ed.) p. 17, note 1.

36. The clearest recognition of this process which I have been able to find in the literature of jurisprudence is in the following passage. "It is

The same thing is happening in our own law. Words like "delivery" (= giving over), "conversion" and "estate" (= condition or status) have gone through like developments. There was a time, probably, when these words were applied legally in their literal sense. Then a period of extension set in, during which the continued use of these words was probably felt as fictional. But the inevitable compensatory change in word meaning took place; the expressions acquired a new, non-fictional meaning. This development is, however, not yet ended. Even today the first of these terms still carries a part of its history with it; it is not a completely dead fiction. Courts are still wont to speak of "symbolic" or "constructive" delivery when the act in question is too far removed in character from the kind of thing contemplated by the original sense of the word. But that the fiction is dying is shown by the fact that there is no definite standard for determining when these qualifying terms are needed; it is a matter of individual discretion.

Of course this process is not confined to the law—it takes place in the whole of our language. "All words expressive of immaterial conceptions are derived from words expressive of sensible ideas."³⁷ "The birth of a new concept is inevitably foreshadowed by a more or less strained or extended use of old linguistic material."³⁸ All the language of abstract thought is metaphorical;

true that so soon as, with the passage of time, normal conceptions have changed, that which was a fiction at the beginning will have become a reality, since there will be, from that time on, a normal adaptation between the effects produced and the legal system . . . to which those effects are attributed. After all, what is a fiction which becomes indispensable if not a reality?" *Salcilles* "De la personnalité juridique" (2d ed.) p. 613. See also *Tourtoulon* "Philosophy in the Development of Law" p. 388: ". . . very old fictions are no longer considered as such."

37. *Max Müller* "The Science of Language" Second Series, p. 355.

38. *Sapir* "Language" p. 16.

Cf. *Mallachow* "Rechtserkenntnistheorie und Fiktionslehre" p. 41: ". . . concepts (both the ordinary and the scientific sort) are accepted by the linguistic sense of the ordinary man as well as by science (with the exception of epistemology) rather blindly and without preliminary examination as something given. The question of their reality is raised only when one may live contemporaneously with, and is conscious of, the creation of a concept, as for example, in the formation of the general designation 'energy' or of the . . . concept of the legal person."

It should be added that this question of the "reality" of a concept is also likely to arise in one's mind when one encounters a concept which has been discarded in the course of history and which is therefore unfamiliar. "Seisin" seems a very unreal thing to us; we have no hesitation in concluding that it was something which existed only in the heads of medieval lawyers. Yet "title" and "possession" are apt to seem very real to us; we say, "Possession passed from A to B," or, "X cannot have title because Y has it," just as the lawyer of the year 1400 talked of seisin passing, or, perhaps more often, refusing to pass. But in a system of law in which important legal consequences are "attributed to" seisin, or stated in another way, where the

but, fortunately, the metaphors involved are for the most part dead metaphors. I quote at length from a popular book on language usage:³⁹

"In all discussion of metaphors it must be borne in mind that some metaphors are living, i.e., are offered and accepted with a consciousness of their nature as substitutes for their literal equivalents, while others are dead, i.e., have been so often used that speaker and hearer have ceased to be aware that the words used are not literal; but the line of distinction between the live and the dead is a shifting one, the dead being sometimes liable, under the stimulus of an affinity or a repulsion, to galvanic stirrings indistinguishable from life. Thus, in *The men were sifting meal* we have a literal use of *sift*; in *Satan hath desired to have you, that he may sift you as wheat*, *sift* is a live metaphor; in *the sifting of evidence*, the metaphor is so familiar that it is about equal chances whether *sifting* or *examination* will be used, and that a sieve is not present to the thought—unless indeed someone conjures it up by saying *All the evidence must first be sifted with acid tests, or with the microscope*—; under such a stimulus our metaphor turns out to have not been dead but dormant; the other word, *examine*, will do well enough as an example of the real stone-dead metaphor; the Latin *examino* being from *examen* the tongue of a balance, meant originally to weigh; but, though weighing is not done with acid tests or microscopes any more than sifting, *examine* gives no convulsive twitches, like *sift*, at finding itself in their company; *examine*, then, is dead metaphor, and *sift* is only half dead, or three-quarters."

Eliminating the "fiction" from law often means only substituting dead metaphors for live ones. One sees an example of this in the following quotation:

"'Consensual' contracts, or some better term, should be used to designate those contracts where there is a real 'meeting,' i.e., coincidence, of the minds of the parties."⁴⁰

"Meeting" was felt as a metaphor, and required quotation marks accordingly. "Coincidence" (= falling on) was a dead metaphor and could stand unadorned.⁴¹

word "seisin" is a way of lumping together the effects of certain legal doctrines, seisin is as real a thing as "title" or "possession."

Cf. *Maitland "Equity"* p. 33: "The use came to be considered as *a sort of metaphysical entity*." (Italics mine.) A use was a "metaphysical entity" in exactly the same sense that "legal title" is a "metaphysical entity" today.

39. *Fowler "Modern English Usage"* p. 348.

40. *Costigan "Constructive Contracts"* (1907) 19 *Green Bag*, 512, 514.

41. The special utility of Latin terms consists in the fact that they are generally fictions which have never lived—in our language—at all; they are, as it were, still born into the language of the law. That is why we seldom see Latin expressions qualified by such apologetic adjectives as "constructive" and "implied." We speak frequently of "constructive" and "implied" *intent* because we have a feeling for the boundaries of this thoroughly naturalized word. On the other hand, although it would be just as

Nor is this sort of change in language meaning confined to single words—whole phrases may be involved. Just as the expression "sowing his wild oats" is more apt to call to mind a cabaret than a field, so it seems probable that the expression, "Fact A is conclusively presumed" carries to the well-trained legal mind the simple connotation, "Fact A is legally immaterial."

The assumptions involved in the typical fiction of the English common law, i. e., the procedural pretense, were usually so violent that there was little likelihood that the adoption of the fiction would usher in a change in language usage which would cure the fiction. When the English court pretended that the Island of Minorca was a part of the city of London, as it once did,⁴² there was little probability that this isolated pretense would lead to a change in the meaning of the word "London" which would extend it to embrace a spot of land in the Mediterranean. But even procedural pretenses may lead to the development of word meanings. The "possession" which gave the right to bring the action of trespass to a plaintiff who had bailed his chattel under a bailment terminable at his will was originally simply a pretense through which a man out of possession was given a possessory action. But this pretense, and others like it, became so common that the word "possession" began to take on new meaning and we end up with two kinds of possession, "constructive" and "actual." When we had this condition of affairs, that inveterate tendency of the human mind, to suppose that where two things have a common name they must have something in common beside the name, began to assert itself. Legal theorists felt the need of what the Continental jurists call a "construction." That is, it was felt that we ought to develop some "concept" which would include, and reconcile, all the conflicting elements to be found in actual and constructive possession. Needless to say the concept has not yet been discovered; the "construction" remains a matter of difficulty.

"Constructive fraud" has had a somewhat similar history. It started, innocently enough, as a pretense by means of which English courts of equity acquired jurisdiction over cases which

logical to do so, we do not speak of "constructive" or "implied" *mens rea*.
 Once in a while a knowledge of Latin coupled with an ignorance of the process of language growth can produce some remarkable results. In *Regina v. Clarence* (1888) 22 Q. B. Div. 23 Stephen J. held the defendant, who had affected his wife with gonorrhoea, not guilty under a statute punishing every one who "inflicts any grievous bodily harm upon any other person" partly on the ground that the Latin *infigere* meant "to strike."

42. Gray "Nature and Sources of the Law" (1st ed.) p. 34.

would otherwise have been outside their province.⁴³ But the term lived beyond the causes which gave rise to it, and survives today into a period when the distinction between legal and equitable jurisdiction is generally done away with. What "constructive fraud" is today, no one knows exactly; but it is still with us.

Those who contend that "corporate personality" is and must be a fiction should be reminded that the word "person" originally meant "mask"; that its application to human beings was at first metaphorical. They would not contend that it is a fiction to say that Bill Smith is a person; their contention that "corporate personality" must necessarily involve a fiction must be based ultimately on the notion that the word "person" has reached the legitimate end of its evolution and that it ought to be pinned down where it now is.

One may test the question whether a fiction is dead or alive by the inquiry, does the statement involve a pretense? Probably the maxim "*Qui facit per alium facit per se*" was originally a fiction because it was understood as an invitation to the reader to pretend that the act in question had actually been done by the principal in person. But the statement has been so often repeated that it now conveys its meaning (that the principal is legally bound by the acts of the agent) *directly*: the pretense which formerly intervened between the statement and this meaning has been dropped out as a superfluous and wasteful intellectual operation. The death of a fiction may indeed be characterized as a result of the operation of the law of economy of effort in the field of mental processes.

REJECTION V. REDEFINITION

It is apparent from what has been said that there are two distinct methods of eliminating fiction from the law: *rejection* and *redefinition*. By rejection is meant simply the discarding of those statements which are felt as fictional. Thus, a statute or judicial decision may declare that henceforth the action of ejectment shall be allowed without the allegations of lease, entry and ouster. By redefinition is meant a change in word meaning which eliminates the element of pretense; to preserve the figure used before, redefinition results in the death of the fiction. Through rejection a fiction disappears entirely; through redefinition it becomes a part of the technical vocabulary of the law.

43. *Smith* "Surviving Fictions" (1928) 27 *Yale L. Jour.* 317, 319.

Both of these processes have taken place in the past. Although the legal language of today is in part, at least, composed of the dead shells of former pretenses ("possession," "conversion," "delivery," "estate," "person," "constructive fraud," "constructive trust"), there are, on the other hand, many fictions of former days which have disappeared completely, which have left no vestigial traces in the language of the law. This fact suggests the inquiry: why, in the course of history, are some fictions discarded entirely, while others are redefined and retained as terms of description? And the fact that the alternative fates of rejection and redefinition rest in the balance for many of our present-day fictions suggests the question, which of these processes—rejection or redefinition—ought we to encourage?

Would it, for example, be desirable to attempt a complete elimination of fiction from the law by a wholesale process of redefinition? Conceivably we might eliminate the pretense from all of our fictions; we might cease to say, "A is legally treated as if it were B," and simply say, "In a technical legal sense, A is B." We might say, "There is no pretense in actions arising under the 'attractive nuisance doctrine,' the word 'inviting,' as used in those decisions, is to be understood in a technical legal sense." We could do this with the boldest of our fictions. The English court which asserted the Island of Minorca to be a part of London might have defended itself by saying, "We only meant that for the special purpose at hand the island was a part of London, and we defy anyone to prove that that is not so." In short, we might join Humpty Dumpty in saying, "When I use a word, it means just what I choose it to mean, neither more nor less." We might erect a legal world in which silence is consent, taking is finding, attracting is inviting, to bring a suit is to achieve Roman citizenship; a world in which even the commonest expressions were to be understood in a Pickwickian sense. This attitude has, indeed, been dignified by a name—"the theory of the juristic truth of fictions."⁴⁴

But it is clear enough that such a wholesale process of redefinition could not be carried out. One cannot introduce sweeping changes in linguistic usage by an arbitrary fiat; in general,

44. The "theory of juristic truth" is discussed by Franz Bernhöft in his book "Zur Lehre von den Fiktionen" and by Bülow in an article in 62 Arch. f. d. C. Praxis 1. Cf. Saleilles "De la personnalité juridique" (2d ed.) 612: "We see then clearly that, from the moment when one introduces into the sphere of law an element of intellectual conceptualism, a portion of conventionalism, one is tempted to say that there are no fictions at all, and that, in every legal relation, from the moment it is accepted as such, there is a reality of law."

new meanings grow only in places where they are needed. And even if it were possible, the proposal ought not to be carried out because it would only result in encumbering the language of the law with a grotesque assemblage of technical concepts lacking the slightest utility.

Is the alternative, then, a wholesale rejection of fictions? This is also impossible, and inadvisable if it were possible. It is *inadvisable* because to reject all of our fictions would be to put legal terminology in a straight jacket—fictions are, to a certain extent, simply the growing pains of the language of the law. It is *impossible* because fiction, in the sense of a “strained use of old linguistic material,” is an inevitable accompaniment of progress in the law itself and this progress can scarcely be expected to wait out of deference toward the tastes of those who experience an unpleasant sensation at the sight of words browsing beyond their traditional pastures.

The solution lies between the extremes. Some fictions should be rejected; some should be redefined. Redefinition is proper where it results in the creation of a useful concept—where the dead (redefined) fiction fills a real linguistic need. Where this is not so, rejection is the proper course to pursue. But what are “useful concepts”? How does it come about that redefinition in some cases results in a needed addition to the terminology of the law; in other cases serves only to preserve a bizarre reminder of a discarded pretense? A discussion of these problems must be postponed until later when an attempt will be made to analyse the fiction from the standpoint of *motives*. When we have discovered *why* courts and legal writers resort to fiction we shall be in a better position to deal with the problem of the utility of particular fictions.

For our present purposes it is enough to notice that the evolution of our legal language has, for the most part, proceeded along the lines suggested. In general, only those fictions which, when redefined, give useful concepts have been retained. The linguistic sense of generations of lawyers has been, in the main, adequate to sift the chaff from the wheat and to keep the language of the law safe from the opposing disasters of linguistic stagnation and a grotesque fecundity.

The development has—in general—been sound. But there are important exceptions—exceptions which ought sufficiently to demonstrate the possibility that the linguistic sense of a profession can run amuck. “Constructive fraud,” “constructive trust,” “construc-

tive possession,"⁴⁵ "constructive intent," "implied malice"—these expressions stand out like ugly scars in the language of the law—the linguistic wounds of discarded make-believes. Is it not significant that each carries still the badge of its shame—the apologetic "constructive" or "implied"?

REACTIONARY TENDENCIES RETARDING THE GROWTH OF TECHNICAL LEGAL MEANINGS

It has just been said that the need of the law for an adequate technical vocabulary makes it desirable that certain of our fictions—picked with discretion—be converted into "juristic truth." Speaking in general terms, it is desirable to speed the growth of technical legal meanings. But it would not be well to be optimistic of sudden success in this direction. For every legal word which has been able to disencumber itself of its burden of extra-legal connotation there are ten words which carry with them into the law a mass of non-juristic associations—frequently with the result that their legal use continues to be felt as fictitious. There are important reactionary forces which operate to hamper and restrict the natural process of language development which I have sketched above.

One thing which works against the development of technical legal meanings is, of course, simply ignorance. It is precisely those who are misled and injured by the extralegal connotations of law words who are unconscious of the danger involved.⁴⁶ They cannot be expected to see the need for redefinition and reform.

But much more important than this, in my opinion, is the tendency which I may call the desire to keep the form of the law persuasive. Metaphor is the traditional device of persuasion. Eliminate metaphor from the law and you have reduced its power to convince and convert.

"Constructive notice" will do as an illustration here. This expression has been striving for a long time to achieve a purely technical meaning, through which it would be completely divorced from the notion of a pretense of actual notice. So understood, the

45. I am speaking here of constructive possession in the remedial sense. I do not include in this condemnation the "constructive possession" which is attributed to one who enters upon a part of a tract of land under color of title to the whole.

46. *Tourtoulon* ("Philosophy in the Development of Law" p. 391) says rather bluntly but with some truth, "If a jurist were found for whom it was difficult to grasp the exact import of fictions, one who was incapable of understanding what the artifice may legitimately give and what it may not, he would do well to renounce law, as well as every other abstract science."

expression would offer a convenient way of grouping together a somewhat complex set of cases, in which a person who has no actual notice of an interest or event receives the same treatment at the hands of the law as the person who has actual notice. But such a conception, being a matter of analysis and classification entirely, offers—in contrast to “actual notice”—no “reason” for the result at all. It is much easier to see why a man should be affected adversely by “actual notice,” than it is to discover the reasons which underlie the treatment he receives in cases of “constructive notice.” Frequently the considerations which are determinative here are rather remote “reasons of policy.” How remote they may be in a given case is shown by the fact that in some jurisdictions one may, through the operation of the recording statute, be charged with constructive notice of a deed which in fact never got on the record.⁴⁷ “Actual notice” is, then, a persuasive term; “constructive notice” is not. But we can make “constructive notice” more appealing if we preserve the notion that it has something in common with “actual notice” beside a name. If we can create the impression of a similarity (in fact and not simply in legal effect) between “actual” and “constructive” notice we will have established for the latter term a kind of vicarious persuasive force.

One way to do this is to state “constructive notice” in the form of “actual notice” proved inferentially, and to speak of “implied notice.”⁴⁸ But the trouble with this expression is that it has been used in this way for so long that it begins to lose its persuasive power. The word “implied” is itself becoming a dead fiction. It is now generally understood (except when qualified by the words, “in fact”) as being substantially the equivalent of “constructive,” i. e., as having the function of indicating that the word it modifies is to be understood in a technical legal sense. It no longer serves to create in the hearer’s mind the suggestion of an actual fact proved inferentially; the insinuation contained in the word fails to take effect.

The only method left of preserving for constructive notice the superior persuasive quality of actual notice is the rather naïve device of a pretense of actual notice. The obviousness of this expedient makes it rather uncommon, but occasionally we find courts saying things like the following:

47. *Tiffany on “Real Property”* (2d ed.) sec. 567j.

48. One American judge went a step farther and spoke of “implied actual notice,” which he defines as “that which one . . . is in duty bound to seek to know.” (*Hopkins v. McCarthy* [1921] 121 Me. 27, 115 Atl. 513, 515). May we expect “constructive actual notice” next?

"The deed was on record, and the defendant . . . must be presumed to have searched the record and come to a knowledge of the contents of the deed."⁴⁹

Sometimes more ingenuity is employed in obfuscating the distinction between actual and constructive notice, as the following quotation will show:

"Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted."⁵⁰

What can be the motive of this obscurantism, which talks of "evidence" that cannot be controverted? Is it not plainly an inordinate desire to preserve the appearance of a likeness between "actual" and "constructive" notice, even at the cost of good sense? Instances like this show how far the human mind is willing to go to preserve a comforting and persuasive analogy.

The whole field of vicarious liability is a branch of the law which, from its infancy, has been honeycombed with fictions, and—what is more significant—with fictions which seem to resist the linguistic process of redefinition, with fictions which stubbornly refuse to die. Does not the explanation for this lie in the fact that the notion of vicarious liability is itself a bitter pill to swallow? The social foundations of vicarious liability are never of the self-apparent type. The harshness involved in visiting the consequences of one man's misdeeds upon another has seemed to call for repeated explanation and apology.

One further point deserves special emphasis. I have spoken of "the desire to keep the form of the law persuasive." This should not be understood as implying the existence of a studied and premeditated attitude directed toward third persons. The judge who resorts to an artificial form of statement which insinuates the existence of actual notice in a case where it is clear no actual notice exists has not consciously weighed the advantages of clarity against those of rhetoric. If he chooses metaphor to dry legal fact, it is because the former mode of expression suits his personal taste and has been successful in winning over his own conscience.

It should be recalled, too, that rhetoric is frequently an intellectual short-cut. It is often a matter of the greatest difficulty to

49. *Digman v. McCollom* (1871) 47 Mo. 372. We have an expression of a similar tendency in those cases where the constructive notice of the principal (through actual notice to the agent) is based upon a presumption that the agent has in fact communicated the fact in question to his principal. See 2 *Mechem* on "Agency" (2d ed.) sec. 1806(b).

50. Eyre, Chief Baron, in *Plumb v. Flutt* (1791) 2 Anst. 432.

frame a satisfactory exposition of reasons which one feels—inarticulately—are sound. At such times metaphor offers a tempting expedient. The desire to keep the form of the law persuasive is frequently the impulse to preserve a form of statement which will make the law acceptable to those who do not have the time or the capacity for understanding reasons which are not obvious—and this class sometimes includes the author of the statement himself.

FICTITIOUS LEGAL RELATIONS

So far our discussion has concerned pretenses as to facts and events which are regarded as giving rise to legal consequences. But assuming the facts to be non-fictitious, may we not also have pretenses concerning the legal consequences to be attributed to those facts? May there not be feigned legal relations, fictitious legal rights and duties, supposititious titles? The difficulty which we encounter at the outset is that in dealing with words like "right," "duty," and "title" we have to do with concepts of a somewhat indefinite scope. The assertion is made that a creditor whose debt has been "barred" by the statute of limitations still has a "right."⁵¹ Some, perhaps, would regard this assertion as inaccurate and misleading. But can it be disproved? Can the boundaries of the concept "legal right" be so rigidly drawn as to exclude a sense of the word which would make this statement true? Or again, it is said that the possessor of a trade secret has no "property right" or "title" in his process (the protection accorded him by the law being explained as an application of contract principles).⁵² Many would regard the statement (that the possessor of the secret has no "property" in it) as a mere quibbling with words. But is the assertion demonstrably untrue?

The uncertainty and flexibility inherent in legal concepts has this consequence: It is generally more difficult to say that a given statement is false when it relates purely to legal concepts, than when it relates to extralegal fact. Consequently it is not common that a statement concerning legal relations is regarded as a fiction. For example, it is a very common thing for courts to employ expressions like the following: "Title, as between the parties, had passed to the mortgagee; as to third parties, title remained in the mortgagor."⁵³ What kind of title is this which is both in, and not in, the grantor and the grantee at the same time? Does not such

51. 3 *Williston* on "Contracts" sec. 2002.

52. *Chafec* "Cases on Equitable Relief against Torts" p. 87, note.

53. Statements of this kind are very common in the so-called "title" states. See *Ellison v. Daniels* (1840) 11 N. H. 274.

a contradictory assertion deserve the disparaging epithet "fiction"? It is doubtful if the term would ordinarily be applied to this kind of statement.⁵⁴ "Title" is itself a concept of great flexibility, serving simply as a means of grouping together certain rather complex legal results in a convenient formula. One is not apt to see any element of pretense in the statement quoted. It is regarded simply as an attempt to describe, with as little circumlocution as possible, a complex legal situation.

Legal facts, then, differ from extralegal facts (at least for those extralegal facts which concern the law) in the fact that their boundaries are generally less certain. But this is a difference of degree only. There are limits to the elasticity of even legal concepts. For example, suppose the parties to a contract stipulate that for their purposes the title to a piece of land should be treated as if it were in A, although the courts have adjudicated it to be in B. Conceivably they may do this as a convenient way of expressing the result which they seek to attain by their contract, in full awareness of the falsity of the supposition. We would not hesitate to call their statement false. We might regard it as a kind of private fiction established between the contracting parties.

But this leaves unanswered a further question: Is there any utility in speaking of fictitious legal rights and duties, or of fictitious titles, when we are speaking of statements made in court decisions? The existence of legal rights and duties depends upon how courts and their enforcement agencies act. If the judge and the sheriff act upon a "pretended" right and enforce it, is there any utility in continuing to treat it as a pretended right? If a statute declares that the courts shall treat A "as if" he had title to certain property, and the courts consistently act upon that assumption, is there any purpose in treating A's title as imaginary?⁵⁵

54. Apparently many French jurists would be willing to regard a statement of this sort as a fiction. For example, sec. 1446 of their Code has frequently been regarded as establishing a fiction. (*Lecocq* "De la fiction comme procédé juridique" 158-162.) This is because the effect of this section is most succinctly stated by saying that, as to the creditors of the wife, the "community" (of the property of husband and wife) is regarded as dissolved, while as to all other persons it is considered as still subsisting.

One gets the impression that the French writers are rather ready to apply the term "fiction" to any sort of legal construction which involves the notion of substitution or comparison. Perhaps they are influenced by the example of their own Code. Section 739 provides "Representation [i. e., in cases of succession to the goods of an intestate] is a legal fiction of which the effect is to have the representatives take the place, the degree, and the rights of the person whom they represent." What is the fiction?

55. The contrary view is supported by Bernhöft in his treatise, "Zur Lehre von den Fiktionen" p. 19. But a careful reading of his discussion will

A legal right reaches objectivity through court action; we have no other test of its "reality." If it meets this test it is a real right—whatever may be the protestations of the agency enforcing it.

WHEN IS A STATEMENT A STATEMENT OF FACT, AND WHEN OF LEGAL RELATIONS?

Many an intellectual battle over the question whether a given statement should be regarded as a fiction might have been avoided if the contestants had taken the trouble to inquire whether the statement in question purported to relate to extralegal facts, or referred to the legal relations of the parties. Section 1890 of the German Civil Code provides, "An illegitimate child and its father are not deemed to be related."⁵⁶ In the original draft of the code the section read simply, "An illegitimate child and its father are unrelated." The notion of the drafters was simply that relationship was a legal matter; if the Code provided that they were unrelated, they *were* unrelated, and there was no need for any apologetic "deemed." It was pointed out, however, that "relationship" is also a state of fact; and that the ordinary meaning of the word comprehends this factual state, rather than the legal relation. It was therefore thought preferable to treat the thing in terms of a fiction of a lack of factual relationship.⁵⁷ This illustration in-

show, I think, that he really has in mind cases where the description of the legal relation adopted by the courts is misleading and inaccurate, the type of case discussed in the section on "Legal Relations Described Metaphorically or Inadequately," *infra*, p. 387.

56. "Ein uneheliches Kind und dessen Vater gelten nicht als Verwandt."

57. *Bernhöft* "Zur Lehre von den Fiktionen" p. 21.

Cf. "When the common law refused to recognize any paternity for an illegitimate son, and said he was *filius nullius*, it was not understood to deny the fact of physiological begetting; it was asserting that such a one did not possess the specific rights which belong to one who was *filius*, implying wedlock as a legal institution." *John Dewey* "The Historic Backgrounds of Corporate Legal Personality" (1926) 35 *Yale L. Jour.* 655, 656.

"In a discussion of legitimacy [and the presumption that a child born in wedlock is legitimate], Lord Campbell remarked: 'So strong is the legal presumption of legitimacy that if a white woman have a mulatto child, although the husband is white and the supposed paramour black, the child is presumed legitimate, if there were any opportunities for intercourse.' Now there might, without absurdity, be a doctrine which fixed upon a husband, even under such circumstances, the legal responsibilities of a father; according to the rough proverbial wisdom, quoted by a vigorous English judge four or five centuries ago, 'who that bulleth my cow the calf is mine.' But . . . Lord Campbell had introduced into his supposition such unusual facts as dissolved and evaporated any rule of presumption." *Thayer* "Preliminary Treatise on Evidence" p. 346.

dicates sufficiently the nature of the problem, and demonstrates that the solution is often a matter of terminology.

Suppose P tells X that he has appointed A his agent to sell his horse, with full power to fix the price. P tells A, the agent, that he must not sell the horse for less than \$100. X buys the horse from A for \$50. Is P bound by this act? The answer of the authorities is in the affirmative: A had an "apparent authority" to fix the price of the horse. Is this "authority" a fiction?⁵⁸ If, by saying that A had "authority," we mean to pretend, for purposes of effecting justice, that P actually stated to A that he might sell the horse for any price he thought proper, then there is a fiction. But if we mean merely that on the facts A has the legal power to sell the horse and bind P, then there is no fiction.

The same considerations are easily seen to underlie the following questions (the list might be greatly extended): When a surety pays the debt of the principal, equity considers the debt "unpaid" in order that the surety may be subrogated to the rights of the creditor.⁵⁹ Is this a fiction? Is a "constructive trust" a fiction? Is it a fiction to say, in cases arising under the "family automobile doctrine" that the son, or other member of the family, is the "agent" of the owner of the car? Section 50 of the German Civil Code provides, "The existence of the association (in liquidation) shall be deemed to continue to the close of the liquidation, in so far as the purpose of the liquidation requires this." Is the word "deemed" necessary here? Is it a fiction to say (in the law of divorce) that "condonation is upon condition of good behavior"? Is it a fiction to say that there is an "implied condition" in a will that the devisee shall not take if he kills the testator? Are "implied conditions" generally fictions?

It has already been shown how fictions "die" through a process of a change in word meanings. This quite frequently, perhaps typically, takes place through a shift of connotation from facts to legal relations. "Constructive fraud" started as a pretended actual fraud; to say today that a transaction is affected with "constructive fraud" is usually simply to affirm that it is voidable for reasons other than actual fraud—the expression relates not to

58. In a note in (1905) 18 Harv. L. Rev. 400 the view is taken that this authority is fictitious; Professor Cook in a rejoinder in "Agency by Estoppel: A Reply" (1906) 6 Col. L. Rev. 34, 44, emphatically denies that any fiction is involved.

59. Occasionally courts regard subrogation as a "resuscitation" of the security. *Thirteenth Ward Bldg. & Loan Assn. v. Kanter* (N. J. 1929) 147 Atl. 809, 811.

pretended facts, but to legal consequences. The "constructive trust" originally involved a pretense that the facts which create an actual trust were present. Today it is simply a way of stating that the case is a proper one for equitable relief.

But it should not be forgotten that the impulse to keep the form of the law persuasive—the effects of which have been traced above—is also active here. A statement of fact, even of pretended fact, is always—from this point of view—to be preferred. The case of the word "offer" will serve as an example here. A offers to sell his horse to B. The "offer" remains open until A withdraws it, or until the lapse of a reasonable time. No fiction is involved in this statement; it is clear that the word "offer" here is a description of the legal situation of the parties—a situation which may be described in other language by saying that B has a "power of acceptance" which continues until something happens to destroy it. But the courts have not always been content to let the matter rest here. They have occasionally added the flourish that in legal contemplation the offer "is repeated during every moment from the time it leaves the offeror until revocation or acceptance."⁶⁰ This spoils the whole thing. An "offer" which is "repeated" must be a physical fact, not a legal relation. And its "repetition" is an obvious fabrication.

LEGAL RELATIONS DESCRIBED METAPHORICALLY OR INADEQUATELY

Some of the hoariest of our fictions are statements which have been made by courts and which plainly refer, not to facts, but to legal relations. The fiction that "husband and wife are one"—which so puzzled Austin that he could only explain it as an expression of "sheer imbecility"⁶¹—is an outstanding example. But is this a fiction? It is a statement, not of fact, but of the legal situation of the parties. It is further a statement made by a court possessed of the power to create and enforce rights. If a court actually treats husband and wife as if they were one, are they not legally "one"? But it is just at this point that the fictitious element of the statement becomes apparent. The courts did not, in actuality, treat husband and wife as "one." The statement was misleading as a description of their legal situation. A legal relation, *accurately*

60. See the note, "Communication of Revocation," in (1904) 18 Harv. L. Rev. 139.

61. "Lectures on Jurisprudence" (5th ed.) p. 611. "I rather impute such fictions to the sheer imbecility (or, if you will, to the active and sportive fancies) of their grave and venerable authors, than to any deliberate design, good or evil."

described and *actually enforced*, cannot, with utility, be regarded as a fiction. But a description of an existing and enforced legal relation can be so inadequate and misleading as to deserve the term fiction.

"Equity regards that as done which ought to be done." "The law often regards money as land and land as money."⁶² Happily such "short, dark maxims" are not so common as they once were. When they are used today it is for the sake of their flavor of antiquity, rather than because of any notion that they are actually explanatory. Undeveloped systems of law have a decided penchant for such brocards. For example, in the jurisprudential language of a tribe in east Africa the statement "woman is a hyena" is intended as an expression of the notion of woman's legal incapacity.⁶³

It is important to realize, however, that statements of this kind differ in degree but not in kind from the methods we commonly employ in describing legal relations. The legal situation which results even from the simplest sort of legal transaction is always too complicated for complete and adequate expression in a single sentence or phrase. The statement, "Husband and wife are one," does not differ in essence or purpose from the statement, "A has a legal right against B to payment of \$100." Both are somewhat imperfect attempts to describe a complex reality. When I am told that A has a "right" to \$100 I am not informed whether A may forcibly take \$100 from B's pocket, nor whether A may have B jailed if B refuses to pay the \$100. For the particulars I must go elsewhere. A good deal of the education of the lawyer consists in finding out in more detail what this "right" really consists of. Nor does every "right" have the same consequences. If A's action has been barred by the statute of limitations, his legal situation has been greatly altered; but he still has a "right."⁶⁴ If, on the other hand, A gets a judgment against B, his legal situation has been decidedly improved, yet the metaphysical core of his rela-

62. *McIntosh v. Aubrey* (1902) 185 U. S. 122, 125. French jurists tend to treat what they call "real subrogation" (which seems to involve a notion similar to that involved in our "equitable conversion," i. e., the substitution of one thing for another, or, more accurately, the attribution of legal qualities usually attached to one kind of property to another kind of property) as a fiction. *Lecocq* "De la fiction comme procédé juridique" pp. 36-47. And see sec. 1407 of the French Civil Code.

63. *Post* "Grundlagen des Rechts" p. 161.

64. This is, at least, the opinion of Professor Kocourek. "A Comment on Moral Consideration and the Statute of Limitations" (1924) 18 ILLINOIS LAW REVIEW 538. In Professor Kocourek's newer terminology the claim descends from the zygomic to the mesomic plane on the running of the Statute. "Jural Relations" p. 141.

tion—however it may be garnished with new privileges, powers and immunities—remains only a “right.”⁶⁵

The term “right” represents a rather inadequate attempt to describe a complex reality.⁶⁶ Yet this inadequacy is not regarded as unusual; one feels simply that in this case we have an illustration of the inadequacy of all expression. I am no more justified in expecting that the word “right” should tell me the detailed story of the relation of the parties than I would be in expecting that the word “house” should inform me whether the structure in question was large or small, how many doors and windows it had, etc. On the other hand the statement, “Husband and wife are one,” involves an unnecessary and aberrational obscurity.⁶⁷

Many common statements stand in a kind of twilight zone between adequacy and inadequacy, i. e., between striking or unusual inadequacy and ordinary and therefore non-apparent inadequacy. The following list might be greatly expanded: “The relation between the mortgagee and the mortgagor in possession is that of landlord and tenant.” “Subrogation is an assignment.” “When the mortgagor conveys the equity of redemption, promising to discharge the land of the mortgage lien, the land becomes surety for the debt.” “Each joint tenant is owner of the whole.” “An enforceable contract for the sale of land makes the vendor trustee of the land and the vendee trustee of the purchase price.”

THE FORM OF THE FICTION. ASSERTIVE AND ASSUMPTIVE FICTIONS

Gray said that the fictions of the English common law were more “brutal” than those of the Roman law.⁶⁸ By this he did not mean that the English fictions did more violence to the truth than those of the Roman law—the Roman fictions were not lacking in a certain audacity or “brutality” in that respect; he referred to the form of the fiction.

65. *Hohfeld* “Fundamental Legal Conceptions” p. 108.

66. In speaking of the common reproach that the fiction does not indicate the limits of its application; Demogue (in ‘*Les notions fondamentales du droit privé*’ 243) says, “But may the same reproach not be directed against every formula of a technical character? Is there any difference between the formula of the fiction and any other rule of law which does not make apparent at the first glance its armature of interests to be satisfied in a certain order, as for example . . . the rule that possession of personal property is equivalent to title?”

67. Should we, following Professor Underhill Moore, call this “non-institutional obscurity”?

68. *Gray* “Nature and Sources of the Law” (2d ed.) p. 31.

"Fictions have played an important part in the administration of the Law in England, and it is characteristic of the two peoples that the use of fictions in England was bolder, and, if one may say so, more brutal in England than it was in Rome.

Thus, for instance, in Rome the fiction that a foreigner was to be considered as a citizen was applied in this way. It was not directly alleged that the foreigner was a citizen, but the mandate by the praetor to the judge who tried the case was put in the following form: 'If, in case Aulus *had been* a Roman citizen, such a judgment ought to have been rendered, then render such a judgment.' In England the plaintiff alleged a fact which was false, and the courts did not allow the defendant to contradict it."⁶⁹

The Roman fiction, in other words, carried a grammatical acknowledgment of its falsity; the English fiction appeared as a statement of fact; its fictitious character was apparent only to the initiate. The Roman fiction was an assumptive fiction, a fiction taking an "as if" form; the English fiction was (and is) a fiction ordinarily taking an "is" or assertive form.⁷⁰

It might seem at first glance that we were dealing here with something very fundamental. Indeed, it might be argued that an assumptive fiction (an "as if"-fiction) is not a fiction at all. If a court only says that it is dealing with A *as if it were* B, it has stated nothing contrary to the fact.

Yet a closer examination will show that the distinction is one of form merely. The "supposing that" or "as if" construction in the assumptive fiction only constitutes a grammatical concession of that which is known anyway, namely, that the statement is false. When we are dealing with statements which are known to be false it is a matter of indifference whether the author adopts a grammatical construction which concedes this falsity, or makes his statement in the form of a statement of fact.

The peculiar force which the fiction has in rendering easier alterations in the law by appeasing the longing for an appearance of conservatism seems not to be lost by clothing it in the "as if"

69. *Gray*, op. cit. Gray here refers of course to the fiction which takes the form of a procedural pretense. The conception of the fiction underlying this article does not confine the term "fiction" to such pretenses, but would extend it to statements made by courts in their opinions which are not based on the pleadings.

70. It is interesting in this connection to consider the old practice of laying venue under a *videlicet* in which the pleading would take some such form as this, "on the high seas, to wit in London in the Ward of Cheap." See *Scott* "Fundamentals of Procedure in Actions at Law" p. 21. Here we have a fiction which *grammatically* takes an assertive form, and yet which, by its very context, carries as clear an admission of falsity as any grammatical sign could give it.

form. The Roman praetor apparently felt that by framing his innovations in terms of older rules he had secured some justification for them, even though the pretenses involved carried on their face the acknowledgment of their falsity.

Gray apparently saw in this difference in the form of the fiction in Rome and in England some expression of a fundamental contrast in the characteristics of the two peoples. It seems likely, however, that there is a more prosaic explanation for the difference. The dissimilarity of the modes of trial in the two systems of law seems adequate to explain the diversity in the form of the fiction.⁷¹

LEGAL INSTITUTIONS AS FICTIONS

"The oldest and most essential ideas are nearly all, if not all, fictitious. Marriage is a fictitious purchase and sale, the power of a father is a fictitious master's power, adoption is a fictitious fatherhood, in certain respects the last will and testament is (at least sometimes is) a fictitious adoption, legitimation assumes fictitiously a marriage which never existed, etc. It would not therefore be inaccurate to claim that our reality is simply fiction differentiated, and that at bottom all law is reduced to a series of fictions heaped one upon another in successive layers."⁷²

Although this passage reveals a certain philosophic insight, it invites an inference which is exceedingly misleading, namely, that legal institutions may be fictitious. By legal "institutions" I mean the social effects of a legal doctrine as contrasted with the doctrine itself. Thus we may distinguish between the action of trover as an "institution" (the fact of social life that courts take certain action in certain cases) and the intellectual superstructure of this institution, the collection of legal constructions and fictions which courts developed to rationalize and explain their action. The reality of a legal institution, understood in this sense, is in no wise affected by the fact that it may be convenient to describe the institution linguistically in fictitious terms (as in the case of adoption), or by

71. In the Roman procedure (at the time when the praetorian fiction played its rôle) the actual trial of a suit was before a judge, or *judex*, on the basis of a written statement of the case previously drawn up by the praetor. Had the praetor phrased the fiction in the form of a statement of fact, it would seem likely that this would have produced confusion in the trial before the *judex*, which took place out of the presence of the praetor. How would the *judex* have known that the fact alleged was fictitious and was not to be taken seriously if the fiction had not assumed a grammatical form which warned of its falsity? On the other hand, in the English system there was always present at the trial an initiate into the freemasonry of the fiction—the judge, who was able, through proper instructions, to prevent the jury's being misled by the allegations in the pleadings.

72. *Tourtoulon* "Philosophy in the Development of Law" p. 387.

the fact that the institution may have originated historically in the application of some familiar notion to a new purpose (as in the case of the marriage ceremony).⁷³

Maine speaks of adoption as being one of the most important and helpful of fictions, without telling us what is fictitious about adoption.⁷⁴ The social and legal institution of adoption is not a fiction in any ordinary sense. If there is any fiction involved in the idea of adoption it is in one of the following notions. (1) It is convenient to describe the institution by saying that the adopted child is treated *as if he were* a natural child. But this is a mere convenience of linguistic expression. (2) In primitive society, because of the extreme tenacity of the intellectual concepts of the primitive mind, adoption as a social institution probably would not have been possible without some pretense of blood relationship. This is illustrated in the ceremonies which accompany adoption in primitive society, as where the child is dropped through the clothing of the adopting parent in imitation of birth.⁷⁵ (3) The original invention of the notion of adoption involved, probably, an imaginative flight, an exercise of ingenuity, similar to that which attends the birth of a legal fiction. But none of these facts means that adoption, as a social institution existing in present-day society, is a fiction.

One should also guard against the converse sort of error, that of supposing that because there is a social reality back of a fictitious statement, the statement itself is therefore non-fictitious. Professor Sturm protests that the quasi-contract is not a fiction because it represents a social institution, that in such-and-such cases recovery may be had in the courts.⁷⁶ But this does not keep the *term* quasi-con-

73. Upon a somewhat deeper level of discourse, a social or legal institution may be regarded as a fiction in the philosophic sense in which the word "fiction" is used by Vaihinger. In fact (or at least "in fact" if one does not penetrate to a still deeper plane of discourse) we have only an enormous number of individual acts by individual human beings, never taking quite the same form and never having quite the same purpose. To introduce simplicity into this chaos of individual actions, we postulate certain "institutions," we group together certain recurring acts which show a thread of similarity into a conceptual entity which we call an institution. A later age may classify our actions upon an entirely different basis than that we are accustomed to, may see in our conduct an entirely different set of "institutions." Conversely, our classification of our own actions into "institutions" may seem as arbitrary and unreal to a later age, as the concept of "seisin" seems arbitrary and unreal to the modern student of law.

74. "Ancient Law" ch. II.

75. P. J. Hamilton-Grierson "An Example of Legal Make-Believe" (1908) 20 Juridical Rev. 32 and (1909) 21 id. 17. Strangely enough the ceremony of dropping the child through the clothing is performed even when the adopting person is a man.

76. Sturm "Fiktion und Vergleich in der Rechtswissenschaft" p. 47.

tract ("as if"-contract) from being fictional. If it is not felt as a fiction the reason lies in the fact that it is not regarded as containing an element of pretense; it is, in the terminology established earlier in this article, a dead fiction, a term of classification and analysis, merely.

FICTIONS AND LEGAL PRESUMPTIONS

A distinction commonly taken between the fiction and the legal presumption runs something as follows: A fiction assumes something which is known to be false; a presumption (whether conclusive or rebuttable) assumes something which may possibly be true.⁷⁷ This distinction is regarded as being reinforced, as it were, in the case of the rebuttable presumption because such a presumption assumes a fact which *probably* is true.

How valid is this distinction? And, what is more important, how significant is it, assuming that it states at least a partial truth? In attempting an answer to these questions it will be convenient to start with the conclusive presumption.

Now in the first place it is fairly clear, I think, that the conclusive presumption is generally applied in precisely those cases where the fact assumed is false and is known to be false. For example, there is said to be a presumption that the grantee of a gift has accepted it.⁷⁸ In practice the only cases in which this presumption is invoked are cases where the grantee did not know of the gift and hence could not possibly have "accepted" it. Hence, the statement that a conclusive presumption assumes a fact which may be true is at least misleading in that it ignores the circumstance that the occasion to use the conclusive presumption generally arises only in those cases where the fact is known to be false. When the fact is present it may usually be proved and there is no occasion for the presumption.

But this is not always so. Conceivably the presumed fact may be present in reality in a case where the party chooses to rely on the conclusive presumption, either because proof would be difficult or because he does not know whether the fact is present or not.⁷⁹ In such a case does the application of the presumption involve any fiction? I think that it does.

77. *Best* "Presumptions of Law and Fact" sec. 20; *Lecocq* "De la fiction comme procédé juridique" p. 29.

78. *Thompson v. Leach* (1691) 2 Vent. 198.

79. The presumption of "fraudulent intent" on the part of one who has given away his property while insolvent might be invoked by a creditor in a case in which the debtor actually did make the conveyance for the purpose of evading the claims of his creditors.

A conclusive presumption is not a fiction because the fact assumed is false, because in that event it would cease to be a fiction if the fact happened to be true.⁸⁰ The ordinary fiction simply says, "Fact A is present" and would cease to be a fiction if Fact A were in reality present in the case. But the conclusive presumption says, "The presence of Fact X is conclusive proof of Fact A." This statement is false, since we know that Fact X does not "conclusively prove" Fact A. And this statement, that Fact X proves the existence of Fact A, remains false, even though Fact A may by chance be present in a particular case.⁸¹ The conclusive presumption attributes to the facts "an arbitrary effect beyond their natural tendency to produce belief."⁸² It "attaches to any given possibility a degree of certainty to which it normally has no right. It knowingly gives an insufficient proof the value of a sufficient one."⁸³

But what of the rebuttable presumption? Can it clear itself of the charge of being fictitious?

In the first place it should be noted that the difference between the rebuttable presumption and the conclusive presumption may, in some cases, become a matter of degree. Some of our rebuttable presumptions have, in the course of time, gathered about them rules declaring what is sufficient to overcome them. So soon as you have begun to limit and classify those things which will rebut a presumption you are importing into the facts "an arbitrary effect" beyond their natural tendency to produce belief. No presumption can be wholly non-fictitious which is not "freely" rebuttable. To the extent that rebuttal is limited, the prima facie or rebuttable presumption has the same effect as a conclusive presumption.

In the second place, it is clear that a rebuttable presumption will be regarded as establishing a fiction if we feel that the inference

80. *Lecocq* "De la fiction comme procédé juridique" at page 29, contains a remarkable bit of reasoning. He says that it might seem that we ought to say that the presumption is a fiction when the fact assumed is false, and not a fiction when the assumed fact is true. But, he says, this would involve an error, because it would be "anti-juridical" to inquire whether the fact is true or not because the presumption is set up for the express purpose of avoiding that inquiry!

81. A creditor sets aside a gift made by his debtor while insolvent. Now even though the fact is that the debtor actually intended to defraud his creditor in making the conveyance, the pretense involved in the presumption—that this fact is conclusively proved by the circumstance that he was giving away his property while insolvent—remains false.

82. *Best* "Presumptions of Law and Fact" p. 19.

83. *Tourtoulon* "Philosophy in the Development of Law" p. 398. *Tourtoulon* would regard this statement as applying also to the rebuttable presumption.

which underlies it is not supported by common experience. Some courts have applied a prima facie presumption that where a child is injured or killed in the streets the parents must be considered as having been guilty of negligence.⁸⁴ Now, even though this presumption may be rebutted by any pertinent evidence, most of us would not hesitate to say that it contains an element of fiction. We do not feel that the inference it establishes is justified by ordinary experience.

If, therefore, we are to have any hope of escaping fiction in a discussion of presumptions we must narrow our inquiry to the case of the presumption which is freely rebuttable and which establishes an inference justified by ordinary experience. There is a presumption that a deed in the possession of the grantee has been delivered.⁸⁵ The presumption is freely rebuttable; any pertinent evidence may be considered as overcoming it. Furthermore, it may be argued, the presumption establishes an inference which experience and common sense justify; it is based on the fact of social life that deeds in the hands of grantees have usually been delivered. Does such a presumption involve any fiction?

But first it will be legitimate to inquire, if the presumption is so reasonable and so much a matter of common sense, might it not be safe to assume that the judge or jury would have made exactly the same inference without the presumption? In other words, is a presumption which merely states a proposition of common sense a significant rule of law? Does it really affect the administration of justice?

It may be urged in answer to these inquiries that that which seems "reasonable" and a "mere matter of common sense" to the author of the presumption, may not seem so to the agency (the judge or the jury) which applies the presumption. It may be urged that the function of the sort of presumption we are here considering is simply to prevent the judge or jury from departing from the ordinary principles of ratiocination. The law is as much concerned that its agencies shall follow common sense in deciding disputes, as it is that they shall apply legal doctrine correctly. And the presumption may be simply a way of insuring the application of common sense.

If we regard a particular presumption in this light—and I think, incidentally, that the number of those which are entitled to

84. (1927) 75 U. P. Law Rev. 476.

85. 2 *Tiffany* "The Law of Real Property" (2d ed.) p. 1750.

be so regarded is extremely small—then it must be admitted that the presumption would involve no fiction were it not for the fact that we habitually treat the presumption, not as directing a disposition of the case, but as “directing an inference” or as commanding an “act of reasoning.”⁸⁶ Now the presumption may have been the product of a process of inference on the part of the one originally conceiving it. But if the presumption is treated by the judge and jury as a rule of law, it is clear that it is not an “inference” as to them. If I am merely accepting someone else’s ready-made inference, I am not “inferring.” There is then a fiction in the case of any rebuttable presumption in the sense that we ordinarily treat that as an “inference” which is in reality merely obedience to a command. The fiction here relates, not to the subject matter of the presumption, but to its effect in the administration of justice.

These points may perhaps be made clearer by a simile. We may treat the presumption as a lens held before the facts of reality. Now if the lens produces a *distortion* of reality—as in the case of the presumption of negligence where a child is injured in the streets—we do not hesitate to attribute a fictional character to the image produced. On the other hand we may be convinced that a particular lens produces a *true* image of nature. Now if we are willing to attribute to the judge or jury normal vision (ordinary powers of ratiocination) does it not follow that if our lens gives a true picture of reality it must in fact be of plain glass, i. e., produce no alteration at all? On the other hand, if we conceive of our lens as a *corrective* device—if we recognize that we are curing a defect—then there is no fiction *if we recognize that we are changing the image*. But our

86. Abbott, C. J., in *Rex v. Burdett* (1820) 4 B. & Ald. 161, “A presumption of any fact is properly an inferring of that fact from other facts which are known; it is an act of reasoning.” In 5 *Wigmore on “Evidence”* (2d ed.) sec. 2491, the view is taken that a presumption is not an “inference” but merely a rule “attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent.” This, as Dean Wigmore’s own remarks show, is intended as a statement of how we *ought* to regard the presumption, rather than as a factual description of how it is commonly regarded by the profession.

It might be remarked parenthetically that a complete discussion of the presumption would have to distinguish presumptions according to the manner in which they are applied. Some presumptions simply operate to “shift the burden of proof.” In some jurisdictions the same presumptions which “shift the burden of proof” are also presented to the jury as having a probative force to be considered along with the other evidence of the case. (*Wigmore, op. cit.*, p. 452, note 5.) Some presumptions are not applied procedurally at all, but are only intended, apparently, as somewhat cryptic statements of a general principle, as the presumption that every man “intends the normal consequences of his acts.” I have attempted to make my remarks sufficiently general to cover any case of the presumption, however applied.

professional linguistic habits tend to keep us in the paradoxical position of insisting that the lens *does not change* and at the same time of asserting that it is *necessary*—that without it a different result might be reached. We tend to assume, not that we have corrected the vision of the judge or jury by artificial means, but that by a kind of legal miracle we have given normal sight to the astigmatic. We tend to assume what unfortunately cannot be—that the law has a “mandamus to the logical faculty.”⁸⁷

A presumption, if it is to escape the charge of “fiction” must, then, comply with at least three requirements: (1) Be based on an inference justified by common experience. (2) Be freely rebuttable. (3) Be phrased in realistic terms; order, not an “inference,” but a disposition of the case in a certain contingency.

Assuming that a presumption has met all of these requirements has it established its right to be considered wholly non-fictitious? There is a presumption of death where one has been absent, unheard from, for a period of seven years.⁸⁸ It is possible to consider this presumption as meeting all three of the requirements enumerated. The presumption may be regarded as based on an inference warranted by experience. When people have been gone for seven years and have not been heard from *usually* they are dead. The presumption is freely rebuttable. And it may be—though usually it is not—phrased in non-fictitious terms, i. e., not as ordering an “inference” of death but as ordering the judge or jury to treat the case as they would one of death. Does it follow that the presumption establishes a proposition which is wholly non-fictitious, i. e., entirely “true”? It is apparent at once that the “truth” of this presumption is a conventionalized, formalized truth. Why should the period be set at exactly seven years? Why should one disposition of a case be made when the absence is six years and eleven months, and a different disposition be made one month later?

This formal, arbitrary element is very conspicuous in the presumption just mentioned. To some extent it is perhaps inherent in all presumptions of whatever character. A formal rule, no matter how firmly rooted its foundations may be in reality, tends to gather about itself a force not entirely justified by its foundations. It crystallizes and formalizes the truth which it expresses. If the presumption is given any weight at all by the judge or jury, there

87. *Thayer* “A Preliminary Treatise on Evidence” p. 314, note. “The law has no mandamus to the logical faculty; it orders nobody to draw inferences,—common as that mode of expression is.”

88. 5 *Wigmore* on “Evidence” (2d ed.) sec. 2531 (b).

is probably a tendency to give it too much weight.⁸⁹ In the language of the figure adopted previously, no lens is a perfect lens. In correcting a defect of sight, the lens produces its own peculiar distortions and that which was intended merely as a correction is usually an over-correction. In this sense every presumption is perhaps a distortion of reality. But this fact probably does not justify the application of the term "fiction." As has been said previously, we reserve the term "fiction" for those distortions of reality which are outstanding and unusual. And the distortion produced by the formal, imperative quality of the presumption is an inevitable incident of the process of reducing a complex truth to a simple, formal statement.

The close kinship of the ordinary fiction and the presumption is shown by the fact that the two meet upon a common grammatical field in such expressions as "deemed" and "regarded as." "The testator must be deemed to have intended to attach a condition upon his gift." Does this mean, "Conceding that the testator had no such intent in fact, we feel it advisable to treat the case as if that had been his intent"? Or does it mean, "Although the evidence is not clear, we feel justified in inferring that the testator in fact intended to attach a condition on his gift"? In truth probably the statement meant neither of these things—and both. That is to say, the mind of the author of this statement had not reached the state of clarification in which this distinction would become apparent. He probably would have agreed with either interpretation of his meaning. This example indicates, I think, that the mental process in-

⁸⁹ This point may be illustrated by the following case. Two years after the death of Q, X claims Blackacre under a deed now in his possession and signed by Q. The facts show that X never made any claim to the land during the life of Q, and that after the death of Q he had access to Q's papers. X relies on the presumption that a deed in the possession of the grantee has been delivered. Do these facts "rebut" the presumption? Or, what is the same thing, do they prevent its "arising"? Now if the judge in passing on this question is simply weighing the fact of social life, that deeds in the possession of the grantee are usually delivered, against the peculiar circumstances of this case, then he is not using the presumption at all. He is using his own reasoning powers. But if the judge is attributing a special significance to the circumstance that the above-mentioned fact of social life has been incorporated into a rule of law, then the presumption is having an "artificial effect." If the judge is saying to himself, "Deeds in the hands of grantees are usually delivered, and I must remember that this fact has been specifically recognized by the law in a formal presumption," then he is dealing, to some extent, with proofs which are formal and not real. Since the question when a presumption "arises," or, what is the same thing, when it is "rebutted" always involves a certain discretion, it may be said that whenever the presumption has any effect at all, its effect is a formal and artificial one.

involved in the invention of the ordinary fiction is at least a close relation to that involved in the establishment of a presumption, and suggests the possibility that there may be a primitive undifferentiated form of thought which includes both.*

*To be continued.

Presumption
It's the Tool of Legal Fiction

A. Presumption is a word that we must understand in today's world of Legal Fictions.

1. It has become a fact of life.
2. It is imperative that we understand legal presumptions and how the local, state and federal governments and their employees, administrative agencies, and courts use the principles of presumption against not only us, but also each other.
3. A Legal Fiction presumption makes up a lot of work for people to pretend they are doing.

B. Presumption, as used in law, is a conclusion derived from a particular set of facts based on law, rather than on probable reasoning.

1. It is a rule of law which permits a court to assume that a fact is true until such time as there is a preponderance of evidence which disproves or outweighs such presumption.
2. Each presumption is based upon a particular set of apparent facts paired with established laws, logic, or reasoning.
3. There are a number of court cases in which there will be a phrase such as, "the defendant raised the issue but failed to produce any rebutting evidence, the defendant failed to rebut."

C. A presumption is rebuttable in that it can be refuted by factual evidence.

1. What constitutes evidence?
2. We have had hundreds of people talk to us about their IRS problems who have never read the "Federal Rules of Evidence."
3. We have talked to people who are in court with the IRS and have never read the "Federal Rules of Evidence."
4. You can go on the Internet and download a copy of the "Federal Rules of Evidence" or you can order a copy from us. It is important that you read them.

5. If you do not know what actually constitutes evidence and what does not constitute evidence then you are behind the eight ball.
6. The documents that many people try to use as evidence usually are only hearsay at best and can be destroyed by a prosecuting attorney or judge. Where does that leave you?
7. We have seen a lot of documents that people are going to rely upon or have already tried to rely upon and that fall short of the evidence test.
8. Many of those documents consist of pages and pages of unconnected statements.
9. We feel sorry for those who get suckered into buying some kind of document for thousands of dollars that is promised to relive them of all their problems. Then they bring them to us and want us to read and go over what someone else put together for them. We ask them; "show me what you feel are the strongest points and what are the weaker ones in this document", That is when 99 percent of the people will admit that they have not read or understand the document themselves. There is no way they could explain it to anyone except to repeat what someone else has told them.
10. We had an individual who came to us with such a document for which he had paid \$3200.00. It consisted of 32 pages and he wanted us to read over it, but he said we could not have a copy of the document. We read the first paragraph, stopped, and then presented him with several similar documents concerning renouncing Citizenship and Expatriating, which had failed in the past.
 - a. In 1996, Congress passed legislation that allows the Federal Government to collect taxes from expatriates who have renounced their citizenship for the purpose of avoiding taxes (See IRC section 877).
 - b. We know that many people are told that when they pay \$3200.00 for this document and send it to a number of addresses, all their former problems with the IRS are gone, vanished, and those entities will no longer bother them anymore.
11. After reading a couple paragraphs of those types of documents we ask, "what is contained in this document that is specific to you," how is this statement personalized to you and the facts in your situation?

D. Rebuttable presumptions vs. Absolute, Conclusive, or Irrebuttable presumptions.

1. Rebuttable presumptions will stand unless conclusive proof is produced to overcome that presumption.

- a. Example a Marine Sergeant is overseas for a year and comes home to find that his wife has a brand new baby and he decides that he is not going to support someone else's baby. What can he do to prove that baby is not his?
 - b. He can go and get a DNA test for himself and the baby to prove that he was not the father. There would also be several other options.
 - c. Until he comes up with proof that he is not the father he will be presumed to be the father of the baby.
 - d. In other words he will have to have specific documents that pertain to him that are not hearsay and those documents must meet the Federal Rules of Evidence.
2. Conclusive presumptions are those which rules of law and logic dictate that there is no possible way the presumption can be disproved.
- E. Once a presumption is relied on by one party, the other party is allowed to offer evidence to disprove the presumption like the Marine Sergeant did.
1. What a presumption really does is place the obligation of presenting evidence concerning a particular fact on a particular party.
- F. Government is a corporate entity and their court are not courts of common law but corporate government to protect the laws the corporation.
1. Corporations and other commercial entities are legal fictions, which were originally created and set up by men by man-made laws.
 2. A Legal fiction can never become a living soul with a conscience.
- G. One way to begin to rebut and defeat presumptions is by the use of a "Notice."
1. A "Notice" can present declarations and facts to rebut the corporate government's presumption they are bringing against you but only if exhibits are included and presented in a logical manner that conforms with the "Federal Rules of Evidence."
- H. The corporate government administrative entities use the "principle of presumption" to pursue someone, first civilly, which can then turn into a criminal action.

1. Whatever their presumption is, it must be defeated if you are to avoid a judgment against you or, in a criminal case, a conviction.
- I. Prior to various indictments by the Federal Corporate government in the 1930's, we went from, "presumed to be innocent until proven guilty," to being "presumed guilty until you prove yourself innocent."
1. Corporate defense attorney's are only allowed to raise certain specific "patterned in the box defenses" therefore the United States has the highest incarceration rate of people of all countries in the world.
 2. The Law Enforcement Growth Industry is the largest fastest growing industry in the United States of America today.
 3. Warehousing living breathing people is a billion-dollar business.
 4. We have visited a number of jails and we have never seen a legal fiction corporation sitting in a jail.

Presume. To assume beforehand. In a more technical sense, to believe or accept upon probable evidence. *See* Presumption.

Presumed intent. A person is presumed to intend the natural and probable consequences of his voluntary acts. The government is not required in crimes to prove that a defendant intended the precise consequences of his act and his criminal intent can be inferred from his act.

Presumption. An inference in favor of a particular fact. A presumption is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted. *Van Wart v. Cook*, Okl.App., 557 P.2d 1161, 1163. A legal device which operates in the absence of other proof to require that certain inferences be drawn from the available evidence. *Port Terminal & Warehousing Co. v. John S. James Co.*, D.C.Ga., 92 F.R.D. 100, 106.

A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence. A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof. *Calif.Evid.Code*, § 600.

In all civil actions and proceedings not otherwise provided for by Act of Congress or by the Federal Rules of Evidence, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. *Federal Evidence Rule 301*.

See also Disputable presumption; Inference; *Juris et de jure*; Presumptive evidence; *Prima facie*; Raise a presumption.

Commercial law. A presumption means that the trier of fact must find the existence of the fact presumed unless

Inference. In the law of evidence, a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. A logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts. *State v. Hyde*, Mo.App., 682 S.W.2d 103, 106. *Computer Identics Corp. v. Southern Pacific Co.*, C.A.Mass., 756 F.2d 200, 204. Inferences are deductions or conclusions which with reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

See also Reasonable inference rule. *Compare* Presumption.

Inference on inference, rule of. Means that one presumption or inference may not be based upon another. *McManimen v. Public Service Co. of Northern Illinois*, 317 Ill.App. 649, 47 N.E.2d 385.

and until evidence is introduced which would support a finding of its non-existence. U.C.C. § 1-201(31).

Conclusive presumptions. A conclusive presumption is one in which proof of basic fact renders the existence of the presumed fact conclusive and irrebuttable. Such is created when a jury is charged that it must infer the presumed fact if certain predicate facts are established. *People v. Sellers*, 3 Dept., 109 A.D.2d 387, 492 N.Y.S.2d 127, 128. Few in number and often statutory, the majority view is that a conclusive presumption is in reality a substantive rule of law, not a rule of evidence. An example of this type of presumption is the rule that a child under seven years of age is presumed to be incapable of committing a felony. The Federal Evidence Rules (301, 302) and most state rules of evidence are concerned only with rebuttable presumptions. *Compare Rebuttable presumption, below.*

Conflicting presumptions. *See Inconsistent presumptions below.*

Inconsistent presumptions. If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies. Uniform Rules of Evidence. Rule 301(b).

Irrebuttable presumption. *See Conclusive presumptions, above.*

Mandatory presumption. *See Conclusive presumptions, above.*

Permissive presumption. One which allows, but does not require, trier of fact to infer elemental fact from proof by prosecutor of basic one, and which places no burden of any kind on defendant. *State v. Scott*, 8 Ohio App.3d 1, 8 O.B.R. 1, 455 N.E.2d 1363, 1368.

Presumptions of fact. Such are presumptions which do not compel a finding of the presumed fact but which warrant one when the basic fact has been proved. The trend has been to reject the classifications of presumptions of "fact" and presumptions of "law". *See Inference.*

Presumptions of law. A presumption of law is one which, once the basic fact is proved and no evidence to the contrary has been introduced, compels a finding of the existence of the presumed fact. The presumption of law is rebuttable and in most cases the adversary introduces evidence designed to overcome it. The trend has been to reject the classifications of presumptions of "law" and presumptions of "fact."

Procedural presumption. One which is rebuttable, which operates to require production of credible evidence to refute the presumption, after which the presumption disappears. *Maryland Cas. Co. v. Williams*, C.A.Miss., 377 F.2d 389, 394, 35 A.L.R.3d 275.

Rebuttable presumption. A presumption that can be overturned upon the showing of sufficient proof. In general, all presumptions other than conclusive presumptions are rebuttable presumptions. Once evidence tending to rebut the presumption is introduced, the

force of the presumption is entirely dissipated and the party with the burden of proof must come forward with evidence to avoid a directed verdict. *Compare Conclusive presumptions, above.*

Statutory presumption. A presumption, either rebuttable or conclusive, which is created by statute in contrast to a common law presumption; e.g. I.R.C. § 60 (individual's name on tax return is prima facie evidence of his authority to sign return).

Presumption of death. A presumption which arises upon the disappearance and continued absence of a person from his customary location or home for an extended period of time, commonly 7 years, without an apparent reason for such absence. *Magers v. Western Southern Life Ins. Co.*, C.A.Mo., 335 S.W.2d 355.

Presumption of innocence. A hallowed principle of criminal law to the effect that the government has the burden of proving every element of a crime beyond a reasonable doubt and that the defendant has no burden to prove his innocence. It arises at the first stage of the criminal process but it is not a true presumption because the defendant is not required to come forward with proof of his innocence once evidence of guilt is introduced to avoid a directed verdict of guilty.

Presumption of innocence succinctly conveys the principle that no person may be convicted of a crime unless the government carries the burden of proving his guilt beyond a reasonable doubt but it does not mean that no significance at all may be attached to the indictment. *U. S. v. Friday*, D.C.Mich., 404 F.Supp. 1343, 1346.

Presumption of legitimacy. Whenever it is established in an action that a child was born to a woman while she was the lawful wife of a specified man, the party asserting the illegitimacy of the child has the burden of producing evidence and the burden of persuading the trier of fact beyond reasonable doubt that the man was not the father of the child. *Bernheimer v. First Natl. Bank*, 359 Mo. 1119, 225 S.W.2d 745; Model Code of Evidence, Rule 703.

Presumption of survivorship. A presumption of fact, to the effect that one person survived another, applied for the purpose of determining a question of succession or similar matter, in a case where the two persons perished in the same catastrophe, and there are no circumstances extant to show which of them actually died first, except those on which the presumption is founded, viz., differences of age, sex, strength, or physical condition.

Presumption of validity. In patent law, the holder of a patent is entitled to a statutory presumption of validity. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 335, 338, 91 S.Ct. 1434, 1447, 28 L.Ed.2d 788. 35 U.S.C.A. § 282.

Presumptive. Resting on presumption; created by or arising out of presumption; inferred; assumed; supposed; as, "presumptive" damages, evidence, heir, notice, or title.

Presumptive evidence. Prima facie evidence or evidence which is not conclusive and admits of explanation or contradiction; evidence which must be received and

treated as true and sufficient until and unless rebutted by other evidence, i.e., evidence which a statute says shall be presumptive of another fact unless rebutted. *See Presumption; Prima facie evidence.*

Prima facie /práymə féyshiy(iy)/. Lat. At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary. *State ex rel. Herbert v. Whims*, 68 Ohio App. 39, 38 N.E.2d 596, 599, 22 O.O. 110. *See also* Presumption.

Prima facie case. Such as will prevail until contradicted and overcome by other evidence. *Pacific Telephone & Telegraph Co. v. Wallace*, 158 Or. 210, 75 P.2d 942, 947. A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded. *In re Hoagland's Estate*, 126 Neb. 377, 253 N.W. 416.

A prima facie case consists of sufficient evidence in the type of case to get plaintiff past a motion for directed verdict in a jury case or motion to dismiss in a nonjury case; it is the evidence necessary to require defendant to proceed with his case. *White v. Abrams*, C.A.Cal., 495 F.2d 724, 729. Courts use concept of "prima facie case" in two senses: (1) in sense of plaintiff producing evidence sufficient to render reasonable a conclusion in favor of allegation he asserts; this means plaintiff's evidence is sufficient to allow his case to go to jury, and (2) courts use "prima facie" to mean not only that plaintiff's evidence would reasonably allow conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it. *Husbands v. Com. of Pa., D.C.Pa.*, 395 F.Supp. 1107, 1139.

Prima facie evidence. Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient. Evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence. *State v. Haremza*, 213 Kan. 201, 515 P.2d 1217, 1222.

That quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence; once a trier of fact is faced with conflicting evidence, it must weigh the prima facie evidence with all of the other probative evidence presented. *Godesky v. Provo City Corp.*, Utah, 690 P.2d 541, 547. Evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. An inference or presumption of law, affirmative or negative of a fact, in the absence of proof, or until proof can be obtained or produced to overcome the inference.

See also Presumptive evidence.

Legal Fiction in the Regulations
Subpart F-Rules, Regulations and Forms

- A. 601.601 (a) Formulation. (1) Internal revenue rules take various forms. The most important rules are issued as regulations and Treasury decisions prescribed by the Commissioner and approved by the Secretary or his delegate (which secretary and of what department). Other rules may be issued over the signature of the Commissioner or the signature of any other official to whom authority has been delegated, Exhibit A, 1 of 6.
1. Who is this “any other” official that keeps popping up in the regulations? What do these “any other” officials do? How many of these “any other” officials are there? How do you get to be an “any other” official?
 2. Exhibit A, 3 of 6, The purpose of publishing revenue rulings and revenue procedures in the Internal Revenue Bulletin is to promote correct and uniform application of the tax laws by Internal Revenue Service employees. Also, to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statues, treaties, regulations, and statements of service procedures affecting the rights and duties of taxpayers.
 - a. I am sure those employees visit you daily to inform you of all those changes.
 - b. I am also sure you spend most of your days and nights reading those Bulletins.
 - c. Now, how is that for some fine Legal Fiction Regulation writing?
 - d. All anyone should have to do is read that one statement to a Jury and if they believe that statement then, as one victim said “find me guilty because if you’re that stupid I want to be locked up so I don’t have stupid people like you around me.” In case you haven’t figured it out yet your next! Or your kids or grand kids are next and who is going to help them.
- B. Exhibit A, 4 of 6, at the arrow 601.101, The regulations relating to the taxes administered by the service are contained in Title 26 of the Code of Federal Regulations. The regulations administered by the BATF are contained in Title 27 of the CFR.
1. This was such a major Legal Fiction that they finally had to remove it out of
- 601.101 26 CFR (4-1-90 Edition) see Exhibit A, 6 of 6 at the arrow on the right hand side.

C. Exhibit 6 of 6 at the arrow of the first column where it starts with “Generally.” Now read that one sentence 10 times in a row and tell me you are still the same.

1. Could you please locate someone who can explain that one sentence to you? Now it may only take 50 years of looking, but I doubt if you are going to find anyone.

certified as provided in paragraph (d) of § 601.504.

[32 FR 15990, Nov. 22, 1967, as amended at 34 FR 6432, Apr. 12, 1969; 45 FR 7259, Feb. 1, 1980]

§ 601.525 Certification of copies of documents.

The provisions of paragraph (e) of § 601.504 with respect to certification of copies are applicable to a power of attorney or a tax information authorization required to be filed under § 601.522 or § 601.523.

§ 601.526 Revocation of powers of attorney and tax information authorizations.

The revocation of the authority of a representative covered by a power of attorney or tax information authorization filed in an office of the Bureau of Alcohol, Tobacco, and Firearms shall in no case be effective prior to the giving of written notice to the proper official that the authority of such representative has been revoked.

[34 FR 6432, Apr. 12, 1969, as amended at 45 FR 7259, Feb. 1, 1980]

§ 601.527 Other provisions applied to representation in alcohol, tobacco, and firearms activities.

The provisions of paragraph (b) of § 601.505, and of §§ 601.506 through 601.508 of this subpart, as applicable, shall be followed in offices of the Bureau of Alcohol, Tobacco, and Firearms.

[34 FR 6433, Apr. 12, 1969, as amended at 34 FR 14604, Sept. 19, 1969; 45 FR 7259, Feb. 1, 1980]

Subpart F—Rules, Regulations, and Forms

§ 601.601 Rules and regulations.

(a) *Formulation.* (1) Internal revenue rules take various forms. The most important rules are issued as regulations and Treasury decisions prescribed by the Commissioner and approved by the Secretary or his delegate. Other rules may be issued over the signature of the Commissioner or the signature of any other official to whom authority has been delegated. Regulations and Treasury decisions are prepared in the Office of the Chief Counsel. After approval by the Commissioner, regulations and

Treasury decisions are forwarded to the Secretary or his delegate for further consideration and final approval.

(2) Where required by 5 U.S.C. 553 and in such other instances as may be desirable, the Commissioner publishes in the FEDERAL REGISTER general notice of proposed rules (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law). This notice includes:

(i) A statement of the time, place, and nature of public rulemaking proceedings;

(ii) Reference to the authority under which the rule is proposed.

(iii) Either the terms or substance of the proposed rule or a description of the subjects and issues involved.

(3)(i) This subparagraph shall apply where the rules of this subparagraph are incorporated by reference in a notice of hearing with respect to a notice of proposed rule making.

(ii) A person wishing to make oral comments at a public hearing to which this subparagraph applies shall file his written comments within the time prescribed by the notice of proposed rule making (including any extensions thereof) and submit the outline referred to in subdivision (iii) of this subparagraph within the time prescribed by the notice of hearing. In lieu of the reading of a prepared statement at the hearing, such person's oral comments shall ordinarily be limited to a discussion of matters relating to such written comments and to questions and answers in connection therewith. However, the oral comments shall not be merely a restatement of matters the person has submitted in writing. Persons making oral comments should be prepared to answer questions not only on the topics listed in his outline but also in connection with the matters relating to his written comments. Except as provided in paragraph (b) of this section, in order to be assured of the availability of copies of such written comments or outlines on or before the beginning of such hearing, any person who desires such copies should make such a request within the time prescribed in the notice of hearing and shall agree to pay reasonable costs for

copied. Persons who make such a request after the time prescribed in the notice of hearing will be furnished copies as soon as they are available, but it may not be possible to furnish the copies on or before the beginning of the hearing. Except as provided in the preceding sentences, copies of written comments regarding the rules proposed shall not be made available at the hearing.

(iii) A person who wishes to be assured of being heard shall submit, within the time prescribed in the notice of hearing, an outline of the topics he or she wishes to discuss, and the time he or she wishes to devote to each topic. An agenda will then be prepared containing the order of presentation of oral comments and the time allotted to such presentation. A period of 10 minutes will be the time allotted to each person for making his or her oral comments.

(iv) At the conclusion of the presentations of comments of persons listed in the agenda, to the extent time permits, other persons may be permitted to present oral comments provided they have notified, either the Commissioner of Internal Revenue (Attention: CC:LR:T) before the hearing, or the representative of the Internal Revenue Service stationed at the entrance to the hearing room at or before commencement of the hearing, of their desire to be heard.

(v) In the case of unusual circumstances or for good cause shown, the application of rules contained in this subparagraph, including the 10-minute rule in subdivision (iii), above, may be waived.

(vi) To the extent resources permit, the public hearings to which this subparagraph applies may be transcribed.

(b) *Comments on proposed rules*—(1) *In general.* Interested persons are privileged to submit any data, views, or arguments in response to a notice of proposed rule making published pursuant to 5 U.S.C. 553. Further, procedures are provided in paragraph (d)(9) of §601.702 for members of the public to inspect and to obtain copies of written comments submitted in response to such notices. Designations of material as confidential or not to be disclosed, contained in such comments, will not be

accepted. Thus, a person submitting written comments in response to a notice of proposed rule making should not include therein material that he considers to be confidential or inappropriate for disclosure to the public. It will be presumed by the Internal Revenue Service that every written comment submitted to it in response to a notice of proposed rule making is intended by the person submitting it to be subject in its entirety to public inspection and copying in accordance with the procedures of paragraph (d)(9) of §601.702. The name of any person requesting a public hearing and hearing outlines described in paragraph (a)(3)(iii) of this section are not exempt from disclosure.

(2) *Effective date.* This paragraph (b) applies only to comments submitted in response to notices of proposed rule making of the Internal Revenue Service published in the FEDERAL REGISTER after June 5, 1974.

(c) *Petition to change rules.* Interested persons are privileged to petition for the issuance, amendment, or repeal of a rule. A petition for the issuance of a rule should identify the section or sections of law involved; and a petition for the amendment or repeal of a rule should set forth the section or sections of the regulations involved. The petition should also set forth the reasons for the requested action. Such petitions will be given careful consideration and the petitioner will be advised of the action taken thereon. Petitions should be addressed to the Commissioner of Internal Revenue, Attention: CC:LR:T, Washington, DC 20224. However, in the case of petitions to amend the regulations pursuant to subsection (c)(4)(A)(viii) or (5)(A)(i) of section 23 or former section 44C, follow the procedure outlined in paragraph (a) of §1.23-6.

(d) *Publication of rules and regulations*—(1) *General.* All Internal Revenue Regulations and Treasury decisions are published in the FEDERAL REGISTER and in the Code of Federal Regulations. See paragraph (a) of §601.702. The Treasury decisions are also published in the weekly Internal Revenue Bulletin and the semiannual Cumulative Bulletin. The Internal Revenue Bulletin is the authoritative instrument of

the Commissioner for the announcement of official rulings, decisions, opinions, and procedures, and for the publication of Treasury decisions, Executive orders, tax conventions, legislation, court decisions, and other items pertaining to internal revenue matters. It is the policy of the Internal Revenue Service to publish in the Bulletin all substantive and procedural rulings of importance or general interest, the publication of which is considered necessary to promote a uniform application of the laws administered by the Service. Procedures set forth in Revenue Procedures published in the Bulletin which are of general applicability and which have continuing force and effect are incorporated as amendments to the Statement of Procedural Rules. It is also the policy to publish in the Bulletin all rulings which revoke, modify, amend, or affect any published ruling. Rules relating solely to matters of internal practices and procedures are not published; however, statements of internal practices and procedures affecting rights or duties of taxpayers, or industry regulation, which appear in internal management documents, are published in the Bulletin. No unpublished ruling or decision will be relied on, used, or cited by any officer or employee of the Internal Revenue Service as a precedent in the disposition of other cases.

(2) *Objectives and standards for publication of Revenue Rulings and Revenue Procedures in the Internal Revenue Bulletin*—(i) (a) A *Revenue Ruling* is an official interpretation by the Service that has been published in the Internal Revenue Bulletin. Revenue Rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned.

(b) A *Revenue Procedure* is a statement of procedure that affects the rights or duties of taxpayers or other members of the public under the Code and related statutes or information that, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge.

(ii) (a) The Internal Revenue Bulletin is the authoritative instrument of the

Commissioner of Internal Revenue for the publication of official rulings and procedures of the Internal Revenue Service, including all rulings and statements of procedure which supersede, revoke, modify, amend, or affect any previously published ruling or procedure. The Service also announces in the Bulletin the Commissioner's acquiescences and nonacquiescences in decisions of the U.S. Tax Court (other than decisions in memorandum opinions), and publishes Treasury decisions, Executive orders, tax conventions, legislation, court decisions, and other items considered to be of general interest. The Assistant Commissioner (Technical) administers the Bulletin program.

(b) The Bulletin is published weekly. In order to provide a permanent reference source, the contents of the Bulletin are consolidated semiannually into an indexed Cumulative Bulletin. The Bulletin Index-Digest System provides a research and reference guide to matters appearing in the Cumulative Bulletins. These materials are sold by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(iii) The purpose of publishing revenue rulings and revenue procedures in the Internal Revenue Bulletin is to promote correct and uniform application of the tax laws by Internal Revenue Service employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, regulations, and statements of Service procedures affecting the rights and duties of taxpayers. Therefore, issues and answers involving substantive tax law under the jurisdiction of the Internal Revenue Service will be published in the Internal Revenue Bulletin, except those involving:

(a) Issues answered by statute, treaty, or regulations;

(b) Issues answered by rulings, opinions, or court decisions previously published in the Bulletin;

(c) Issues that are of insufficient importance or interest to warrant publication;

- 601.505 Requirements for changing representation.
 601.506 Notices to be given to recognized representatives; delivery of refund checks to recognized representatives.
 601.507 Evidence required to substantiate facts alleged in conferences.
 601.508 Contest between representatives of a taxpayer.
 601.509 Power of attorney or tax information authorization not required in cases docketed in the Tax Court of the United States.

REQUIREMENTS FOR ALCOHOL, TOBACCO, AND FIREARMS ACTIVITIES

- 601.521 Requirements for conference and representation in conference.
 601.522 Power of attorney.
 601.523 Tax information authorization.
 601.524 Execution and filing powers of attorney and tax information authorizations.
 601.525 Certification of copies of documents.
 601.526 Revocation of powers of attorney and tax information authorizations.
 601.527 Other provisions applied to representation in alcohol, tobacco, and firearms activities.

Subpart F—Rules, Regulations, and Forms

- 601.601 Rules and regulations.
 601.602 Tax forms and instructions.

Subpart G—Records (Note)

- 601.701 Publicity of information.
 601.702 Publication and public inspection.

Subpart H—Tax Counseling for the Elderly

- 601.801 Purpose and statutory authority.
 601.802 Cooperative agreements.
 601.803 Program operations and requirements.
 601.804 Reimbursements.
 601.805 Miscellaneous administrative provisions.
 601.806 Solicitation of applications.

Subpart J—OMB Control Numbers Under the Paperwork Reduction Act

- 601.9000 OMB control numbers for the statement of procedural rules.

AUTHORITY: 5 U.S.C. 301 and 552, unless otherwise noted.

SOURCE: 32 FR 15990, Nov. 22, 1967, unless otherwise noted.

NOMENCLATURE CHANGE NOTE: In Part 601 the terms "Assistant Regional Commissioner (Alcohol, Tobacco and Firearms)" or "Regional Director" shall mean the "special agent in charge" or the "regional regulatory

administrator in the Bureau of Alcohol, Tobacco and Firearms". For further explanation, see 41 FR 44038, Oct. 6, 1976.

Subpart A—General Procedural Rules

§ 601.101 Introduction.

(a) *General.* The Internal Revenue Service is a bureau of the Department of the Treasury under the immediate direction of the Commissioner of Internal Revenue. The Commissioner has general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue. The Internal Revenue Service is the agency by which these functions are performed. Within an internal revenue district the internal revenue laws are administered by a district director of internal revenue. The Director, Foreign Operations District, administers the internal revenue laws applicable to taxpayers residing or doing business abroad, foreign taxpayers deriving income from sources within the United States, and taxpayers who are required to withhold tax on certain payments to nonresident aliens and foreign corporations, provided the books and records of those taxpayers are located outside the United States. For purposes of these procedural rules any reference to a district director or a district office includes the Director, Foreign Operations District, or the District Office, Foreign Operations District, if appropriate. Generally, the procedural rules of the Service are based on the Internal Revenue Code of 1939 and the Internal Revenue Code of 1954, and the procedural rules in this part apply to the taxes imposed by both Codes except to the extent specifically stated or where the procedure under one Code is incompatible with the procedure under the other Code. Reference to sections of the Code are references to the Internal Revenue Code of 1954, unless otherwise expressly indicated.

(b) *Scope.* This part sets forth the procedural rules of the Internal Revenue Service respecting all taxes administered by the Service, and supersedes the previously published statement (28 CFR (1949 ed., Part 300-End) Parts 600 and 601) with respect to such procedural rules. Subpart A provides a de-

scriptive statement of the general course and method by which the Service's functions are channeled and determined, insofar as such functions relate generally to the assessment, collection, and enforcement of internal revenue taxes. Certain provisions special to particular taxes are separately described in Subpart D of this part. Conference and practice requirements of the Internal Revenue Service are contained in Subpart E of this part. Specific matters not generally involved in the assessment, collection, and enforcement functions are separately described in Subpart B of this part. A description of the rule making functions of the Department of the Treasury with respect to internal revenue tax matters is contained in Subpart F of this part. The procedural rules with respect to distilled spirits, wines, beer, cigars, cigarettes, cigarette papers and tubes, and certain firearms are described in Subpart C of this part. Subpart G of this part relates to matters of official record in the Internal Revenue Service and the extent to which records and documents are subject to publication or open to public inspection. This part does not contain a detailed discussion of the substantive provisions pertaining to any particular tax or the procedures relating thereto, and for such information it is necessary that reference be made to the applicable provisions of law and the regulations promulgated thereunder. The regulations relating to the taxes administered by the Service are contained in Title 26 of the Code of Federal Regulations. The regulations administered by the Bureau of Alcohol, Tobacco and Firearms are contained in Title 27 of the Code of Federal Regulations. See § 601.301.

(c) *Application to Bureau of Alcohol, Tobacco and Firearms.* This part sets forth most of the procedural rules for the Bureau of Alcohol, Tobacco and Firearms. However, some of its procedural rules have been transferred to Part 71 of Title 27 of the Code of Federal Regulations (a portion of the Code of Federal Regulations exclusively devoted to alcohol, tobacco, firearms, and explosives matters). As used in this part, with regard to the administration and enforcement of the laws

applicable to distilled spirits, wines, beer, cigars, cigarettes, cigarette papers and tubes, firearms, and explosives, the terms "assistant regional commissioner", "Commissioner", and "Chief Counsel" shall be construed as meaning respectively "regional regulatory administrator", "Director", and "Chief Counsel", the Bureau of Alcohol, Tobacco and Firearms. The term "internal revenue region" or "region" when used in connection with documents filed with, or matters handled by, a regional regulatory administrator, shall mean an Alcohol, Tobacco and Firearms Region. The seven ATF regions are listed in Appendix A to Subpart C, 27 CFR Part 71.

(38 FR 4955, Feb. 23, 1973 and 41 FR 20880, May 21, 1976, as amended at 45 FR 7251, Feb. 1, 1980; 49 FR 36498, Sept. 18, 1984)

§ 601.102 Classification of taxes collected by the Internal Revenue Service.

(a) *Principal divisions.* Internal revenue taxes fall generally into the following principal divisions:

- (1) Taxes collected by assessment.
 → (2) Taxes collected by means of revenue stamps.

(b) *Assessed taxes.* Taxes collected principally by assessment fall into the following two main classes:

(1) Taxes within the jurisdiction of the U.S. Tax Court. These include:

(i) Income and profits taxes imposed by Chapters 1 and 2 of the 1939 Code and taxes imposed by subtitle A of the 1954 Code, relating to income taxes.

(ii) Estate taxes imposed by Chapter 3 of the 1939 Code and Chapter 11 of the 1954 Code.

(iii) Gift tax imposed by Chapter 4 of the 1939 Code and Chapter 12 of the 1954 Code.

(iv) The tax on generation-skipping transfers imposed by Chapter 13 of the 1954 Code.

(v) Taxes imposed by Chapters 41 through 44 of the 1954 Code.

(2) Taxes not within the jurisdiction of the U.S. Tax Court. Taxes not imposed by Chapter 1, 2, 3, or 4 of the 1939 Code or Subtitle A or Chapter 11 or 12 of the 1954 Code are within this class, such as:

- (i) Employment taxes.

SUBCHAPTER H—INTERNAL REVENUE PRACTICE

PART 600—[RESERVED]

PART 601—STATEMENT OF PROCEDURAL RULES

Subpart A—General Procedural Rules

- Sec.
- 601.101 Introduction.
 - 601.102 Classification of taxes collected by the Internal Revenue Service.
 - 601.103 Summary of general tax procedure.
 - 601.104 Collection functions.
 - 601.105 Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.
 - 601.106 Appeals functions.
 - 601.107 Criminal investigation functions.
 - 601.108 Review of overpayments exceeding \$200,000.
 - 601.109 Bankruptcy and receivership cases.

Subpart B—Rulings and Other Specific Matters

- 601.201 Rulings and determinations letters.
- 601.202 Closing agreements.
- 601.203 Offers in compromise.
- 601.204 Changes in accounting periods and in methods of accounting.
- 601.205 Tort claims.
- 601.206 Certification required to obtain reduced foreign tax rates under income tax treaties.

Subpart C—[Reserved]

Subpart D—Provisions Special to Certain Employment Taxes

- 601.401 Employment taxes.

Subpart E—Conference and Practice Requirements

- 601.501 Scope of rules; definitions.
- 601.502 Recognized representative.
- 601.503 Requirements of power of attorney, signatures, fiduciaries and Commissioner's authority to substitute other requirements.
- 601.504 Requirements for filing power of attorney.
- 601.505 Revocation, change of representation and substitution or delegation of representative.
- 601.506 Notices to be given to recognized representative; direct contact with taxpayer; delivery of a check drawn on the United States Treasury to recognized representative.
- 601.507 Evidence required to substantiate

facts alleged by a recognized representative.

- 601.508 Dispute between recognized representatives of a taxpayer.
- 601.509 Power of attorney not required in cases docketed in the Tax Court of the United States.

REQUIREMENTS FOR ALCOHOL, TOBACCO, AND FIREARMS ACTIVITIES

- 601.521 Requirements for conference and representation in conference.
- 601.522 Power of attorney.
- 601.523 Tax information authorization.
- 601.524 Execution and filing powers of attorney and tax information authorizations.
- 601.525 Certification of copies of documents.
- 601.526 Revocation of powers of attorney and tax information authorizations.
- 601.527 Other provisions applied to representation in alcohol, tobacco, and firearms activities.

Subpart F—Rules, Regulations, and Forms

- 601.601 Rules and regulations.
- 601.602 Tax forms and instructions.

Subpart G—Records (Note)

- 601.701 Publicity of information.
- 601.702 Publication and public inspection.

Subpart H—Tax Counseling for the Elderly

- 601.801 Purpose and statutory authority.
- 601.802 Cooperative agreements.
- 601.803 Program operations and requirements.
- 601.804 Reimbursements.
- 601.805 Miscellaneous administrative provisions.
- 601.806 Solicitation of applications.

AUTHORITY: 5 U.S.C. 301 and 552, unless otherwise noted.

SOURCE: 32 FR 15990, Nov. 22, 1967, unless otherwise noted.

Subpart A—General Procedural Rules

§ 601.101 Introduction.

(a) *General.* The Internal Revenue Service is a bureau of the Department of the Treasury under the immediate direction of the Commissioner of Internal Revenue. The Commissioner has general superintendence of the assessment and collection of all taxes imposed by any law providing internal

revenue. The Internal Revenue Service is the agency by which these functions are performed. Within an internal revenue district the internal revenue laws are administered by a district director of internal revenue. The Director, Foreign Operations District, administers the internal revenue laws applicable to taxpayers residing or doing business abroad, foreign taxpayers deriving income from sources within the United States, and taxpayers who are required to withhold tax on certain payments to nonresident aliens and foreign corporations, provided the books and records of those taxpayers are located outside the United States. For purposes of these procedural rules any reference to a district director or a district office includes the Director, Foreign Operations District, or the District Office, Foreign Operations District, if appropriate. Generally, the procedural rules of the Service are based on the Internal Revenue Code of 1939 and the Internal Revenue Code of 1954, and the procedural rules in this part apply to the taxes imposed by both Codes except to the extent specifically stated or where the procedure under one Code is incompatible with the procedure under the other Code. Reference to sections of the Code are references to the Internal Revenue Code of 1954, unless otherwise expressly indicated.

(b) *Scope.* This part sets forth the procedural rules of the Internal Revenue Service respecting all taxes administered by the Service, and supersedes the previously published statement (26 CFR (1949 ed., Part 300-End) Parts 600 and 601) with respect to such procedural rules. Subpart A provides a descriptive statement of the general course and method by which the Service's functions are channeled and determined, insofar as such functions relate generally to the assessment, collection, and enforcement of internal revenue taxes. Certain provisions special to particular taxes are separately described in Subpart D of this part. Conference and practice requirements of the Internal Revenue Service are contained in Subpart E of this part. Specific matters not generally involved in the assessment, collection, and enforcement functions are separately described in Subpart B of this part. A de-

scription of the rule making functions of the Department of the Treasury with respect to internal revenue tax matters is contained in Subpart F of this part. Subpart G of this part relates to matters of official record in the Internal Revenue Service and the extent to which records and documents are subject to publication or open to public inspection. This part does not contain a detailed discussion of the substantive provisions pertaining to any particular tax or the procedures relating thereto, and for such information it is necessary that reference be made to the applicable provisions of law and the regulations promulgated thereunder. The regulations relating to the taxes administered by the Service are contained in Title 26 of the Code of Federal Regulations.

[38 FR 4955, Feb. 23, 1973 and 41 FR 20880, May 21, 1976, as amended at 45 FR 7251, Feb. 1, 1980; 49 FR 36498, Sept. 18, 1984; T.D. 8685, 61 FR 58008, Nov. 12, 1996]

§ 601.102 Classification of taxes collected by the Internal Revenue Service.

(a) *Principal divisions.* Internal revenue taxes fall generally into the following principal divisions:

- (1) Taxes collected by assessment.
- (2) Taxes collected by means of revenue stamps.

(b) *Assessed taxes.* Taxes collected principally by assessment fall into the following two main classes:

(1) Taxes within the jurisdiction of the U.S. Tax Court. These include:

(i) Income and profits taxes imposed by Chapters 1 and 2 of the 1939 Code and taxes imposed by subtitle A of the 1954 Code, relating to income taxes.

(ii) Estate taxes imposed by Chapter 3 of the 1939 Code and Chapter 11 of the 1954 Code.

(iii) Gift tax imposed by Chapter 4 of the 1939 Code and Chapter 12 of the 1954 Code.

(iv) The tax on generation-skipping transfers imposed by Chapter 13 of the 1954 Code.

(v) Taxes imposed by Chapters 41 through 44 of the 1954 Code.

(2) Taxes not within the jurisdiction of the U.S. Tax Court. Taxes not imposed by Chapter 1, 2, 3, or 4 of the 1939 Code or Subtitle A or Chapter 11 or 12

The Fictional Regulations

- A. Here is just a small listing of some of the regulations from title 26. Read the Description and then the Location of Enforcement Regulations from the CFR Index book. Exhibit A.

- B. As you see many of the Enforcement Regulations are found in title 27 CFR part 70, so Exhibit B is that section of the CFR.
 - 1. We have chosen the 1998 Edition to include here for several reasons.
 - 2. After 1998, when Congress passed the TRRA of '98 the Department of Treasury and IRS has had to start making a number of changes to the Regulations.
 - 3. If you look at page 762 of these keys at the bottom of the first column is the Authority for these Regulations
 - a. We see 5 USC and 26 USC but what authority is missing? Title 27.
 - b. It seems like nothing in part 70 pertains to assessment or enforcement under Title 27 only Title 26.
 - 4. As you read this section you will realize it is packed with a lot of information. We could spend hours going over this information on an audio tape, however, it is more important that you read and understand the regulations and how they are being applied or misapplied in your specific situation.

Title 26	Description	Location of Enforcement Regulations
6020	<i>Returns prepared for or executed by Secretary</i>	27 CFR Parts 53, 70
6201	<i>Assessment authority</i>	27 CFR Part 70
6203	<i>Method of assessment</i>	27 CFR Part 70
6212	<i>Notice of deficiency</i>	No Regulation
6213	<i>Restrictions applicable to; deficiencies, petition to Tax Court</i>	No Regulation
6214	<i>Determinations by Tax Court</i>	No Regulation
6215	<i>Assessment of deficiency found by Tax Court</i>	No Regulation
6301	<i>Collection authority</i>	27 CFR Parts 24, 25, 53, 250, 270, 275
6303	<i>Notice and demand for tax</i>	27 CFR Parts 53, 70
6321	<i>Lien for taxes</i>	27 CFR Part 70
6331	<i>Levy and distraint</i>	27 CFR Part 70
6332	<i>Surrender of property subject to levy</i>	27 CFR Part 70
6420	<i>Gasoline used on farms</i>	No Regulation
6601	<i>Interest on underpayment, nonpayment, or extensions for payment, of tax</i>	27 CFR Part 70, 170, 194, 296
6651	<i>Failure to file tax return or to pay tax</i>	27 CFR Parts 24, 25, 70, 194
6671	<i>Rules for application of assessable penalties</i>	27 CFR Part 70
6672	<i>Failure to collect and pay over tax, or attempt to evade or defeat tax</i>	27 CFR Part 70
6701	<i>Penalties for adding and abetting understatement of tax liability</i>	27 CFR Part 70
6861	<i>Jeopardy assessments of income, estate, and gift taxes</i>	No Regulation
6902	<i>Provisions of special application to transferees</i>	No Regulation
7201	<i>Attempt to evade or defeat tax</i>	No Regulation
7203	<i>Willful failure to file return, supply information, or pay tax</i>	No Regulation
7206	<i>Fraud and false statements</i>	No Regulation
7207	<i>Fraudulent returns, statements and other documents</i>	27 CFR Part 70
7210	<i>Failure to obey summons</i>	No Regulation
7212	<i>Attempts to interfere with administration of internal revenue laws</i>	27 CFR Parts 170, 270, 275, 290, 295, 296
7342	<i>Penalty for refusal to permit entry, or examination</i>	27 CFR Parts 24, 25, 170, 270, 275, 290, 295, 296
7343	<i>Definition of term "person"</i>	No Regulation
7344	<i>Extended application of penalties relating to officers of Treasury Department</i>	No Regulation
7401	<i>Authorization (judicial proceedings)</i>	27 CFR Part 70
7402	<i>Jurisdiction of district courts</i>	No Regulation
7403	<i>Action to enforce lien or to subject property to payment of tax</i>	27 CFR Part 70
7454	<i>Burden of proof in fraud, foundation manager, and transferee cases</i>	No Regulation
7601	<i>Canvass of districts for taxable persons and objects</i>	27 CFR Part 70
7602	<i>Examination of books and witnesses</i>	27 CFR Parts 70, 170, 296
7603	<i>Service of summons</i>	27 CFR Part 70
7604	<i>Enforcement of summons</i>	27 CFR Part 70
7605	<i>Time and place of examination</i>	27 CFR Part 70
7608	<i>Authority of internal revenue enforcement officers</i>	27 CFR Parts 70, 170, 296

Exhibit A

Subpart F—Application of Section 6423, Internal Revenue Code of 1954, as Amended, to Refund or Credit of Tax on Distilled Spirits, Wines, and Beer

GENERAL

- 70.501 Meaning of terms.
- 70.502 Applicability to certain credits or refunds.
- 70.503 Ultimate burden.
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CLAIM PROCEDURE

- 70.506 Execution and filing of claim.
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PENALTIES

- 70.509 Penalties.

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- 70.601 Meaning of terms.

PAYMENTS

- 70.602 Circumstances under which payment may be made.

CLAIMS PROCEDURES

- 70.603 Execution and filing of claims.
- 70.604 Record of inventory to support claims.
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- 70.606 Claimant to furnish proof.
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DESTRUCTION OF LIQUORS

- 70.609 Supervision.

Subpart H—Rules, Regulations and Forms

- 70.701 Rules and regulations.
- 70.702 Forms and instructions.

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- 70.801 Publicity of information.
- 70.802 Rules for disclosure of certain specified matters.
- 70.803 Requests or demands for disclosure in testimony and in related matters.

AUTHORITY: 5 U.S.C. 301 and 552; 26 U.S.C. 4181, 4182, 5146, 5203, 5207, 5275, 5367, 5415, 5504, 5555, 5684(a), 5741, 5761(b), 5802, 6020, 6021, 6064, 6102, 6155, 6159, 6201, 6203, 6204, 6301, 6303, 6311, 6313, 6314; 6321, 6323, 6325, 6326, 6331-6343, 6401-6404, 6407, 6416, 6423, 6501-6503, 6511, 6513, 6514.

6532, 6601, 6602, 6611, 6621, 6622, 6651, 6653, 6656-6658, 6665, 6671, 6672, 6701, 6723, 6801, 6862, 6863, 6901, 7011, 7101, 7102, 7121, 7122, 7207, 7209, 7214, 7304, 7401, 7403, 7406, 7423, 7424, 7425, 7426, 7429, 7430, 7432, 7502, 7503, 7505, 7506, 7513, 7601-7606, 7608-7610, 7622, 7623, 7653, 7805.

SOURCE: T.D. ATF-6, 38 FR 32445, Nov. 26, 1973, unless otherwise noted.

Subpart A—Scope

§ 70.1 General.

(a) The regulations in Subparts C, D, and E of this part set forth the procedural and administrative rules of the Bureau of Alcohol, Tobacco and Firearms for:

(1) The issuance and enforcement of summonses, examination of books of account and witnesses, administration of oaths, entry of premises for examination of taxable objects, granting of rewards for information, canvass of regions for taxable objects and persons, and authority of ATF officers.

(2) The use of commercial banks for payment of excise taxes imposed by 26 U.S.C. Subtitles E and F.

(3) The preparing or executing of returns; deposits; payment on notice and demand; assessment; abatements, credits and refunds; limitations on assessment; limitations on credit or refund; periods of limitation in judicial proceedings; interest; additions to tax, additional amounts, and assessable penalties; enforced collection activities; authority for establishment, alteration, and distribution of stamps, marks, or labels; jeopardy assessment of alcohol, tobacco, and firearms taxes, and registration of persons paying a special tax.

(4) Distilled spirits, wines, beer, tobacco products, cigarette papers and tubes, firearms, ammunition, and explosives.

(b) The regulations in Subpart F of this part relate to the limitations imposed by 26 U.S.C. 6423, on the refund or credit of tax paid or collected in respect to any article of a kind subject to a tax imposed by Part I, Subchapter A of Chapter 51, I.R.C., or by any corresponding provision of prior internal revenue laws.

(c) The regulations in Subpart G of this part implement 26 U.S.C. 5064, which permits payments to be made by

the United States for amounts equal to the internal revenue taxes paid or determined and customs duties paid on distilled spirits, wines, and beer, previously withdrawn, that were lost, made unmarketable, or condemned by a duly authorized official as a result of disaster, vandalism, or malicious mischief. This subpart applies to disasters or other specified causes of loss, occurring on or after February 1, 1979. This subpart does not apply to distilled spirits, wines, and beer manufactured in Puerto Rico and brought into the United States.

[T.D. ATF-376, 61 FR 31031, June 19, 1996]

§70.2 Forms prescribed.

(a) The Director is authorized to prescribe all forms required by this part. All of the information called for in each form shall be furnished as indicated by the headings on the form and the instructions on or pertaining to the form. In addition, information called for in each form shall be furnished as required by this part.

(b) Requests for forms should be mailed to the ATF Distribution Center, P.O. Box 5950, Springfield, Virginia 22153-5950.

[T.D. ATF-376, 61 FR 31031, June 19, 1996]

Subpart B—Definitions

§70.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meaning ascribed in this section. Words in the plural form shall include the singular, and vice versa, and words imparting the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude things not enumerated which are in the same general class.

ATF officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) authorized to perform any function relating to the administration or enforcement of this part.

Bureau. The Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Washington, DC 20226.

CFR. The Code of Federal Regulations.

Chief, Tax Processing Center. The ATF officer principally responsible for administering regulations in this part concerning special (occupational) tax, and also responsible for filing tax liens and issuing third-party levies, and for disbursing money due to taxpayers under the provisions of 26 U.S.C. enforced and administered by the Bureau.

Commercial bank. A bank, whether or not a member of the Federal Reserve System, which has access to the Federal Reserve Communications System (FRCS) or Fedwire. The "FRCS" or "Fedwire" is a communications network that allows Federal Reserve System member banks to effect a transfer of funds for their customers (or other commercial banks) to the Treasury Account at the Federal Reserve Bank of New York.

Delegate. Any officer, employee, or agency of the Department of the Treasury authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the delegation order.

Director. The Director, Bureau of Alcohol, Tobacco and Firearms, the Department of the Treasury, Washington, DC.

Electronic fund transfer or EFT. Any transfer of funds effected by a taxpayer's commercial bank, either directly or through a correspondent banking relationship, via the Federal Reserve Communications System (FRCS) or Fedwire to the Treasury Account at the Federal Reserve Bank of New York.

Enforced collection. Collection of taxes when a taxpayer neglects or refuses to pay voluntarily. Includes such administrative measures as liens and levies.

Levy. The taking of property by seizure and sale or by collection of money due to the debtor, such as wages.

Lien. A charge upon real or personal property for the satisfaction of some debt or performance of an obligation.

Person. An individual, a trust, estate, partnership, association or other unincorporated organization, fiduciary,

company, or corporation, or the District of Columbia, a State, or a political subdivision thereof (including a city, county, or other municipality).

Provisions of 26 U.S.C. enforced and administered by the Bureau. Sections 4181 and 4182 of the Internal Revenue Code of 1986 (the Code), as amended; subchapters F and G of chapter 32 of the Code, insofar as they relate to activities administered and enforced with respect to sections 4181 and 4182 of the Code; subtitle E of the Code; and subtitle F of the Code as it relates to any of the foregoing.

Regional director (compliance). The ATF regional official principally responsible for administering regulations in this part concerning commodity taxes imposed by the provisions of 26 U.S.C. enforced and administered by the Bureau, and for collecting tax by levy (other than third-party levy).

Secretary. The Secretary of the Treasury or designated delegate.

Seizure. The act of taking possession of property to satisfy a tax liability or by virtue of an execution.

Special agent in charge. The principal official responsible for the ATF criminal enforcement program within an ATF district.

Treasury Account. The Department of the Treasury's General Account at the Federal Reserve Bank of New York.

U.S.C. The United States Code.

(Aug. 16, 1954, Ch. 736, 68A Stat. 775 (26 U.S.C. 6301); June 29, 1956, Ch. 462, 70 Stat. 391 (26 U.S.C. 6301))

[T.D. ATF-48, 43 FR 13535, Mar. 31, 1978; 44 FR 55841, Sept. 28, 1979, as amended by T.D. ATF-77, 46 FR 3002, Jan. 13, 1981; T.D. ATF-301, 55 FR 47608, Nov. 14, 1990; T.D. ATF-331, 57 FR 40327, Sept. 3, 1992; T.D. ATF-378, 61 FR 29955, June 13, 1996]

Subpart C—Discovery of Liability and Enforcement of Laws

EXAMINATION AND INSPECTION

§ 70.21 Canvass of regions for taxable persons and objects.

Each regional director (compliance) shall, to the extent deemed practicable, cause officers or employees under the regional director's supervision and control to proceed, from time to time, through the region and

inquire after and concerning all persons therein who may be liable to pay any tax, imposed under provisions of 26 U.S.C. enforced and administered by the Bureau, and all persons owning or having the care and management of any objects with respect to which such tax is imposed.

[T.D. ATF-331, 57 FR 40327, Sept. 3, 1992]

§ 70.22 Examination of books and witnesses.

(a) *In general.* For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any tax imposed under provisions of 26 U.S.C. enforced and administered by the Bureau (including any interest, additional amount, addition to the tax, or civil penalty) or the liability at law or in equity of any transferee or fiduciary of any person in respect of any such tax, or collecting any such liability, any authorized officer or employee of the Bureau may examine any books, papers, records or other data which may be relevant or material to such inquiry; and take such testimony of the person concerned, under oath, as may be relevant to such inquiry.

(b) *Summonses.* For the purposes described in paragraph (a) of this section the officers and employees of the Bureau designated in paragraph (c) of this section are authorized to summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of accounts containing entries relating to the business of the person liable for tax or required to perform the act, or any person deemed proper, to appear before a designated officer or employee of the Bureau at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. The officers and employees designated in paragraph (c) of this section may designate any other employee of the Bureau as the individual before whom a person summoned

pursuant to 26 U.S.C. 7602 shall appear. Any such other employee, when so designated in a summons, is authorized to take testimony under oath of the person summoned and to receive and examine books, papers, records, or other data produced in compliance with the summons. The authority to issue a summons may not be redelegated. See § 70.302 of this part for rules concerning payments to certain persons who are summoned to give information to the Bureau under 26 U.S.C. 7602 and this section.

(c) *Persons who may issue summonses.* The following officers and employees of the Bureau are authorized to issue summonses pursuant to 26 U.S.C. 7602:

(1) Regional director (compliance), and

(2) Office of Inspection: Assistant Director, Deputy Assistant Director, and regional inspectors.

(Aug. 16, 1954, Chapter 736, 68A Stat. 901; (26 U.S.C. 7602))

[T.D. ATF-6, 38 FR 32445, Nov. 26, 1973, as amended by T.D. ATF-42, 42 FR 8367, Feb. 10, 1977; T.D. ATF-301, 55 FR 47608, Nov. 14, 1990; T.D. ATF-331, 57 FR 40328, Sept. 3, 1992]

§ 70.23 Service of summonses.

(a) *In general.* A summons issued under 26 U.S.C. 7602 shall be served by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode. The certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

(b) *Persons who may serve summonses.* The following officers and employees of the Bureau are authorized to serve a summons issued under 26 U.S.C. 7602: ~~X~~

(1) The officers and employees designated in paragraph (c) of § 70.22; and

(2) Chiefs, field operations, area supervisors, inspectors, regional audit managers and auditors, Compliance Operations; special agents, Internal Affairs; and all special agents, Law Enforcement. The authority to serve a summons may be redelegated only by

the Assistant Director, Office of Inspection, and regional directors (compliance), to officers and employees under their jurisdiction.

(68A Stat. 902, as amended (26 U.S.C. 7603); 26 U.S.C. 7805 (68A Stat. 917), 27 U.S.C. 205 (49 Stat. 981 as amended), 18 U.S.C. 926 (82 Stat. 959), and sec. 38, Arms Export Control Act (22 U.S.C. 2778, 90 Stat. 744), 27 U.S.C. 205, 22 U.S.C. 2778, 26 U.S.C. 7602, and 5 U.S.C. 301)

[T.D. ATF-6, 38 FR 32445, Nov. 26, 1973, as amended by T.D. ATF-48, 43 FR 13531, Mar. 31, 1978; T.D. ATF-201, 50 FR 12533, Mar. 29, 1985; T.D. ATF-249, 52 FR 5961, Feb. 27, 1987; T.D. ATF-301, 55 FR 47608, Nov. 14, 1990]

§ 70.24 Enforcement of summonses.

(a) *In general.* Whenever any person summoned under 26 U.S.C. 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, application may be made to the judge of the district court or to a U.S. magistrate for the district within which the person so summoned resides or is found for an attachment against him as for a contempt.

(b) *Persons who may apply for an attachment.* The officers and employees of the Bureau designated in paragraph (c) of § 70.22 are authorized to apply for an attachment as provided in paragraph (a) of this section. The authority to apply for an attachment for the enforcement of a summons may not be redelegated.

(68A Stat. 902, as amended (26 U.S.C. 7604))

[T.D. ATF-6, 38 FR 32445, Nov. 26, 1973; 38 FR 33767, Dec. 7, 1973]

§ 70.25 Special procedures for third-party summonses.

(a) When the Bureau summons the records of persons defined by 26 U.S.C. 7609(a)(3) as "third-party record-keepers", the person about whom information is being gathered must be notified in advance, except when:

(1) The summons is served on the person about whom information is being gathered, or any officer or employee of such person, or

(2) The summons is served to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(3) The summons does not identify the person with respect to whose liability the summons is issued (a "John Doe" summons issued under the provisions of 26 U.S.C. 7609(f)), or

(4) The Director petitions, and the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying or production of records.

(b) Within 3 days of the day on which the summons was served, the notice required by paragraph (a) of this section shall be served upon the person entitled to notice, or mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, left with the person summoned. No examination of any records required to be produced under a summons as to which notice is required under paragraph (a) of this section may be made:

(1) Before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in this paragraph, or

(2) Where a proceeding under paragraph (c) of this section was begun within the 20-day period referred to in that paragraph and the requirements of paragraph (c) of this section have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(c) If the person about whom information is being gathered has been given notice, that person has the right to institute, until and including the 20th day following the day such notice was served on or mailed, by certified or registered mail, to such notified person, a proceeding to quash the summons. During the time the validity of the summons is being litigated, the statutes of limitation are suspended under 26 U.S.C. 7609(e). Title 26 U.S.C. 7609 does not restrict the authority under 26 U.S.C. 7602 (or under any other provision of law) to examine records

and witnesses without serving a summons and without giving notice of an examination.

(26 U.S.C. 7609)

[T.D. ATF-301, 55 FR 47608, Nov. 14, 1990]

§ 70.26 Third-party recordkeepers.

(a) *Definitions*—(1) *Accountant*. A person is an "accountant" under 26 U.S.C. 7609(a)(3)(F) for purposes of determining whether that person is a third-party recordkeeper if the person is registered, licensed, or certified under State law as an accountant.

(2) *Attorney*. A person is an "attorney" under 26 U.S.C. 7609(a)(3)(E) for purposes of determining whether that person is a third-party recordkeeper if the person is admitted to the bar of a State or the District of Columbia.

(3) *Credit cards*—(i) *Person extending credit through credit cards*. The term "person extending credit through credit cards or similar devices" under 26 U.S.C. 7609(a)(3)(C) generally includes any person who issues a credit card. It does not include a seller of goods or services that honors credit cards issued by other parties but does not extend credit on the basis of credit cards or similar devices issued by itself.

(ii) [Reserved]

(iii) *Similar devices to credit cards*. An object is a "similar device" to a credit card under 26 U.S.C. 7609(a)(3)(C) only if it is physical in nature, such as a coupon book, a charge plate, or a letter of credit. Thus, a person who extends credit by requiring credit customers to sign sales slips without requiring use of physical objects issued by that person is not a third-party recordkeeper under 26 U.S.C. 7609(a)(3)(C).

(b) *When third-party recordkeeper status arises*. A person is a "third-party recordkeeper" with respect to a given set of records only if the person made or kept the records in the person's capacity as a third-party recordkeeper. Thus, for instance, an accountant is not a third-party recordkeeper (by reason of being an accountant) with respect to the accountant's records of a sale of property by the accountant to another person. Similarly, a credit card issuer is not a third-party recordkeeper (by reason of being a person extending credit through the use of credit

cards or similar devices) with respect to:

(1) Records relating to noncredit card transactions, such as a cash sale by the issuer to a holder of the issuer's credit card; or

(2) Records relating to transactions involving the use of another issuer's credit card.

(c) *Duty of third-party recordkeeper—*

(1) *In General.* Upon receipt of a summons, the third-party recordkeeper ("recordkeeper") must begin to assemble the summoned records. The recordkeeper must be prepared to produce the summoned records on the date which the summons states the records are to be examined regardless of the institution or anticipated institution of a proceeding to quash or the recordkeeper's intervention (as allowed under 26 U.S.C. 7609(a)(3)(C)) into a proceeding to quash.

(2) *Disclosing recordkeepers not liable—*

(i) *In general.* A recordkeeper, or an agent or employee thereof, who makes a disclosure of records as required by this section, in good faith reliance on the "Certificate of the Secretary" (as defined in paragraph (c)(2)(ii) of this section) or an order of a court requiring production of records, will not be liable for such disclosure to any customer, or to any party with respect to whose tax liability the summons was issued, or to any other person.

(ii) *Certificate of the Secretary.* The Director may issue to the recordkeeper a "Certificate of the Secretary" stating both:

(A) That the 20-day period, within which a notified person may institute a proceeding to quash the summons has expired; and

(B) That no proceeding has been properly instituted within that period. The Director may also issue a "Certificate of the Secretary" to the recordkeeper if the taxpayer, with respect to whose tax liability the summons was issued, expressly consents to the examination of the records summoned.

(3) *Reimbursement of costs.* Recordkeepers may be entitled to reimbursement of their costs of assembling and preparing to produce summoned records, to the extent allowed by 26 U.S.C. 7610, even if the summons ultimately is not enforced.

(26 U.S.C. 7609)

[T.D. ATF-301, 55 FR 47608, Nov. 14, 1990]

§ 70.27 Right to intervene; right to institute a proceeding to quash.

(a) *Notified person.* Under 26 U.S.C. 7609(a), the Bureau must give a notice of summons to any person, other than the person summoned, who is identified in the description of the books and records contained in the summons in order that such person may contest the right of the Bureau to examine the summoned records by instituting a proceeding to quash the summons. Thus, if the Bureau issues a summons to a bank requesting checking account records of more than one person all of whom are identified in the description of the records contained in the summons, then all such persons are notified persons entitled to notice under 26 U.S.C. 7609(a). Therefore, if the Bureau requests the records of a joint bank account of A and B, both of whom are named in the summons, then both A and B are notified persons entitled to notice under 26 U.S.C. 7609(a).

(b) *Right to institute a proceeding to quash—*(1) *In general.* Title 26 U.S.C. 7609(b) grants a notified person the right to institute a proceeding to quash the summons in the United States district court for the district within which the person summoned resides or is found. Jurisdiction of the court is based on 26 U.S.C. 7609(b). The act of filing a petition in district court does not in and of itself institute a proceeding to quash under 26 U.S.C. 7609(b)(2). Rather, the filing of the petition must be coupled with notice as required by 26 U.S.C. 7609(b)(2)(B).

(2) *Elements of institution of a proceeding to quash.* In order to institute a proceeding to quash a summons, the notified person (or the notified person's agent, nominee, or other person acting under the direction or control of the notified person) must, not later than the 20th day following the day the notice of the summons was served on or mailed to such notified person:

(i) File a petition to quash in the name of the notified person in a district court having jurisdiction.

(ii) Notify the Bureau by sending a copy of that petition by registered or certified mail to the Bureau employee

and office designated to receive the copy in the notice of summons that was given to the notified person, and

(iii) Notify the recordkeeper by sending to that recordkeeper by registered or certified mail a copy of the petition. Failure to give timely notice to either the summoned party or the Bureau in the manner described in this paragraph means that the notified person has failed to institute a proceeding to quash and the district court has no jurisdiction to hear the proceeding. Thus, for example, if the notified person mails a copy of the petition to the summoned person but not to the designated Bureau employee and office, the notified person has failed to institute a proceeding to quash. Similarly, if the notified person mails a copy of such petition to the summoned person, but instead of sending a copy of the petition by registered or certified mail to the designated employee and office, the notified person gives the designated employee and office the petition by some other means, the notified person has failed to institute a proceeding to quash.

(3) *Failure to institute a proceeding to quash.* If the notified person fails to institute a proceeding to quash within 20 days following the day the notice was served on or mailed to such notified person, the Bureau may examine the summoned records following the 23rd day after notice of the summons was served on or mailed to the notified person (see 26 U.S.C. 7609(d)(1)).

(c) *Presumption no notice has been mailed.* Title 26 U.S.C. 7609(b)(2)(B) permits a notified person to institute a proceeding to quash by filing a petition in district court and notifying both the Bureau and the summoned person. Unless the notified person has notified both the Bureau and the summoned person in the appropriate manner, the notified person has failed to institute a proceeding to quash. If the copy of the petition has not been delivered to the summoned person or the person and office designated to receive the notice on behalf of the Bureau within 3 days from the close of the 20-day period allowed to institute a proceeding to quash, it is presumed that the notification has not been timely mailed.

(26 U.S.C. 7609)

[T.D. ATF-301, 55 FR 47609, Nov. 14, 1990]

§ 70.28 Summonses excepted from 26 U.S.C. 7609 procedures.

(a) *In aid of the collection of certain liabilities—(1) In general.* Title 26 U.S.C. 7609(c)(2)(B) contains an exception to the general notice requirement when a summons is issued to a third-party recordkeeper. That section excepts summonses issued in aid of the collection of the liability of any person against whom an assessment has been made or judgment rendered or the liability at law or in equity of any transferee of such a person.

(2) *Examples.* Examples of summonses referred to in paragraph (a)(1) of this section are:

(i) Summonses issued to determine the amount held in a bank in the name of a person against whom an assessment has been made or judgment rendered;

(ii) Summonses issued to enforce transferee liability for a tax which has been assessed.

(b) *Numbered account (or similar arrangement).* Under 26 U.S.C. 7609(c)(2), a summons issued solely to determine the identity of a person having a numbered account (or similar arrangement) with a bank or other institution is excepted from the requirements of 26 U.S.C. 7609. A “numbered account (or similar arrangement)” under 26 U.S.C. 7609(c)(2) is an account through which a person may authorize transactions solely through the use of a number, symbol, code name, or other device not involving the disclosure of the person’s identity. A “person having a numbered account (or similar arrangement)” includes the person who opened the account and any person authorized to use the account or to receive records or statements concerning it.

(26 U.S.C. 7609)

[T.D. ATF-301, 55 FR 47610, Nov. 14, 1990]

§ 70.29 Suspension of statutes of limitations.

(a) *Suspension while a proceeding under 26 U.S.C. 7609(b) is pending.* Under 26 U.S.C. 7609(e)(1), the statutes of limitations of 26 U.S.C. 6501 and 6531 are

suspended if a notified person with respect to whose liability a summons is issued, or the notified person's agent, nominee, or other person acting under the direction or control of the notified person, takes any action as provided in 26 U.S.C. 7609(b).

(1) *Agent, nominee, etc.* A person is a notified person's agent, nominee, or other person acting under the direction or control of a notified person for purposes of 26 U.S.C. 7609(e) if the person with respect to whose liability the summons is issued has the ability in fact or at law to cause the agent, etc., to take the actions permitted under 26 U.S.C. 7609(b). Thus, in the case of a corporation, direction or control by the notified person may exist even though less than 50 percent of the voting power of the corporation is held by the notified person.

(2) *Period during which a proceeding, etc., is pending.* Under 26 U.S.C. 7609(e), the statute of limitations shall be suspended for the period during which a proceeding and any appeals regarding the enforcement of such summons is pending. This period begins on the date the petition to quash the summons is filed in district court. The period continues until all appeals are disposed of, or until the expiration of the period in which an appeal may be taken or a request for a rehearing may be made. Full compliance, partial compliance, and noncompliance have no effect on the suspension provisions. The periods of limitations which are suspended under 26 U.S.C. 7609(e) are those which apply to the taxable periods to which the summons relates.

(3) *Taking of action as provided in 26 U.S.C. 7609(b).* Title 26 U.S.C. 7609(b) allows intervention by a notified person as a matter of right upon compliance with the Federal Rules of Civil Procedure. The phrase "takes any action as provided in subsection (b)", found in 26 U.S.C. 7609(e), includes any intervention whether or not 26 U.S.C. 7609(b) is specifically mentioned in the order of the court allowing intervention. The phrase also includes the fulfilling of only part of the requirements of 26 U.S.C. 7609(b)(2), relating to the right of a person to institute a proceeding to quash. Thus, for instance, if a notified person notifies a person who has been

summoned by sending a copy of the petition by registered or certified mail but does not mail a copy of that notice to the appropriate person and office under 26 U.S.C. 7609(b)(2)(B), the notified person has taken an action under 26 U.S.C. 7609(e).

(b) *Suspension after 6 months of service of summons.* In the absence of the resolution of the third-party recordkeeper's response to the summons described in 26 U.S.C. 7609(c) or the summoned party's response to a summons described in 26 U.S.C. 7609(f) the running of any period of limitations under 26 U.S.C. 6501 or under 26 U.S.C. 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in 26 U.S.C. 7609(b)) shall be suspended for the period:

(1) Beginning on the date which is 6 months after the service of such summons, and

(2) Ending with the final resolution of such response.

(26 U.S.C. 7609)

[T.D. ATF-301, 55 FR 47610, Nov. 14, 1990]

§ 70.30 Time and place of examination.

(a) *Time and place.* The time and place of examination pursuant to the provisions of 26 U.S.C. 7602 shall be such time and place as may be fixed by an officer or employee of the Bureau and as are reasonable under the circumstances. The date fixed for appearance before an officer or employee of the Bureau shall not be less than 10 days from the date of the summons.

(b) *Restrictions on examination of taxpayer.* No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless an authorized internal revenue or Bureau officer, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(68A Stat. 902, as amended (26 U.S.C. 7605))

[T.D. ATF-6, 38 FR 32445, Nov. 26, 1973. Redesignated by T.D. ATF-301, 55 FR 47606, Nov. 14, 1990]

§ 70.31 Entry of premises for examination of taxable objects.

(a) *General.* Any officer of the Bureau may, in the performance of his duty, enter in the daytime any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects and also enter at night any such building or place, while open, for a similar purpose.

(b) *Distilled spirits plants.* Any officer of the Bureau may, at all times, as well by night as by day, enter any plant or any other premises where distilled spirits are produced or rectified, or structure or place used in connection therewith for storage or other purposes; to make examination of the materials, equipment and facilities thereon; and make such gauges and inventories as he deems necessary. Whenever any Bureau officer, having demanded admittance, and having declared his name and office, is not admitted to such premises by the proprietor or other person having charge thereof, he may at all times, use such force as is necessary for him to gain entry to such premises.

(c) *Authority to break up grounds.* Any officer of the Bureau, and any person acting in his aid, may break up the ground on any part of a distilled spirits plant, or any other premises where spirits are produced or rectified, or any ground adjoining or near to such plant or premises, or any wall or partition thereof, or belonging thereto, or other place, to search for any pipe, cock, private conveyance, or utensil; and, upon finding any such pipe or conveyance leading therefrom or thereto, to break up any ground, house, wall, or other place through or into which such pipe or other conveyance leads, and to break or cut away such pipe or other conveyance, and turn any cock, or to determine whether such pipe or other conveyance conveys or conceals any spirits, mash, wort, or beer, or other liquor, from the sight or view of the officer, so as to prevent or hinder him from taking a true account thereof.

(68A Stat. 903, 72 Stat. 1357 (26 U.S.C. 7606, 5203))

[T.D. ATF-6, 38 FR 32445, Nov. 26, 1973. Redesignated by T.D. ATF-301, 55 FR 47606, Nov. 14, 1990]

§ 70.32 Examination of records and objects.

Any officer of the Bureau may enter, during business hours, the premises of any regulated establishment for the purpose of inspecting and examining any records, articles, or other objects required to be kept by such establishment under 18 U.S.C. chapter 40 or 44, or provisions of 26 U.S.C. enforced and administered by the Bureau, or regulations issued pursuant thereto.

(68A Stat. 715, as amended, 903, 72 Stat. 1348, 1361, 1373, 1381, 1390, 1391, 1395, 82 Stat. 231, as amended, 84 Stat. 955; (26 U.S.C. 5741, 7606, 5146, 5207, 5275, 5367, 5415, 5504, 5555, 18 U.S.C. 923, 843))

[T.D. ATF-331, 57 FR 40328, Sept. 3, 1992]

§ 70.33 Authority of enforcement officers of the Bureau.

Any special agent or other officer of the Bureau by whatever term designated, whom the Director or a special agent in charge charges with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of the laws administered and enforced by the Bureau pertaining to commodities subject to regulation by the Bureau, the enforcement of which such officers are responsible, may perform the following functions:

(a) Carry firearms;

(b) Execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under authority of the United States;

(c) In respect to the performance of such duty, make arrests without warrant for any offense against the United States committed in his presence, or for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony; and

(d) In respect to the performance of such duty, make seizures of property subject to forfeiture to the United States.

(53 Stat. 1291, 62 Stat. 840, 68 Stat. 848, as amended, 72 Stat. 1429, as amended, 82 Stat. 233, as amended, 84 Stat. 956 (49 U.S.C. 782, 18 U.S.C. 3615, 22 U.S.C. 1934, 26 U.S.C. 7608, 18 U.S.C. 924, 844); 26 U.S.C. 7805 (68A Stat. 917), 27 U.S.C. 205 (49 Stat. 981 as amended), 18 U.S.C. 926 (82 Stat. 959), and sec. 38, Arms Export Control Act (22 U.S.C. 2778, 90 Stat. 744))

[T.D. ATF-6, 38 FR 32445, Nov. 26, 1973, as amended by T.D. ATF-48, 43 FR 13531, Mar. 31, 1978. Redesignated by T.D. ATF-301, 55 FR 47606, Nov. 14, 1990]

§ 70.34 Listing by regional directors (compliance) of taxable objects owned by nonresidents of ATF regions.

Whenever there are in any ATF region any articles subject to tax, which are not owned or possessed by, or under the care or control of, any person within such region, and of which no list has been transmitted to the regional director (compliance), as required by law or by regulations prescribed pursuant to law, the regional director (compliance), or other authorized ATF officer or employee, shall enter the premises where such articles are situated, shall make such inspection of the articles as may be necessary, and shall make lists of the same according to the forms prescribed. Such list, being subscribed by the regional director (compliance) or other authorized ATF officer or employee, shall be sufficient lists of such articles for all purposes.

(26 U.S.C. 6021)

[T.D. ATF-301, 55 FR 47610, Nov. 14, 1990]

GENERAL POWERS AND DUTIES

§ 70.40 Authority to administer oaths and certify.

The officers and employees of the Bureau designated in paragraph (b) of § 70.23 are authorized to administer such oaths or affirmations and to certify to such papers as may be necessary under the tax laws administered by the Bureau, the Federal Alcohol Administration Act, or regulations issued thereunder, except that the authority to certify shall not be construed as applying to those papers or documents the certification of which is authorized by separate order or directive. The authority to administer oaths and to cer-

tify may be redelegated only by the Assistant Director, Office of Inspection, and special agents in charge, to officers and employees under their jurisdiction.

(68A Stat. 904 (26 U.S.C. 7622))

[T.D. ATF-6, 38 FR 32445, Nov. 26, 1973, as amended by T.D. ATF-48, 44 FR 55841, Sept. 28, 1979. Redesignated by T.D. ATF-301, 55 FR 47606, Nov. 14, 1990]

§ 70.41 Rewards for information relating to violations of tax laws administered by the Bureau.

(a) *In general.* A special agent in charge may approve such reward as he deems suitable for information that leads to the detection and punishment of any person guilty of violating any tax law administered by the Bureau or conniving at the same. The rewards provided for by 26 U.S.C. 7623 are limited in their aggregate to the sum appropriated therefor and shall be paid only in cases not otherwise provided for by law.

(b) *Eligibility to file claim for reward—*

(1) *In general.* Any person, other than certain present or former federal employees (see paragraph (b)(2) of this section), who submits, in the manner set forth in paragraph (d) of this section, information relating to the violation of tax laws administered and enforced by the Bureau, is eligible to file a claim for reward under 26 U.S.C. 7623.

(2) *Federal employees.* No person who was an officer or employee of the Department of the Treasury at the time he came into possession of information relating to violations of tax laws administered by the Bureau, or at the time he divulged such information, shall be eligible for reward under 26 U.S.C. 7623 and this section. Any other federal employee, or former federal employee, is eligible to file a claim for reward if the information submitted came to his knowledge other than in the course of his official duties.

(3) *Deceased informants.* A claim for reward may be filed by an executor, administrator, or other legal representative on behalf of a deceased informant if, prior to his death, the informant was eligible to file a claim for such reward under 26 U.S.C. 7623 and this section. Certified copies of the letters testamentary, letters of administration,

or other similar evidence must be annexed to such a claim for reward on behalf of a deceased informant in order to show the authority of the legal representative to file the claim for reward.

(c) *Amount and payment of reward.* All relevant factors, including the value of the information furnished in relation to the facts developed by the investigation of the violation, shall be taken into account by a SAC in determining whether a reward shall be paid, and, if so, the amount thereof. The amount of a reward shall represent what the special agent in charge deems to be adequate compensation in the particular case, normally not to exceed 10 percent of the additional taxes, penalties, and fines which are recovered as a result of the information. No reward, however, shall be paid with respect to any additional interest that may be collected. Payment of a reward will be made as promptly as the circumstances of the case permit, but generally not until the taxes, penalties, or fines involved have been collected. However, the informant may waive any claim for reward with respect to an uncollected portion of the taxes, penalties, or fines involved, in which case the claim may be immediately processed. No person is authorized under these regulations to make any offer, or promise, or otherwise to bind a special agent in charge with respect to the payment of any reward or the amount thereof.

(d) *Submission of information.* Persons desiring to claim rewards under the provisions of 26 U.S.C. 7623 and this section may submit information relating to violations of tax laws administered by the Bureau, in person, to the Office of the Director, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226 or to the office of a special agent in charge. If the information is submitted in person, either orally or in writing, the name and official title of the person to whom it is submitted and the date on which it is submitted must be included in the formal claim for reward.

(e) *Anonymity.* No unauthorized person shall be advised of the identity of an informant.

(f) *Filing claim for reward.* An informant who intends to claim a reward

under 26 U.S.C. 7623 should notify the person to whom he submits his information of such intention, and must file a formal claim, signed with his true name, as soon after submission of the information as practicable. If other than the informant's true name was used in furnishing the information, the claimant must include with his claim satisfactory proof of his identity as that of the informant. Claim for reward under the provisions of 26 U.S.C. 7623 shall be made on Form 25. Form 25 should be obtained from offices where claims for reward may be submitted: These are offices of SAC and the Office of the Director, Washington, DC 20226.

(68A Stat. 904 (26 U.S.C. 7623); 26 U.S.C. 7805 (68A Stat. 917), 27 U.S.C. 205 (49 Stat. 981 as amended), 18 U.S.C. 926 (82 Stat. 959), and sec. 38, Arms Export Control Act (22 U.S.C. 2778, 90 Stat. 744))

[T.D. ATF-6, 38 FR 32445, Nov. 26, 1973, as amended by T.D. ATF-48, 43 FR 13531, Mar. 31, 1978; 44 FR 55841, Sept. 28, 1979. Redesignated by T.D. ATF-301, 55 FR 47606, Nov. 14, 1990; T.D. ATF-312, 56 FR 31085, July 9, 1991]

§ 70.42 Returns prepared or executed by regional directors (compliance) or by other ATF officers.

(a) *Preparation of returns—(1) General.* If any person required by provisions of 26 U.S.C. enforced and administered by the Bureau or by the regulations prescribed thereunder to make a return fails to make such return, it may be prepared by the regional director (compliance), the Chief, Tax Processing Center, or other authorized ATF officer provided the person required to make the return consents to disclose all information necessary for the preparation of such return. The return upon being signed by the person required to make it shall be received by the regional director (compliance) or the Chief, Tax Processing Center, as the return of such person.

(2) *Responsibility of person for whom return is prepared.* A person for whom a return is prepared in accordance with paragraph (a)(1) of this section shall for all legal purposes remain responsible for the correctness of the return to the same extent as if the return had been prepared by such person.

(b) *Execution of returns—(1) General.* If any person required by provisions of 26

U.S.C. enforced and administered by the Bureau or by the regulations prescribed thereunder to make a return fails to make a return at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the regional director (compliance), the Chief, Tax Processing Center, or other authorized ATF officer shall make such return from the officer's own knowledge and from such information as the officer can obtain through testimony or otherwise.

(2) *Status of returns.* Any return made in accordance with paragraph (b)(1) of this section and subscribed by the regional director (compliance), the Chief, Tax Processing Center, or other authorized ATF officer shall be prima facie good and sufficient for all legal purposes.

(c) *Cross references.* (1) For provisions that the return executed by a regional director (compliance), the Chief, Tax Processing Center, or other authorized ATF officer will not start the running of the period of limitations on assessment and collection, see 26 U.S.C. 6501(b)(3) and § 70.222(b) of this part.

(2) For additions to the tax and additional amounts for failure to file returns, see section 6651 of the Internal Revenue Code.

(3) For additions to the tax for failure to pay tax, see sections 5684, 5761, and 6653 of the Internal Revenue Code.

(4) For failure to make deposit of taxes or overstatement of deposit claims, see section 6656 of the Internal Revenue Code.

(5) For an additional penalty for tendering a bad check or money order, see section 6657 of the Internal Revenue Code.

(6) For certain failures to pay tax with respect to cases pending under Title 11 of the United States Code, see section 6658 of the Internal Revenue Code.

(7) For failure to supply identifying numbers, see section 6676 of the Internal Revenue Code.

(8) For penalties for aiding and abetting understatement of tax liability, see section 6701 of the Internal Revenue Code.

(9) For criminal penalties for willful failure to make returns, see sections

7201, 7202, and 7203 of the Internal Revenue Code.

(10) For criminal penalties for willfully making false or fraudulent returns, see sections 7206 and 7207 of the Internal Revenue Code.

(11) For authority to examine books and witnesses, see section 7602 of the Internal Revenue Code and § 70.22.

(26 U.S.C. 6020)

[T.D. ATF-251, 52 FR 19314, May 22, 1987. Re-designated and amended by T.D. ATF-301, 55 FR 47606 and 47610, Nov. 14, 1990]

Subpart D—Collection of Excise and Special (Occupational) Tax

COLLECTION—GENERAL PROVISIONS

§ 70.51 Collection authority.

The taxes imposed by provisions of 26 U.S.C. enforced and administered by the Bureau shall be collected by regional directors (compliance), the Chief, Tax Processing Center, and other ATF officials designated by the Director of the Bureau.

(26 U.S.C. 6301)

[T.D. ATF-301, 55 FR 47611, Nov. 14, 1990]

§ 70.52 Signature presumed authentic.

An individual's name signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement or other document was actually signed by that individual.

(26 U.S.C. 6064)

[T.D. ATF-301, 55 FR 47611, Nov. 14, 1990]

RECEIPT OF PAYMENT

§ 70.61 Payment by check or money order.

(a) *Authority to Receive*—(1) *General.* (i) Regional director(s) (compliance) or the Chief, Tax Processing Center, may accept checks drawn on any bank or trust company incorporated under the laws of the United States or under the laws of any State, Territory, or possession of the United States, or money orders in payment for internal revenue taxes, provided such checks or money orders are collectible in U.S. currency

at par, and subject to the further provisions contained in this section. The Director may accept such checks or money orders in payment for internal revenue stamps (authorized under Subtitle E of the Internal Revenue Code or any provision of Subtitle F which relates to Subtitle E) to the extent and under the conditions prescribed in paragraph (a)(2) of this section. A check or money order in payment for internal revenue taxes or internal revenue stamps should be made payable to the Bureau of Alcohol, Tobacco and Firearms. A check or money order is payable at par only if the full amount thereof is payable without any deduction for exchange or other charges. As used in this section, the term "money order" means:

(A) U.S. postal, bank, express, or telegraph money order; and

(B) Money order issued by a domestic building and loan association (as defined in section 7701(a)(19) of the Internal Revenue Code) or by a similar association incorporated under the laws of a possession of the United States;

(C) A money order issued by such other organization as the Director may designate; and

(D) A money order described in paragraph (a)(1)(ii) of this section in cases therein described. However, the regional director(s) (compliance) or the Chief, Tax Processing Center, may refuse to accept any personal check whenever there is good reason to believe that such check will not be honored upon presentment.

(ii) An American citizen residing in a country with which the United States maintains direct exchange of money orders on a domestic basis may pay his/her tax by postal money order of such country. For a list of such countries, see section 171.27 of the Postal Manual of the United States.

(iii) If one check or money order is remitted to cover two or more persons' taxes, the remittance should be accompanied by a letter of transmittal clearly identifying—

(A) Each person whose tax is to be paid by the remittance;

(B) The amount of the payment on account of each such person; and

(C) The kind of tax paid.

(2) *Payment for internal revenue stamps—In general.* The Director may accept checks and money orders described in paragraph (a)(1) of this section, in payment for internal revenue stamps authorized under Subtitle E of the Internal Revenue Code or under any provision of Subtitle F which relates to Subtitle E. However, the Director may refuse to accept any personal check whenever there is good reason to believe that the check will not be honored upon presentment.

(3) *Payment of tax on distilled spirits, wine, beer, tobacco products, pistols, revolvers, firearms (other than pistols and revolvers), shells and cartridges; proprietor in default.* Where a check or money order tendered in payment for taxes on distilled spirits, wine or beer products (imposed under Chapter 51 of the Internal Revenue Code), or tobacco products (imposed under chapter 52 of the Internal Revenue Code), or pistols, revolvers, firearms (other than pistols and revolvers), shells and cartridges (imposed under chapter 32 of the Internal Revenue Code) is not paid on presentment, or where a taxpayer is otherwise in default in payment of such taxes, any remittance for such taxes made during the period of such default, and until the regional director(s) (compliance) or the Chief, Tax Processing Center, finds that the revenue will not be jeopardized by the acceptance of personal checks, shall be in cash, or shall be in the form of a certified, cashier's, or treasurer's check, drawn on any bank or trust company incorporated under the laws of the United States, or under the laws of any State or possession of the United States, or a money order as described in paragraph (a)(1) of this section.

(b) *Checks or money orders not paid—*

(1) *Ultimate liability.* The person who tenders any check (whether certified or uncertified, cashier's, treasurer's, or other form of check) or money order in payment for taxes is not released from liability until the check or money order is paid; and, if the check or money order is not duly paid, the person shall also be liable for all legal penalties and additions, to the same extent as if such check or money order had not been tendered. For the penalty in case a check or money order is not

duly paid, see section 6657 of the Internal Revenue Code. For assessment of the amount of a check or money order not duly paid see section 6201(a)(2)(B) of the Internal Revenue Code.

(2) *Liability of banks and others.* If any certified, treasurer's, or cashier's check (or other guaranteed draft) or money order is not duly paid, the United States shall have a lien for the amount of such check upon all assets of the bank or trust company on which drawn or for the amount of such money order upon the assets of the issuer thereof. The unpaid amount shall be paid out of such assets in preference to any other claims against such bank or issuer except the necessary costs and expenses of administration and the reimbursement of the United States for the amount expended in the redemption of the circulating notes of such bank. In addition, the Government has the right to exact payment from the person required to make the payment.

(26 U.S.C. 6311)

[T.D. ATF-251, 52 FR 19314, May 22, 1987. Re-designated by T.D. ATF-301, 55 FR 47606, Nov. 14, 1990; T.D. ATF-331, 57 FR 40328, Sept. 3, 1992; T.D. ATF-353, 59 FR 2522, Jan. 18, 1994]

§ 70.62 Fractional parts of a cent.

In the payment of any tax, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent. Fractional parts of a cent shall not be disregarded in the computation of taxes.

(26 U.S.C. 6313)

[T.D. ATF-251, 52 FR 19314, May 22, 1987. Re-designated by T.D. ATF-301, 55 FR 47606, Nov. 14, 1990]

§ 70.63 Computations on returns or other documents.

(a) *Amounts shown on forms.* To the extent permitted by any ATF form or instructions prescribed for use with respect to any ATF return, declaration, statement, or other document, or supporting schedules, any amount required to be reported in such form may be entered at the nearest whole dollar amount. The extent to which, and the conditions under which, such whole dollar amounts may be entered on any

form will be set forth in the instructions issued with respect to such form. For the purpose of the computation to the nearest dollar, a fractional part of a dollar shall be disregarded unless it amounts to one-half dollar or more, in which case the amount (determined without regard to the fractional part of a dollar) shall be increased by \$1. The following illustrates the application of this paragraph:

Exact amount	To be reported as
\$18.49	\$18
\$18.50	19
\$18.51	19

(b) *Election not to use whole dollar amounts—(1) Method of election.* Where any ATF form, or the instructions issued with respect to such form, provide that whole dollar amounts shall be reported, any person making a return, declaration, statement, or other document on such form may elect not to use whole dollar amounts by reporting thereon all amounts in full, including cents.

(2) *Time of election.* The election not to use whole dollar amounts must be made at the time of filing the return, declaration, statement, or other document. Such election may not be revoked after the time prescribed for filing such return, declaration, statement, or other document, including extensions of time granted for such filing. Such election may be made on any return, declaration, statement, or other document which is filed after the time prescribed for filing (including extensions of time), and such an election is irrevocable.

(3) *Effect of election.* The taxpayer's election shall be binding only on the return, declaration, statement, or other document filed for a taxable year or period, and a new election may be made on the return, declaration, statement, or other document filed for a subsequent taxable year or period.

(4) *Fractional part of a cent.* For treatment of the fractional part of a cent in the payment of taxes, see 26 U.S.C. 6313 and § 70.62 of this part.

(c) *Inapplicability to computation of amount.* The provisions of paragraph (a) of this section apply only to amounts required to be reported on a return,

declaration, statement, or other document. They do not apply to items which must be taken into account in making the computations necessary to determine such amounts. For example, each item of liability must be taken into account at its exact amount, including cents, in computing the amount of total liability required to be reported on a tax return or supporting schedule. It is the amount of total liability, so computed, which is to be reported at the nearest whole dollar on the return or supporting schedule.

(26 U.S.C. 6102)

[T.D. ATF-301, 55 FR 47611, Nov. 14, 1990]

§ 70.64 Receipt for taxes.

The regional director (compliance) or the Chief, Tax Processing Center shall, upon request, issue a receipt for each tax payment made (other than a payment for stamps sold or delivered). In addition, the regional director (compliance) or the Chief, Tax Processing Center or other authorized ATF officer or employee shall issue a receipt for each payment of 1 dollar or more made in cash, whether or not requested. In the case of payments made by check, the canceled check is usually a sufficient receipt. No receipt shall be issued in lieu of a stamp representing a tax, whether the payment is in cash or otherwise.

(26 U.S.C. 6314)

[T.D. ATF-301, 55 FR 47611, Nov. 14, 1990]

§ 70.65 Use of commercial banks.

For provisions relating to the use of commercial banks and electronic fund transfer of taxpayment to the Treasury Account, see the regulations relating to the particular tax.

(Aug. 16, 1954, ch. 736, 68A Stat. 775 (26 U.S.C. 6301); June 29, 1956, ch. 462, 70 Stat. 391 (26 U.S.C. 6301))

[T.D. ATF-77, 46 FR 3002, Jan. 13, 1981. Redesignated by T.D. ATF-301, 55 FR 47606, Nov. 14, 1990]

ASSESSMENT

§ 70.71 Assessment authority.

The regional director (compliance) and the Chief, Tax Processing Center are authorized and required to make

all inquiries necessary to the determination and assessment of all taxes imposed under the provisions of 26 U.S.C. enforced and administered by the Bureau. The regional director (compliance) and the Chief, Tax Processing Center are further authorized and required to make the determinations and the assessments of such taxes. The term "taxes" includes interest, additional amounts, additions to the taxes, and assessable penalties. The authority of the regional director (compliance) and the Chief, Tax Processing Center to make assessment includes the following:

(a) *Taxes shown on return.* The regional director (compliance) or the Chief, Tax Processing Center shall assess all taxes determined by the taxpayer or by the regional director (compliance) or by the Chief, Tax Processing Center and disclosed on a return or list.

(b) *Unpaid taxes payable by stamp.* (1) If without use of the proper stamp:

(i) Any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof, or

(ii) Any transaction or act upon which a tax is required to be paid by means of a stamp occurs, the regional director (compliance) or the Chief, Tax Processing Center, upon such information as can be obtained, must estimate the amount of the tax which has not been paid and the regional director (compliance) or the Chief, Tax Processing Center must make assessment therefor upon the person the regional director (compliance) or the Chief, Tax Processing Center determines to be liable for the tax. However, the regional director (compliance) or the Chief, Tax Processing Center may not assess any tax which is payable by stamp unless the taxpayer fails to pay such tax at the time and in the manner provided by law or regulations.

(2) If a taxpayer gives a check or money order as a payment for stamps but the check or money order is not paid upon presentment, then the regional director (compliance) or the Chief, Tax Processing Center shall assess the amount of the check or money order against the taxpayer as if it were a tax due at the time the check or

money order was received by the regional director (compliance) or the Chief, Tax Processing Center.

(26 U.S.C. 6201)

[T.D. ATF-301, 55 FR 47611, Nov. 14, 1990]

§ 70.72 Method of assessment.

The regional director (compliance) and the Chief, Tax Processing Center shall appoint one or more assessment officers. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, the taxpayer shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

(26 U.S.C. 6203)

[T.D. ATF-251, 52 FR 19314, May 22, 1987. Redesignated and amended by T.D. ATF-301, 55 FR 47606 and 47612, Nov. 14, 1990]

§ 70.73 Supplemental assessments.

If any assessment is incomplete or incorrect in any material respect, the regional director (compliance) or the Chief, Tax Processing Center, subject to the applicable period of limitation, may make a supplemental assessment for the purpose of correcting or completing the original assessment.

(26 U.S.C. 6204)

[T.D. ATF-301, 55 FR 47612, Nov. 14, 1990]

§ 70.74 Request for prompt assessment.

(a) Except as otherwise provided in § 70.223 of this part, any tax for which a return is required and for which:

(1) A decedent or an estate of a decedent may be liable, or

(2) A corporation which is contemplating dissolution, is in the process of dissolution, or has been dissolved, may be liable, shall be assessed, or a proceeding in court without assessment for the collection of such tax shall be begun, within 18 months after the receipt of a written request for prompt assessment thereof.

(b) The executor, administrator, or other fiduciary representing the estate of the decedent, or the corporation, or the fiduciary representing the dissolved corporation, as the case may be, shall, after the return in question has been filed, file the request for prompt assessment in writing with the regional director (compliance) of the region in which the taxpayer is located or with the Chief, Tax Processing Center. The request, in order to be effective, must be transmitted separately from any other document, must set forth the classes of tax and the taxable periods for which the prompt assessment is requested, and must clearly indicate that it is a request for prompt assessment under the provisions of 26 U.S.C. 6501(d). The effect of such a request is to limit the time in which an assessment of tax may be made, or a proceeding in court without assessment for collection of tax may be begun, to a period of 18 months from the date the request is filed with the proper regional director (compliance) or with the Chief, Tax Processing Center. The request does not extend the time within which an assessment may be made, or a proceeding in court without assessment shall be begun, after the expiration of 3 years from the date the return was filed. This special period of limitations will not apply to any return filed after a request for prompt assessment has been made unless an additional request is filed in the manner provided herein.

(c) In the case of a corporation the 18-month period shall not apply unless:

(1) The written request notifies the regional director (compliance) or the Chief, Tax Processing Center that the corporation contemplates dissolution at or before the expiration of such 18-month period; the dissolution is in good faith begun before the expiration of such 18-month period; and the dissolution so begun is completed either before or after the expiration of such 18-month period; or

(2) The written request notifies the regional director (compliance) or the Chief, Tax Processing Center that a dissolution has in good faith begun, and the dissolution is completed either before or after the expiration of such 18-month period; or

(3) A dissolution has been completed at the time the written request is made.

(26 U.S.C. 6501(d))

[T.D. ATF-301, 55 FR 47612, Nov. 14, 1990, as amended by T.D. ATF-353, 59 FR 2522, Jan. 18, 1994]

§ 70.75 Jeopardy assessment of alcohol, tobacco, and firearms taxes.

(a) If the regional director (compliance) or the Chief, Tax Processing Center believes that the collection of any tax imposed under provisions of 26 U.S.C. enforced and administered by the Bureau will be jeopardized by delay, the regional director (compliance) or the Chief, Tax Processing Center shall, whether or not the time otherwise prescribed by law for filing the return or paying such tax has expired, immediately assess such tax, together with all interest, additional amounts and additions to the tax provided by law. A regional director (compliance) or the Chief, Tax Processing Center will make an assessment under this section if collection is determined to be in jeopardy because at least one of the following conditions exists.

(1) The taxpayer is or appears to be designing quickly to depart from the United States or to conceal himself or herself.

(2) The taxpayer is or appears to be designing quickly to place the taxpayer's property beyond the reach of the Government either by removing it from the United States, by concealing

it, or by dissipating it, or by transferring it to other persons.

(3) The taxpayer's financial solvency is or appears to be threatened.

(b) The tax, interest, additional amounts, and additions to the tax will, upon assessment, become immediately due and payable, and the regional director (compliance) or the Chief, Tax Processing Center shall, without delay, issue a notice and demand for payment thereof in full.

(c) See 26 U.S.C. 7429 with respect to requesting the regional director (compliance) or the Chief, Tax Processing Center to review the making of the jeopardy assessment.

(d) For provisions relating to stay of collection of jeopardy assessments, see § 70.76 of this part.

(26 U.S.C. 6862 and 6863)

[T.D. ATF-301, 55 FR 47612, Nov. 14, 1990]

§ 70.76 Stay of collection of jeopardy assessment; bond to stay collection.

(a) The collection of taxes assessed under 26 U.S.C. 6862 (referred to as a "jeopardy assessment" for purposes of this section) of any tax may be stayed by filing with the regional director (compliance) or Chief, Tax Processing Center a bond on the form to be furnished by ATF upon request.

(b) The bond may be filed:

(1) At any time before the time collection by levy is authorized under 26 U.S.C. 6331(a), or

(2) After collection by levy is authorized and before levy is made on any property or rights to property, or

(3) In the discretion of the regional director (compliance) or the Chief, Tax Processing Center, after any such levy has been made and before the expiration of the period of limitations on collection.

(c) The bond must be in an amount equal to the portion (including interest thereon to the date of payment as calculated by the regional director (compliance) or the Chief, Tax Processing Center) of the jeopardy assessment collection of which is sought to be stayed. See 26 U.S.C. 7101 and § 70.281, relating to the form of bond and the sureties thereon. The bond shall be conditioned upon the payment of the amount (together with interest thereon), for

Legal Forms and Legal Fictions

- A. We are going to first explore some of the BATF Forms considering the previous information that we just covered.
- B. ATF F 5000.19 TAX INFORMATION AUTHORIZATION. Exhibit A, 1 of 2. Go to the Paperwork Reduction Act Notice. We find “the information requested is voluntary.”
- C. ATF F 2148 (Bond) Exhibit B, 1 of 2, go to 2 of 2 and read the, Paperwork Reduction Act Notice the information is MANDATORY by statute, (26 U.S.C. 5314) (Not Title 27).
- D. ATF Form (5120.32) Exhibit C, 1 of 2, read the text and see how they go from 26 USC to 27 CFR.
 - 1. Read the Paperwork Reduction Act Notice, “not subject to OMB review.”
- E. ATF Excise Tax Return ATF F 5000.24 Exhibit D, again read the Paperwork Reduction Act Notice “mandatory by statute” (26 U.S.C 5061, 5703) NOT TITLE 27.
- F. ATF F 5030.6 Exhibit E and read the Paperwork Reduction Act Notice “the information is required to obtain a benefit.”
- G. Exhibit F, 1 of 3, this is the “Application for Basic Permit under the Federal Alcohol Administration Act,” If you notice it has an OMB No. and a expiration date.
 - 1. Go to item 3. Employer Identification number (EIN) (Social Security number is not acceptable).
 - 2. Next go to 9. C. Social Security or Employer Identification Number.
 - 3. Now go to F, 3 of 3 and read the Privacy Act Information especially number 5 were it says, “you do not have to supply these numbers” you do not need a number to get a basic permit.
 - 4. Note the last statement at the bottom of the page, the OMB number must be current.

H. Now we are going to cover the BIG ONE “ 2002 1040” Exhibit G, 1 of 4 which is the instructions for the Form 1040. We are sure that you spend hours pouring over these instructions so you will know how to correctly file a 1040 Form. Why? It is well settled that the instructions for filling out forms and also all IRS publications have absolutely no force and effect of law, and cannot be used in a court of law as they are only considered as guidelines.

1. If you look at the 1040 Form itself you do not find any Privacy Act Statements or Paperwork Reduction Act Notice Statement. If you raise this issue the Government will come back and tell you it is in the Instructions. The Instructions carry no force and effect of law so why do I rely on the instructions?
2. Go to Exhibit G, 2 of 4, which is page 76 of the 2002, 1040 Instructions book and you can read some actual LEGAL FICTIONAL writing.
3. Go to the last sentence of column one. “Books or records relating to a form or its instruction must be retained as long as their contents may become material in the administration of any Internal Revenue Law.”
 - a. I have a friend whose father just passed away and he had kept every tax return he had filed from 1943 to 2001 with all the paperwork and canceled checks, box after box. He is thinking about scanning it all and putting it on a CD for all the family members as it is a detailed financial history of his parent’s life. He had also moved several times so he had to haul all those boxes with him from house to house. How many hours of his life did he waste doing all this and why?
4. If you notice it said, “any Internal Revenue Law,” not “Internal Income Tax.” If we look at the top of the 1040 it says “U.S. Individual Income Tax Return,” not “U.S. Individual Revenue Tax Return,” or “Citizen of the United States of America Individual Revenue Tax Return.”
5. The OMB number of “1545-0074” has also under several corrections as people learn of this Legal Fiction form and has pertained to items over the years.
6. So where is the expiration date? There is none as this form can change from year to year depending on which way the wind blows.
7. If you read in the middle of the second column it says, “We may disclose your tax return information to certain foreign governments to carry out their tax laws.” Do you have list of those certain foreign governments? In order to get Russia to sign a tax agreement your wonderful government representatives agreed to give total access to all your tax records to Russia if they ask for them without your knowledge. Talk about “IDENTIFY THEFT.”

- a. Why would anyone in his or her right mind voluntarily turn over all the information on the 1040 with any supporting information after reading that one statement? There is already case after case of this happening right now and it has become a major problem which, for the most part, has been kept out of the main stream press.
 - b. This massive turnover of information not only pertains to individuals but also businesses.
- I. 3rd column, first full paragraph, “If you have a problem just call or visit any Internal Revenue Office.” Those of you who have walked in and asked for an IMFOLT, BMFOLT, AMDISA, TAXMOD, Taxpayers Transcript of Account, all of which you are supposed to be able to obtain from any IRS office, know how you get treated. Don’t feel bad as we have also been threatened, sneered at, run out, or have gotten the 3rd degree. However, you may politely remind them that they are a public servant and working for the government is a privilege not a right. “Now I would appreciate if you would do what you are hired to do and that is to use the government computer they allow you to use and print out the files I requested.”

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO FIREARMS
TAX INFORMATION AUTHORIZATION

(PURSUANT TO TITLE 26 OF THE UNITED STATES CODE AND THE FEDERAL ALCOHOL ADMINISTRATION ACT)
IMPORTANT-Please Read Instructions on Reverse Before Completing This Form
(Prepare in duplicate - See instructions on back)

PART I - AUTHORIZATION

1. PRINCIPAL _____ 2. ADDRESS (Number, Street, City, State, ZIP Code) _____

3. BUSINESS IN WHICH ENGAGED _____

4. NAME OF REPRESENTATIVE (Attorney, Certified Public Accountant, or Agent) _____ 5. ADDRESS (Number Street, City, State, ZIP Code) _____

6. THE ABOVE-NAMED REPRESENTATIVE IS HEREBY AUTHORIZED TO: (See Instruction 3)

Check applicable box(es)

- a. Receive from, or inspect in, the office of the District Director, Chief, Technical Services, Chief, Tax Processing Center and/or the office of the Director, Bureau of Alcohol, Tobacco and Firearms, any confidential information on behalf of the principal.
- b. Receive from, or inspect in, such office(s) confidential information with respect to:

- c. Receive the original of any ruling (or correspondence in connection therewith) on behalf of the principal.
- d. Receive copies of notices and other written communications addressed to the principal involving confidential tax matters.

7. THE FOLLOWING IS THE SIGNATURE OF THE REPRESENTATIVE HEREBY AUTHORIZED TO RECEIVE CONFIDENTIAL INFORMATION

8. SIGNATURE OF OR FOR PRINCIPAL(S) (If a corporate officer, partner, or fiduciary signs below on behalf of the principal, the following statement of authority applies)

I certify that I have the authority to execute this Tax Information Authorization on behalf of the principal.

SIGNATURE	TITLE (If applicable)	DATE	CORPORATE SEAL (If applicable)
_____	_____	_____	
_____	_____	_____	
_____	_____	_____	
_____	_____	_____	

PART II - DECLARATION BY ATTORNEY OR CERTIFIED PUBLIC ACCOUNTANT (See Instruction 5)

9. I declare that I am not currently under suspension or disbarment from practice before the Bureau of Alcohol, Tobacco and Firearms; That

- a. I am a member in good standing of the bar of the highest court of _____
- b. I am qualified to practice as a certified public accountant in _____

and that I am authorized to represent _____

SIGNATURE

DATE

Exhibit A / of 2

INSTRUCTIONS

1. 26 CFR Part 601, Subpart E, requires the filing of a Tax Information Authorization for a representative to obtain, on behalf of the principal, information of a confidential nature as described in the regulations, unless a power of attorney is on file. Form 5000.19 need not be filed if Power of Attorney, Form 5000.8, or a copy thereof, is on file in the office from which such confidential information will be received by the representative.
2. Form 5000.19 shall be filed in duplicate, with the District Director, or the Chief, Technical Services of the District in which the place of business or establishment of the principal is located, or with the Chief, Tax Processing Center or the Director, Bureau of Alcohol, Tobacco and Firearms, as applicable. A copy of the Tax Information Authorization must also be filed with each office of the Bureau in which the attorney or agent is to represent the principal. If the authorization is applicable to more than one establishment or business, an additional copy for each must be submitted. Copies reproduced by photographic processes need not be certified as true and correct copies of the original; copies reproduced by other methods will be acceptable if their authenticity is certified (a) by an attorney, certified public accountant, or agent; or (b) by a notary public or other official, who will state that he has personally compared the copy with the original and finds it to be true and correct.
3. Item 6: 26 CFR Part 601, Subpart E, requires that a Tax Information Authorization clearly express the scope of the authority of the representative. If more than one person is authorized to represent the principal, the representative who is to receive notices and other written communications should be designated. The original of a ruling will be addressed to a representative only if the Tax Information Authorization (or power of attorney) contains a statement to that effect. Therefore, the information covered by Item 6(c) and Item 6(d) will not be given to the representative unless specifically authorized by a check mark in the applicable box. Authority in Item 6(d) should be extended to one representative only, whether by Form 5000.8 or Form 5000.19.
4. Item 8: Form 5000.19 shall be signed by the principal(s) as follows: (a) If an individual, by such individual. (b) If a husband and wife, by each of them, unless one spouse authorized the other in writing to sign for both: In such case, the authorization should accompany Form 5000.19: (c) If a partnership, either by all members or in the name of the partnership by one of the partners authorized to act, in the latter case, unless the authorization is provided under local law, it should accompany Form 5000.19. (d) If an estate, by the executor or administrator. (e) If a corporation or an association, by an officer having authority to bind the entity, who shall certify that he has such authority. The Bureau of Alcohol, Tobacco and Firearms does not require the affixing of a corporate seal. Space for affixing a corporate seal is provided as convenience for a corporation required by charter, or by the law of the jurisdiction in which it is incorporated, to affix its corporate seal in the execution of instruments.
5. Item 9: Qualified attorneys or certified public accountants who, in addition to receiving tax information, will represent the principal in conference may complete the declaration in Part II. This declaration, if completed, satisfies the requirement (26 C.F.R. 601 .521) to submit evidence of recognition to practice.
6. Revocation by the principal of the authority of an attorney, certified public accountant, or agent to represent him shall not be effective before written notice has been given to the District Director, Chief, Technical Services, the Chief Tax Processing Center, or the Director, Bureau of Alcohol, Tobacco and Firearms as appropriate, that the authority of such representative has been revoked.
7. The rules governing the recognition of attorneys, certified public accountants, and agents representing clients before the Bureau of Alcohol, Tobacco and Firearms are contained in Treasury Department Circular No. 230, as amended (31 CFR Part 8), and in the Statement of Procedural Rules (26 CFR Part 601 or those regulations as recodified in 27 CFR Part 71 and 27 CFR 70.419). Representatives must comply with such rules, as applicable, and with all pertinent statutes.

PAPERWORK REDUCTION ACT NOTICE

This request is in accordance with Section 3507, Public Law 96-511, December 11, 1980. This information collection documents the taxpayer's authorization granting a specific individual to examine specified tax information. ATF uses the information to insure that individuals other than the taxpayer have been properly authorized to examine tax information which is confidential under Federal law. The information requested is voluntary.

The estimated average burden associated with this collection of information is 1 hour per respondent or recordkeeper, depending on individual circumstances. Comments concerning the accuracy of this burden estimate and suggestion for reducing this burden should be addressed to Reports Management Officer, Document Services Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C. 20226, and the Office of Management and Budget, Paperwork Reduction Project (1512-0033), Washington, D.C. 20503.

DEPARTMENT OF THE TREASURY BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS BOND — DRAWBACK OF TAX ON TOBACCO PRODUCTS, CIGARETTE PAPERS OR TUBES (See Instructions on Reverse)		1. AMOUNT OF BOND		
2. PRINCIPAL	3. ADDRESS (Number, Street, City, State, Zip Code)			
4. NAME OF SURETY	5. LOCATION OF PRODUCTS (Number, Street, City, State, Zip Code)			
KNOW ALL MEN BY THESE PRESENTS, That we, the above-named principal and surety, are held and firmly bound unto the United States of America in the above-named amount, lawful money of the United States, for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Whereas, the said principal makes claim, as identified below, for allowance of drawback of internal revenue tax paid on tobacco products, cigarette papers, or cigarette tubes, subject to drawback of tax under Title 26, United States Code.				
IDENTIFICATION OF CLAIM				
AMOUNT	DATE	LOCATION OF REGIONAL DIRECTOR (COMPLIANCE), BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, WITH WHOM FILED	KIND OF ARTICLES	TO BE SHIPPED TO (Name and Address)
NOW, THEREFORE, if the said articles or any part thereof, be not relanded at any port or place within the United States, and if the claimant or his legal representative shall produce as required by the applicable regulations evidence satisfactory to the Regional Director (Compliance) that the said articles have been landed at some port without the jurisdiction of the internal revenue laws of the United States, or that after clearance from the United States the same were lost (otherwise than by theft), then this obligation shall be void; otherwise it shall remain in full force and effect.				
Witness our hands and seals this _____ day of _____ 19____ Signed, sealed, and delivered in the presence of -				
				(SEAL)
				(SEAL)
				(SEAL)
				(SEAL)

Exhibit B of 2

6. REGION

I approve the foregoing bond, which has been executed in due form and in compliance with law and regulations.

7. SIGNATURE OF REGIONAL DIRECTOR (COMPLIANCE), BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

8. DATE APPROVED

INSTRUCTIONS

1. This bond must be filed in duplicate with the Regional Director (Compliance), Bureau of Alcohol, Tobacco and Firearms, for the region in which the tobacco products, cigarette papers, or cigarette tubes are located, for each claim for drawback filed under 27 CFR Part 290.

2. The bond may be given with corporate surety authorized to act as surety by the Secretary of the Treasury, or by the deposit of transferable bonds or notes of the United States. The United States Code (6 U.S.C. 15) provides that "the phrase 'bonds or notes of the United States' shall be deemed *** to mean any public debt obligations of the United States and any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States."

3. If any alteration or erasure is made on this bond before it is executed, the principal and the surety shall incorporate in the bond a statement specifically identifying the nature of the change. If any alteration or erasure is made on this bond after it is executed, the consent of all parties thereto shall be written in the bond.

4. The principal shall be identified by stating the full name, if an individual; by stating the firm name and the full name of each partner or member, if a partnership or association; or, if a corporation, by stating the corporate name, the name of the State under the laws of which it is organized, and the address of the principal office.

5. The amount of the bond shall be not less than the amount of tax for which drawback is claimed.

6. The bond shall be executed in duplicate by the principal and by the surety in the following manner:

(a) If the principal is an individual, either he or his authorized attorney-in-fact shall sign the bond. The signature shall be affixed in the presence of two persons who must sign the bond as witnesses.

(b) If the principal is a partnership or an association, the firm name shall be typed or written and shall be followed by the word "by" and

the signatures of all partners or members, or the signature of any partner or member authorized to sign in behalf of the firm, or the signature of an empowered attorney-in-fact. Each signature shall be affixed in the presence of two persons who must sign the bond as witnesses.

(c) If the principal is a corporation, the corporate name shall be typed or written and shall be followed by the word "by" and the signature and the title of the officer of the corporation who has been authorized to act in its behalf, or the signature of the empowered attorney-in-fact. If the corporation has a corporate seal, the signature for the principal shall be attested under corporate seal. If the corporation has no corporate seal, the fact shall be stated following the name of the corporation and in such case, the signature of the person executing the bond for the corporate principal shall be affixed in the presence of two persons who must sign the bond as witnesses.

(d) The name of the corporate surety shall be typed or written and shall be immediately followed by the word "by" and the signature and the title of the officer of the corporation who has been authorized to sign, or the signature of an empowered attorney-in-fact. The signature for the surety shall be attested under corporate seal.

7. If the bond is signed by an attorney-in-fact for the principal or by one of the members for a partnership or association, or by an officer for a corporation, the authorization for the person to sign (authenticated power of attorney, resolution of the board of directors, except of the bylaws, or other document) must be filed with the bond, unless such authorization has previously been filed with the Regional Director (Compliance) in which event a statement to such effect shall be attached to the bond.

8. After this bond is approved by the Regional Director (Compliance), a copy will be returned to the principal.

9. All correspondence about the filing of this form or any subsequent action, including termination affecting this bond, should be addressed to the Regional Director (Compliance), Bureau of Alcohol, Tobacco and Firearms, with whom the bond is filed.

PAPERWORK REDUCTION ACT NOTICE

This request is in accordance with the Paperwork Reduction Act of 1980. The purpose of this information collection is for the protection of Federal excise taxes. The information will be used to determine compliance by payment on untaxpaid commodities. The information required is mandatory by statute. (26 U.S.C. 5314).

Exhibit B 2092

DEPARTMENT OF THE TREASURY- BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
TAX DEFERRAL BOND-WINE
(Puerto Rico)
(File in duplicate-see instructions on reverse)

PRINCIPAL (See instructions 2, 3, and 4.)	ADDRESS OF BUSINESS OFFICE (Number, street, city, State, ZIP Code)
SURETY (OR SURETIES)	AMOUNT OF BOND
KIND OF BOND (Check applicable box)	EFFECTIVE DATE
<input type="checkbox"/> ORIGINAL	<input type="checkbox"/> STRENGTHENING
<input type="checkbox"/> SUPERSEDING	
PREMISES FROM WHICH WITHDRAWALS ARE TO BE MADE	NO. LOCATED AT

KNOW ALL MEN BY THESE PRESENTS, That we, the above-named principal and surety (or sureties), are held and firmly bound to the United States of America in the above-named amount, lawful money of the United States, for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

This bond shall not in any case be effective before the above-named date, but if accepted by the United States it shall be effective according to its terms on and after that date without notice to the obligors: Provided, That if no date is inserted in the space above provided therefor, the date of execution hereof shall be the effective date.

WHEREAS, the principal is operating, under the laws and regulations of the Commonwealth of Puerto Rico, the premises specified above; and

WHEREAS, the principal intends to withdraw from the above specified premises wine of Puerto Rican manufacture for shipment to the United States; and

WHEREAS, under the provisions of 26 U.S.C. 7652(a) (1), there is imposed on all articles of Puerto Rican manufacture coming into the United States and withdrawn for consumption or sale a tax equal to the internal revenue tax imposed in the United States upon like articles of merchandise of domestic manufacture; and

WHEREAS, under the provisions of 26 U.S.C. 7652(a) (2), the tax imposed by 26 U.S.C. 7652(a) (1), may be paid before shipment from Puerto Rico; and

WHEREAS, under the provisions of the regulations in 27 CFR Part 250, the principal, as proprietor of the premises specified above, may give bond to secure the deferred payment of taxes on wine of Puerto Rican manufacture withdrawn from insular bond for shipment to the United States; and

WHEREAS, pursuant to such regulations, the principal gives this bond, to secure the deferred payment, as provided therein, of the taxes imposed by 26 U.S.C. 7652(a) (1), and equal to the tax imposed on wine of domestic manufacture by 26 U.S.C. 5041.

NOW, THEREFORE, the condition of this bond is such that if the principal shall pay, or cause to be paid, to the United States, at the time and in the manner prescribed in 27 CFR Part 250, the full amount of taxes with respect to wine (equal to the tax imposed by 26 U.S.C. 5041) which have been computed when the wine was withdrawn from insular bond, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

We, the obligors, for ourselves, our heirs, executors, administrators, successors, and assigns, do further covenant and agree that the total amount of this bond shall be available for satisfaction of any liability incurred under the terms and conditions of this bond, and that upon the breach of any of the covenants of this bond, the United States may pursue its remedies against the principal or surety, independently, or against both jointly, and the said surety hereby waives any right or privilege it may have of requiring, upon notice, or otherwise, that the United States shall first commence action, intervene in any action of any nature whatsoever already commenced, or otherwise exhaust its remedies against the principal.

WITNESS our hands and seals this _____ day of _____, 19_____

Signed, sealed, and delivered in the presence of --

	(SEAL)
	(SEAL)
	(SEAL)
	(SEAL)
	(SEAL)
	(SEAL)

Exhibit C / of 2

**APPROVAL OF REGIONAL DIRECTOR (COMPLIANCE)
BUREAU OF ALCOHOL, TOBACCO & FIREARMS**

On behalf of the United States, I approve the foregoing bond which has been executed in due form and in compliance with the law, regulations, and instructions.

SIGNATURE OF REGIONAL DIRECTOR (COMPLIANCE)

DATE

INSTRUCTIONS

1. This bond shall be filed in duplicate with the Regional Director (Compliance), Bureau of Alcohol, Tobacco & Firearms, New York, New York

2. The name, including the full given name, of each party to the bond shall be shown and each such party shall sign the bond with his signature, or the bond may be executed in his name by a duly empowered attorney-in-fact.

3. In the case of a partnership, the trade name of the firm, followed by the names of all the members thereof, shall be given in the heading. In executing the bond the firm name shall be typed or written followed by the word "by" and the signatures of all partners, or the signature of any partner duly authorized to sign the bond in behalf of the firm or the signature of a duly empowered attorney-in-fact.

4. If the principal is a corporation, give not only the corporate name, but also the name of the political entity under the laws of which it is organized (i.e. Commonwealth of Puerto Rico, Delaware, etc.), and the location of the principal office; and the bond shall be executed in the corporate name, immediately followed by the signature and title of the person duly authorized to act in its behalf.

5. If the bond is signed by an attorney-in-fact for the principal, or by one of the members for a partnership or association, or by an officer or other person for a corporation, there shall be filed with the bond a duly authenticated copy of the power of attorney, resolution of the board of directors, excerpt of the bylaws, or other document, authorizing the person signing the bond to execute it on behalf of the principal.

6. The signature for the surety shall be attested under corporate seal. The signature for the principal, if a corporation, shall also be so attested if the corporation has a corporate seal; if the corporation has no seal, that fact should be stated. Each signature shall be made in the presence of two witnesses (except where corporate seals are affixed), who shall sign their names as such.

7. A bond may be given with corporate surety authorized to act as surety by the Secretary of the Treasury of the United States, or by the deposit of collateral security consisting of bonds or notes of the United States. The Act of July 30, 1947 (section 15, title 6, U.S.C.), provides that "the phrase 'bonds or notes of the United States' shall be deemed *** to mean any public debt obligations of the United States and any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States."

8. Where any alteration or erasure is made in any bond before the execution thereof, there shall be incorporated in the bond a statement to that effect by the principal and surety or sureties; or if such alteration or erasure was made after the bond was executed, the consent of all parties thereto shall be written in the bond.

9. The penal sum named in the bond shall be in accordance with the regulations in 27 CFR Part 250.

10. After approval of the bond a copy shall be returned to the principal.

11. All correspondence about the filing of this form or subsequent action including termination affecting this bond should be addressed to the Regional Director (Compliance), Bureau of Alcohol, Tobacco and Firearms, New York, New York.

PAPERWORK REDUCTION ACT NOTICE

This form is not subject to OMB review and approval because it requires only that information necessary to identify the parties involved and the amount of the bond.

**DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
EXCISE TAX RETURN**

(Prepare in duplicate - See instructions on back)

2. FORM OF PAYMENT
 CHECK MONEY ORDER EFT OTHER (Specify) _____

4. RETURN COVERS (Check one) BEGINNING _____
 PREPAYMENT PERIOD ENDING _____

5. DATE PRODUCTS TO BE REMOVED (For Prepayment Returns Only): _____

6. EMPLOYER IDENTIFICATION NUMBER _____ 7. PLANT, REGISTRY, OR PERMIT NUMBER _____

8. NAME AND ADDRESS OF TAXPAYER (Include ZIP Code) _____

1. SERIAL NUMBER _____

3. AMOUNT OF PAYMENT
 \$ _____

NOTE: PLEASE MAKE CHECKS OR MONEY ORDERS PAYABLE TO THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS (SHOW EMPLOYER IDENTIFICATION NUMBER ON ALL CHECKS OR MONEY ORDERS)

FOR ATF USE ONLY

TAX	\$
PENALTY	
INTEREST	
TOTAL	\$

EXAMINED BY: _____

DATE EXAMINED: _____

CALCULATION OF TAX DUE (Before making entries on lines 18 - 21, complete Schedules A and B)

PRODUCT (a)	AMOUNT OF TAX (b)
9. DISTILLED SPIRITS	\$
10. WINE	
11. BEER	
12. CIGARS	
13. CIGARETTES	
14. CIGARETTE PAPERS AND/OR CIGARETTE TUBES	
15. CHEWING TOBACCO AND/OR SNUFF	
16. PIPE TOBACCO AND/OR ROLL-YOUR-OWN TOBACCO	
17. TOTAL TAX LIABILITY (Total of lines 9-16)	\$ 0.00
18. ADJUSTMENTS INCREASING AMOUNT DUE (From line 29)	0.00
19. GROSS AMOUNT DUE (Line 17 plus line 18)	\$ 0.00
20. ADJUSTMENTS DECREASING AMOUNT DUE (From line 34)	0.00
21. AMOUNT TO BE PAID WITH THIS RETURN (Line 19 minus line 20)	\$ 0.00

Under penalties of perjury I declare that I have examined this return (including any accompanying explanations, statements, schedules, and forms) and to the best of my knowledge and belief it is true, correct, and includes all transactions and tax liabilities required by law or regulations to be reported.

22. DATE _____ 23. SIGNATURE _____ 24. TITLE _____

SCHEDULE A - ADJUSTMENTS INCREASING AMOUNT DUE

EXPLANATION OF INDIVIDUAL ERRORS OR TRANSACTIONS (a)	AMOUNT OF ADJUSTMENTS		
	(b) TAX	(c) INTEREST	(d) PENALTY
25.	\$	\$	\$
26.			
27.			
28. SUBTOTALS OF COLUMNS (b), (c) and (d)	\$ 0.00	\$ 0.00	\$ 0.00
29. TOTAL ADJUSTMENTS INCREASING AMOUNT DUE (Line 28, Col (b) + (c) + (d)) Enter here and on line 18.			\$ 0.00

SCHEDULE B - ADJUSTMENTS DECREASING AMOUNT DUE

EXPLANATION OF INDIVIDUAL ERRORS OR TRANSACTIONS (a)	AMOUNT OF ADJUSTMENTS	
	(b) TAX	(c) INTEREST
30.	\$	\$
31.		
32.		
33. SUBTOTALS OF COLUMNS (b) and (c)	\$ 0.00	\$ 0.00
34. TOTAL ADJUSTMENTS DECREASING AMOUNT DUE (Line 33, Col (b) + (c)) Enter here and on line 20.		\$ 0.00

Exhibit 010f2

INSTRUCTIONS

1. Prepare ATF F 5000.24, Excise Tax Return, in duplicate. The return shall cover all tax liabilities incurred or discovered during the tax period.
2. Prepare a separate ATF F 5000.24 for each distilled spirits plant, bonded wine cellar or winery, brewery, tobacco products factory, or cigarette papers and tubes factory from which you make removals subject to tax.
3. ATF Form 5000.24 shall be used as both a prepayment tax return and a deferred payment tax return. Except as noted below, you must file ATF F 5000.24 for each tax return period, whether or not you prepaid all tax liabilities incurred during the period. Exceptions: (a) distilled spirits plant proprietors who do not have an approved bond covering the deferred payment of taxes; (b) proprietors of bonded wine cellars or wineries who have no tax due, per 27 CFR 24.271, or who are eligible to pay annually per 27 CFR 24.273; (c) manufacturers of tobacco products who have complied with the provisions of 27 CFR 270.162; and (d) manufacturers of cigarette papers and tubes who have complied with the provisions of 27 CFR 285.25.
4. Export warehouse proprietors transmitting remittances for unassessed liabilities (27 CFR 290.67) shall prepare ATF F 5000.24. The proprietor shall complete items 2, 3, 6-8, and 22-24. Also complete appropriate line items under Calculation of Tax Due and make any necessary explanation in item 35.
5. **ITEM 1.** Begin with "1" January 1 of each year. Use a separate series of numbers with the prefix "P" to designate prepayment returns. Begin with "P-1" to designate the first prepayment return filed on or after January 1 of each year.
6. If this form contains pre-printed information in items 6, 7 or 8, and the information is incorrect, make the necessary corrections by crossing out any errors and printing the correct information in the same area. If there is no pre-printed information in these areas, print or type the required information in the spaces provided.
7. **ITEM 6.** Enter your employer identification number here and on all checks or money orders which accompany your return. If you have not been assigned an employer identification number, you must obtain and file Form SS-4 with your local Internal Revenue Service office.
8. **LINES 9-21.** Show on the appropriate line or lines the amount of tax being prepaid or, if the return covers a tax return period, the tax liability incurred during the period. If the return covers a tax return period, you must include at lines 9-16 all tax liabilities incurred during the period even if you have already prepaid the tax. (You will show prepayments in Schedule B as adjustments decreasing the amount due.)

Brewers must calculate the amount of tax reported at Line 11 using net taxable removals during the return period. For any return period, net taxable removals equal the total number of barrels removed for consumption or sale minus the total number of barrels returned to the brewery from which removed during the same period.
9. **SCHEDULE A.** Use Schedule A to report adjustments increasing the amount due (for example, an error in a previous return period that resulted in an underpayment of tax). In addition, proprietors of distilled spirits plants shall use Schedule A to report the tax and interest, if any, on unexplained shortages of bottled distilled spirits, as required by 26 U.S.C. 5008(a)(1)(C), and proprietors of small winery premises who overestimated their wine credits shall compute the tax and interest as required by 27 CFR 24.279(a).
10. **SCHEDULE B.** Use Schedule B to report adjustments decreasing the amount due (for example, an error in a previous return period that resulted in an overpayment of tax). Prepayments of tax, claims approved for credit of tax, the number of gallons and the applicable tax credit allowed for being a small winery, and other

authorized adjustments shall be reported in Schedule B. You may carry over to Schedule B of your next tax return the unused portion of any approved tax credits or adjustments.

11. **EXPLANATION OF ADJUSTMENTS.** You must fully explain adjustments reported in Schedules A and B. Identify any prepayments by serial number of the tax return on which the tax was prepaid. Identify approved claims by claim number. In all other cases, you must enter, as a minimum, the date of the transaction (the date of an error, the date a shortage was found, etc.), the identity and quantity of the product involved in the adjustment, and the reason for the adjustment. If necessary, use the space above and/or attach a separate sheet to explain adjustments fully.
12. **INTEREST.** The law provides for the payment of interest on underpayments and overpayments of tax. Interest, if applicable, will be computed at the rate prescribed by 26 U.S.C. 6621 and reported as a separate entry in Schedule A or B. To avoid paying interest on unexplained shortages of bottled distilled spirits, you must report the shortage on the tax return covering the period in which you discovered the shortage. Interest is not allowed on adjustments involving the prepayment of tax or approved claims for credit of tax (unless the approved claim specifically authorized such interest).

Compute the interest on underpayments from the due date of the return in error to the date of payment. Compute the interest on overpayments from the date of overpayment to the due date of the return on which the credit is taken.
13. Enter "NONE" in Schedule A or Schedule B if there is no transaction.
14. Payment must accompany this form except when the payment is by electronic funds transfer (EFT).
15. Mail this return to the appropriate address:

Alabama, Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin, Wyoming

Bureau of ATF
Excise Tax
P. O. Box 360958
Pittsburgh, PA 15251-6958

Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont

Bureau of ATF
Excise Tax
P. O. Box 360144
Pittsburgh, PA 15251-6144

Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington

Bureau of ATF
Excise Tax
P. O. Box 371517
Pittsburgh, PA 15251-7517

16. Retain the duplicate copy of ATF F 5000.24 for your records.

PAPERWORK REDUCTION ACT NOTICE

This request is in accordance with the Paperwork Reduction Act of 1995. The purpose of this information is to identify taxpayers, the period covered, and the amount of tax due for each tax return. The information is used by the Government to ensure that the correct tax payment was made and received. The information is mandatory by statute (26 U.S.C., 5061, 5703).

The estimated average burden associated with this collection is .25 hours per respondent or recordkeeper depending on individual circumstances. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Reports Management Officer, Document Services Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C. 20226.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Exhibit D 2 of 2

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
AUTHORIZATION TO FURNISH FINANCIAL INFORMATION
AND
CERTIFICATE OF COMPLIANCE
 (Right to Financial Privacy Act of 1978)

SECTION A: CUSTOMER AUTHORIZATION (12 U.S.C. 3404) TO BE COMPLETED BY CUSTOMER

I, _____ having read the explanation of my rights on the reverse of this form, hereby authorize the following financial institution to disclose the financial records specified below and any and all information pertaining to those financial records to the Bureau of Alcohol, Tobacco and Firearms.

NAME OF FINANCIAL INSTITUTION AND PERSON TO CONTACT (IF KNOWN)

STREET ADDRESS

CITY, STATE AND ZIP CODE

CHECKING ACCOUNT NUMBER AND NAME ON ACCOUNT

SAVINGS ACCOUNT NUMBER AND NAME ON ACCOUNT

LOAN NUMBER AND NAME(S) APPEARING ON LOAN

OTHER (SPECIFY)

PURPOSE FOR WHICH DISCLOSURE IS NECESSARY

I understand that this authorization may be revoked by me in writing at any time before my records, as described above, are disclosed and that this authorization is valid for no more than three (3) months from the date of signature.

SIGNATURE OF CUSTOMER

DATE

ADDRESS OF CUSTOMER

SECTION B: CERTIFICATE OF COMPLIANCE BY ATF OFFICER (12 U.S.C. 3403(b))

NAME OF FINANCIAL INSTITUTION OFFICIAL AND TITLE

DATE OF REQUEST

I hereby certify that the applicable provisions of the Right to Financial Privacy Act of 1978, 12 USC 3401-3422, have been complied with and the good faith reliance upon this certificate relieves your institution and its employees and agents of any possible liability to the customer in connection with the disclosure of these financial records.

SIGNATURE OF ATF OFFICER

ADDRESS

NAME AND TITLE OF ATF OFFICER

TELEPHONE NUMBER (Including Area Code)

INSTRUCTIONS

If you have any questions about your rights under this law or about how to consent to the release of your financial records, you may contact your nearest ATF office.

1. Section A should be completed by the customer in triplicate and returned to ATF.
2. Section B should be completed by the ATF officer conducting the financial record check.
3. Distribution:
 - a. Original (with Section B completed) to the financial institution
 - b. Second copy (with Section B completed) filed with the report of inspection
 - c. Third copy (without Section B completed) to the customer

STATEMENT OF CUSTOMER RIGHTS UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

Federal law protects the privacy of your financial records. Before banks, savings and loan associations, credit unions, credit care issuers or other financial institutions may give financial information about you to a Federal agency, certain procedures must be followed.

CONSENT TO FINANCIAL RECORDS

You may be asked to consent to make your financial records available to the Government. You may withhold your consent, and your consent is not required as a condition of doing business with any financial institution. If you give your consent, it can be revoked in writing at any time before your records are disclosed. Furthermore, any consent you give is effective for only three months, and your financial institution must keep a record of the instances in which it discloses your financial information.

WITHOUT YOUR CONSENT

Without your consent, a Federal agency that wants to see your financial records may do so ordinarily only by means of a lawful subpoena, summons, formal written request, or search warrant for that purpose.

Generally, the Federal agency must give you advance notice of its request for your records explaining why the information is being sought and telling you how to object in court. The Federal agency must also send you copies of court documents to be prepared by you with instructions for filling them out. While these procedures will be kept as simple as possible, you may want to consult with an attorney before making a challenge to a Federal agency's request.

EXCEPTIONS

In some circumstances, a Federal agency may obtain financial information about you without advance notice or your consent. In most of these cases, the Federal agency will be required to go to court to get permission to obtain your records without giving you notice beforehand. In these instances, the court will make the Government show that its investigation and request for your records are proper.

When the reason for the delay of notice no longer exists, you will usually be notified that your records were obtained.

Generally, the Internal Revenue Service will continue to get records pursuant to its existing procedures authorized by the Internal Revenue Code rather than under the Right to Financial Privacy Act.

TRANSFER OF INFORMATION

Generally, a Federal agency which obtains your financial records is prohibited from transferring them to another Federal agency unless it certifies in writing that the transfer is proper and sends a notice to you that your records have been sent to another agency.

PENALTIES

If a Federal agency or financial institution violates the Right to Financial Privacy Act, you may sue for damages or to seek compliance with the law. If you win, you may be repaid your attorney's fees and costs.

PAPERWORK REDUCTION ACT NOTICE

This request is in accordance with the Paperwork Reduction Act of 1980. This information collection issued by ATF to determine if the applicant is eligible to receive an alcohol or tobacco permit. The information is required to obtain a benefit.

INSTRUCTIONS

1. GENERAL. You must file this application if you want a permit under the Federal Alcohol Administration Act (FAA Act) to engage in the business of:

- Producing or processing distilled spirits or wine includes for nonindustrial use.
- Importing into the United States, or wholesaling, alcoholic beverages.

Nonindustrial use of distilled spirits or wines includes all beverage purposes or uses in preparing foods or drinks. Wholesaling under the FAA Act means purchasing alcoholic beverages for resale at wholesale. The FAA Act defines alcoholic beverages as distilled spirits, wine, or malt beverages including any fermented cereal beverages which have an alcohol content of less than 1/2 percent.

2. COMPLETING AND FILING THIS APPLICATION.

- Please type or print and complete all items.
- Write "not applicable" in any item requesting information that does not apply to your business.
- Items 8 through 11: If this information is on file with ATF, state "On file under (name and ATF permit or registry number or type of pending application).
- If you need additional room, use a separate sheet.
- If your producing or processing operations will be in Puerto Rico, contact the Chief, Puerto Rico Operations, for additional requirements.
- Send this form in duplicate to the appropriate ATF (Bureau of Alcohol, Tobacco and Firearms) office.

Table with 3 columns: Location of Business, Send to: ATF, Telephone Number. Row 1: CA, 221 Main Street, 11th Floor San Francisco, CA 94105-1931, 415-744-7011

Table with 3 columns: State, Address, Phone Number. Rows: CT, DE, MA, MD, ME, NH, NJ, NY, PA, RI, VT; Independence Square West Philadelphia, PA 19106-3308; 215-597-2246; PUERTO RICO; Federico Degatau Federal Bldg. Hato Rey, PR 00918-1746; 809-766-5584; ALL OTHER STATES; 550 Main Street Cincinnati, OH 45202-3263; 800-398-2282

3. LABEL APPROVALS FOR BOTTLED ALCOHOLIC BEVERAGES. Bottlers, packagers, and importers should have ATF approved label certificates (ATF F 5100.31). A label approval is required to sell, ship or deliver for sale or shipment, or to otherwise introduce in interstate or foreign commerce, alcoholic beverages. Also, a label approval allows importers to release specific imported alcoholic beverages from Customs' custody. For label approvals contact the Product Compliance Branch, ATF, Washington, DC 20226 (202-927-8140). ATF does not approve certificates until you have the appropriate FAA Act basic permit. You can submit draft labels (for example, mockups) to ATF for review before printing the labels. Trade name approval on your FAA Act basic permit does not constitute approval as a brand name for labeling purposes.

4. SPECIAL TAX. If you operate a distilled spirits plant or bonded wine premises or deal in beer, wine or distilled spirits, file ATF F 5630.5, Special Tax Registration and Return, and pay an annual tax. File ATF F 5630.5 and pay this tax when you start selling, or offer for sale, alcoholic beverages. You do not file this form or pay special tax when your business only involves the importation or sale of fermented cereal beverages which have an alcoholic content of less than 1/2 percent or where your business is only in Puerto Rico.

5. EMPLOYER IDENTIFICATION NUMBER. You need to have this number for your business even if you do not have any employees. To obtain an EIN, file Form SS-4 with the Internal Revenue Service.

PRIVACY ACT INFORMATION

- 1. AUTHORITY. Solicitation of information on ATF F 5100.24 is made pursuant to 27 U.S.C. Section 204(c). Disclosure of this information by the applicant is mandatory if the applicant wishes to obtain a basic permit under the Federal Alcohol Administration Act.
2. PURPOSES. To identify the applicant; the location of the premises; and to determine the eligibility of the applicant to obtain a basic permit.
3. ROUTINE USES. The information will be used by ATF to make determinations set forth in paragraph 2 above. Where such disclosure is not prohibited, ATF officers may disclose this information to other Federal, State foreign and local law enforcement and regulatory agency personnel to verify information on the application and for enforcement of the laws of such other agency. The information may be disclosed to the Justice Department if the application appears to be false or misleading. ATF officers may disclose the information to individuals to verify information on the application where such disclosure is not prohibited.
4. EFFECTS OF NOT SUPPLYING INFORMATION REQUESTED. ATF may delay or deny the issuance of the FAA Act basic permit where information is not complete or missing.
5. DISCLOSURE OF EMPLOYER IDENTIFICATION NUMBER AND SOCIAL SECURITY NUMBER. You do not have to supply these numbers. These numbers are used to identify an individual or business. If you do not supply the numbers, your application may be delayed.

PAPERWORK REDUCTION ACT NOTICE

This request is in accordance with the Paperwork Reduction of 1995. The information collection is used to determine the eligibility of the applicant to engage in certain operations, to determine the location and extent of operations, and to determine whether the operations will be in conformity with Federal laws and regulations. The information requested is required to obtain or retain a benefit and is mandatory by statute (27 U.S.C. 203 and 204 (c)).

The estimated average burden associated with this collection of information is 1 hour and 45 minutes per respondent depending on individual circumstances. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be addressed to Reports Management Officer, Document Services Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Exhibit E 3 of 3

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

APPLICATION FOR BASIC PERMIT UNDER THE FEDERAL ALCOHOL ADMINISTRATION ACT

1. FULL NAME AND PREMISES ADDRESS

3. EMPLOYER IDENTIFICATION NUMBER (EIN)
(Social Security number is not acceptable)

4. OPERATING NAME (DBA), if any

TELEPHONE NUMBER ()
State in which organized for Corporations and Limited Liability Companies (LLC):

2. MAILING ADDRESS *(If different from premises address)*

5. LABELING TRADE NAME(S), if any

3. BUSINESS(ES) TO BE CONDUCTED AT PREMISES ADDRESS *(Check applicable boxes)*

a. DISTILLED SPIRITS PLANT *(BEVERAGE)*
 DISTILLING
 WAREHOUSING AND BOTTLING DISTILLED SPIRITS
 PROCESSING *(RECTIFYING)* DISTILLED SPIRITS AND WINE

b. BONDED WINE PREMISES
 PRODUCING AND BLENDING WINE
 BLENDING WINE

c. IMPORTING INTO THE UNITED STATES
 DISTILLED SPIRITS
 WINE
 MALT BEVERAGES

d. PURCHASING FOR RESALE AT WHOLESALE
 DISTILLED SPIRITS
 WINE
 MALT BEVERAGES

or while so engaged, sell, offer, or deliver for sale, contract to sell, or ship in interstate or foreign commerce the alcoholic beverages so distilled produced, rectified, blended or bottled, warehoused and bottled, imported or purchased for resale at wholesale.

7. REASON FOR THE APPLICATION

a. NEW BUSINESS
Anticipated start date _____

b. CHANGE IN CONTROL *(Actual or legal)*
 Submit Basic Permit(s) with this application.
Date of Change _____

c. CHANGE IN OWNERSHIP
Date of Change _____
Name, address and permit number(s) of predecessor _____

8. OWNER INFORMATION *(List sole owner, all general parties, LLC members/managers, corporate officers and directors, and shareholders with more than 10% voting stock. Each listed person must also furnish the information in Item 9.)*

NAME	TITLE	% VOTING STOCK/INTEREST <i>(If applicable)</i>	INVESTMENT IN BUSINESS <i>(Item 6)</i>	SOURCE OF FUNDS INVESTED <i>(savings, loans, gift or specify other)</i>

IF APPLICANT IS ACTUALLY OR LEGALLY CONTROLLED BY PERSONS OR BUSINESSES NOT IDENTIFIED ABOVE, PROVIDE ON A SEPARATE SHEET INFORMATION *(as specified for Item 9)* FOR EACH PERSON OR BUSINESS AND STATE THE EXTENT AND MANNER OF THE CONTROL. BUSINESSES SHOULD INCLUDE THEIR EIN.

9. COMPLETE FOR EACH PERSON LISTED IN ITEM 8.

a. FULL GIVEN NAME

b. DATE AND PLACE OF BIRTH

c. SOCIAL SECURITY OR EMPLOYER IDENTIFICATION NUMBER

d. ARE YOU A U.S. CITIZEN?
 YES NO

e. MALE FEMALE

f. OTHER NAMES USED *(Maiden name, nicknames, etc.)*

j. RESIDENCE(S) OVER THE LAST FIVE YEARS

Exhibit F 1682

a. FULL GIVEN NAME	b. DATE AND PLACE OF BIRTH	c. SOCIAL SECURITY OR EMPLOYER IDENTIFICATION NUMBER	d. ARE YOU A U.S. CITIZEN? <input type="checkbox"/> YES <input type="checkbox"/> NO
e. <input type="checkbox"/> MALE <input type="checkbox"/> FEMALE	f. OTHER NAMES USED (Maiden name, nicknames, etc.)		
g. RESIDENCE(S) OVER THE LAST FIVE YEARS			

a. FULL GIVEN NAME	b. DATE AND PLACE OF BIRTH	c. SOCIAL SECURITY OR EMPLOYER IDENTIFICATION NUMBER	d. ARE YOU A U.S. CITIZEN? <input type="checkbox"/> YES <input type="checkbox"/> NO
e. <input type="checkbox"/> MALE <input type="checkbox"/> FEMALE	f. OTHER NAMES USED (Maiden name, nicknames, etc.)		
g. RESIDENCE(S) OVER THE LAST FIVE YEARS			

a. FULL GIVEN NAME	b. DATE AND PLACE OF BIRTH	c. SOCIAL SECURITY OR EMPLOYER IDENTIFICATION NUMBER	d. ARE YOU A U.S. CITIZEN? <input type="checkbox"/> YES <input type="checkbox"/> NO
e. <input type="checkbox"/> MALE <input type="checkbox"/> FEMALE	f. OTHER NAMES USED (Maiden name, nicknames, etc.)		
g. RESIDENCE(S) OVER THE LAST FIVE YEARS			

a. FULL GIVEN NAME	b. DATE AND PLACE OF BIRTH	c. SOCIAL SECURITY OR EMPLOYER IDENTIFICATION NUMBER	d. ARE YOU A U.S. CITIZEN? <input type="checkbox"/> YES <input type="checkbox"/> NO
e. <input type="checkbox"/> MALE <input type="checkbox"/> FEMALE	f. OTHER NAMES USED (Maiden name, nicknames, etc.)		
g. RESIDENCE(S) OVER THE LAST FIVE YEARS			

10. HAS THE APPLICANT OR ANY PERSON LISTED FOR ITEMS 8 OR 9 EVER BEEN DENIED A PERMIT, LICENSE OR OTHER AUTHORIZATION TO ENGAGE IN ANY BUSINESS TO MANUFACTURE, DISTRIBUTE, IMPORT, SELL OR USE ALCOHOL PRODUCTS (beverage or nonbeverage) BY ANY GOVERNMENT AGENCY (Federal, State, local or foreign) OR HAD SUCH PERMIT, LICENSE OR OTHER AUTHORIZATION REVOKED, SUSPENDED OR OTHERWISE TERMINATED?
 YES. State details of each event on a separate sheet. NO

11. HAS THE APPLICANT OR ANY PERSON LISTED FOR ITEMS 8 OR 9 EVER BEEN ARRESTED FOR, CHARGED WITH, OR CONVICTED OF ANY CRIME UNDER FEDERAL, STATE OR FOREIGN LAWS other than traffic violations or convictions that are not felonies under Federal or State law.
 YES. State details of each event on a separate sheet. NO

ATF MAY REQUIRE additional information to process this application. If you are applying for a basic permit to operate a distilled spirits plant or bonded wine premises, you must also file additional forms and information required under the Internal Revenue Code. **OPERATION WITHOUT A PERMIT.** Criminal and administrative actions may be taken against persons engaged in a business listed in Item 6 of this form if it is not conducted pursuant to an FAA Act basic permit.

APPLICANT'S AFFIRMATION. Under penalties of perjury, I declare that I have examined this application, including accompanying statements, and to the best of my knowledge and belief, it is true, correct and complete. The applicant will immediately notify the ATF official with whom this application is filed of any change in ownership, management, or control of the applicant (in the case of a corporation, any change in the officers, directors, or persons holding 10 percent or more of the corporate stock). The business for which this application is made does not violate the law of the State in which the business will be conducted. In addition, if this application is approved, the applicant will conduct operations within a reasonable period of time and maintain such operations in conformity with Federal law.

12. APPLICANT'S SIGNATURE (Sole owner, partner, corporate officer, LLC member or manager, or if designated agent, submit ATF F 5000.8)	13. TITLE OF PERSON SIGNING	14. DATE
--	-----------------------------	----------

15. E-MAIL (INTERNET) ADDRESS (optional):

Exhibit F 2612

Note. This booklet does not contain any tax forms.



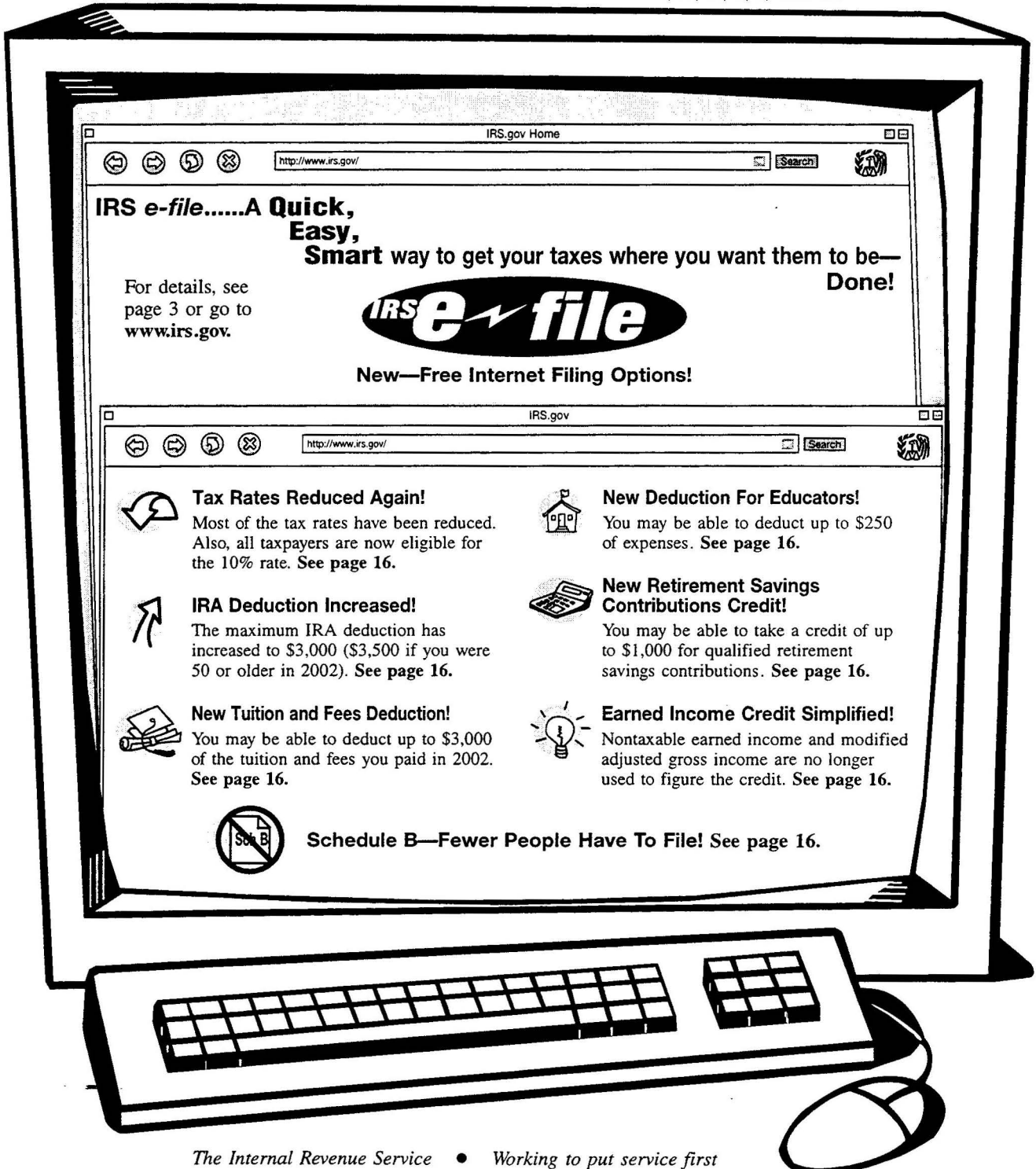
Department of the Treasury
Internal Revenue Service

www.irs.gov

20021040

Instructions

Including Instructions for Schedules A, B, C, D, E, F, J, and SE



The Internal Revenue Service • Working to put service first

Cat. No. 11325E

112

Exhibit G 1 of 4

Disclosure, Privacy Act, and Paperwork Reduction Act Notice

The IRS Restructuring and Reform Act of 1998, the Privacy Act of 1974, and Paperwork Reduction Act of 1980 require that when we ask you for information we must first tell you our legal right to ask for the information, why we are asking for it, and how it will be used. We must also tell you what could happen if we do not receive it and whether your response is voluntary, required to obtain a benefit, or mandatory under the law.

This notice applies to all papers you file with us, including this tax return. It also applies to any questions we need to ask you so we can complete, correct, or process your return; figure your tax; and collect tax, interest, or penalties.

Our legal right to ask for information is Internal Revenue Code sections 6001, 6011, and 6012(a) and their regulations. They say that you must file a return or statement with us for any tax you are liable for. Your response is mandatory under these sections. Code section 6109 requires that you provide your social security number or individual taxpayer identification number on what you file. This is so we know who you are, and can process your return and other papers. You must fill in all parts of the tax form that apply to you. But you do not have to check the boxes for the Presidential Election Campaign Fund or for the third-party designee. You also do not have to provide your daytime phone number.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become

material in the administration of any Internal Revenue law.

We ask for tax return information to carry out the tax laws of the United States. We need it to figure and collect the right amount of tax.

If you do not file a return, do not provide the information we ask for, or provide fraudulent information, you may be charged penalties and be subject to criminal prosecution. We may also have to disallow the exemptions, exclusions, credits, deductions, or adjustments shown on the tax return. This could make the tax higher or delay any refund. Interest may also be charged.

Generally, tax returns and return information are confidential, as stated in Code section 6103. However, Code section 6103 allows or requires the Internal Revenue Service to disclose or give the information shown on your tax return to others as described in the Code. For example, we may disclose your tax information to the Department of Justice, to enforce the tax laws, both civil and criminal, and to cities, states, the District of Columbia, U.S. commonwealths or possessions, and certain foreign governments to carry out their tax laws. We may disclose your tax information to the Department of Treasury and contractors for tax administration purposes; and to other persons as necessary to obtain information which we cannot get in any other way in order to determine the amount of or to collect the tax you owe. We may disclose your tax information to the Comptroller General of the United States to permit the Comptroller General to review the Internal Revenue Service. We may disclose your tax information to Committees of Congress; Federal, state, and local child support agencies; and to

other Federal agencies for the purposes of determining entitlement for benefits or the eligibility for and the repayment of loans. We may also disclose this information to other countries under a tax treaty, or to Federal and state agencies to enforce Federal nontax criminal laws and to combat terrorism.

Please keep this notice with your records. It may help you if we ask you for other information. If you have questions about the rules for filing and giving information, please call or visit any Internal Revenue Service office.

The Time It Takes To Prepare Your Return

We try to create forms and instructions that can be easily understood. Often this is difficult to do because our tax laws are very complex. For some people with income mostly from wages, filling in the forms is easy. For others who have businesses, pensions, stocks, rental income, or other investments, it is more difficult.

We Welcome Comments on Forms

If you have comments concerning the accuracy of the time estimates shown below or suggestions for making these forms simpler, we would be happy to hear from you. You can e-mail us your suggestions and comments through the IRS Web Site (www.irs.gov/help and click on **Help Comments, and Feedback**) or write to the Tax Forms Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. **Do not** send your return to this address. Instead, see the back cover.

Estimated Preparation Time

The time needed to complete and file Form 1040, its schedules, and accompanying worksheets will vary depending on individual circumstances. The estimated average times are:

Form	Recordkeeping	Learning about the law or the form	Preparing the form	Copying, assembling, and sending the form to the IRS	Totals
Form 1040	2 hr., 46 min.	3 hr., 45 min.	6 hr., 5 min.	34 min.	13 hr., 10 min.
Sch. A	3 hr., 4 min.	39 min.	1 hr., 34 min.	20 min.	5 hr., 37 min.
Sch. B	33 min.	8 min.	25 min.	20 min.	1 hr., 26 min.
Sch. C	6 hr., 4 min.	1 hr., 41 min.	2 hr., 19 min.	31 min.	10 hr., 35 min.
Sch. C-EZ	45 min.	3 min.	35 min.	20 min.	1 hr., 43 min.
Sch. D	1 hr., 29 min.	2 hr., 54 min.	2 hr., 38 min.	34 min.	7 hr., 35 min.
Sch. D-1	13 min.	1 min.	11 min.	34 min.	59 min.
Sch. E	3 hr.	1 hr., 6 min.	1 hr., 24 min.	34 min.	6 hr., 4 min.
Sch. EIC	-----	1 min.	13 min.	20 min.	34 min.
Sch. F:					
Cash Method	3 hr., 29 min.	36 min.	1 hr., 27 min.	20 min.	5 hr., 52 min.
Accrual Method	3 hr., 36 min.	26 min.	1 hr., 25 min.	20 min.	5 hr., 47 min.
Sch. H	1 hr., 38 min.	30 min.	53 min.	34 min.	3 hr., 35 min.
Sch. J	19 min.	12 min.	1 hr., 56 min.	20 min.	2 hr., 47 min.
Sch. R	19 min.	15 min.	29 min.	34 min.	1 hr., 37 min.
Sch. SE:					
Short	13 min.	14 min.	13 min.	13 min.	53 min.
Long	26 min.	20 min.	35 min.	20 min.	1 hr., 41 min.

Label

(See instructions on page 21.)

Use the IRS label. Otherwise, please print or type.

Presidential Election Campaign (See page 21.)

LABEL HERE

For the year Jan. 1–Dec. 31, 2002, or other tax year beginning . . . 2002, ending . . . 20 . . . OMB No. 1545-0074

Your social security number . . . Spouse's social security number . . .

Important! You must enter your SSN(s) above.

Filing Status

Check only one box.

Note. Checking "Yes" will not change your tax or reduce your refund. Do you, or your spouse if filing a joint return, want \$3 to go to this fund? . . .

Exemptions

If more than five dependents, see page 22.

6a Yourself. If your parent (or someone else) can claim you as a dependent on his or her tax return, do not check box 6a. 6b Spouse. 6c Dependents: (1) First name Last name (2) Dependent's social security number (3) Dependent's relationship to you (4) if qualifying child for child tax credit (see page 22)

Income

Attach Forms W-2 and W-2G here. Also attach Form(s) 1099-R if tax was withheld.

If you did not get a W-2, see page 23.

Enclose, but do not attach, any payment. Also, please use Form 1040-V.

7 Wages, salaries, tips, etc. Attach Form(s) W-2. 8a Taxable interest. Attach Schedule B if required. 8b Tax-exempt interest. Do not include on line 8a. 9 Ordinary dividends. Attach Schedule B if required. 10 Taxable refunds, credits, or offsets of state and local income taxes (see page 24). 11 Alimony received. 12 Business income or (loss). Attach Schedule C or C-EZ. 13 Capital gain or (loss). Attach Schedule D if required. If not required, check here. 14 Other gains or (losses). Attach Form 4797. 15a IRA distributions. 15b Taxable amount (see page 25). 16a Pensions and annuities. 16b Taxable amount (see page 25). 17 Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E. 18 Farm income or (loss). Attach Schedule F. 19 Unemployment compensation. 20a Social security benefits. 20b Taxable amount (see page 27). 21 Other income. List type and amount (see page 29). 22 Add the amounts in the far right column for lines 7 through 21. This is your total income.

Adjusted Gross Income

23 Educator expenses (see page 29). 24 IRA deduction (see page 29). 25 Student loan interest deduction (see page 31). 26 Tuition and fees deduction (see page 32). 27 Archer MSA deduction. Attach Form 8853. 28 Moving expenses. Attach Form 3903. 29 One-half of self-employment tax. Attach Schedule SE. 30 Self-employed health insurance deduction (see page 33). 31 Self-employed SEP, SIMPLE, and qualified plans. 32 Penalty on early withdrawal of savings. 33a Alimony paid b Recipient's SSN. 34 Add lines 23 through 33a. 35 Subtract line 34 from line 22. This is your adjusted gross income.

Exhibit G 3 of 4

Tax and Credits

Standard Deduction for—

• People who checked any box on line 37a or 37b or who can be claimed as a dependent, see page 34.

- All others: Single, \$4,700; Head of household, \$6,900; Married filing jointly or Qualifying widow(er), \$7,850; Married filing separately, \$3,925

36 Amount from line 35 (adjusted gross income)
37a Check if: [] You were 65 or older, [] Blind; [] Spouse was 65 or older, [] Blind.
38 Itemized deductions (from Schedule A) or your standard deduction (see left margin)
39 Subtract line 38 from line 36
40 If line 36 is \$103,000 or less, multiply \$3,000 by the total number of exemptions claimed on line 6d.
41 Taxable income. Subtract line 40 from line 39.
42 Tax (see page 36). Check if any tax is from: a [] Form(s) 8814 b [] Form 4972
43 Alternative minimum tax (see page 37). Attach Form 6251
44 Add lines 42 and 43
45 Foreign tax credit. Attach Form 1116 if required
46 Credit for child and dependent care expenses. Attach Form 2441
47 Credit for the elderly or the disabled. Attach Schedule R
48 Education credits. Attach Form 8863
49 Retirement savings contributions credit. Attach Form 8880
50 Child tax credit (see page 39)
51 Adoption credit. Attach Form 8839
52 Credits from: a [] Form 8396 b [] Form 8859
53 Other credits. Check applicable box(es): a [] Form 3800 b [] Form 8801 c [] Specify
54 Add lines 45 through 53. These are your total credits
55 Subtract line 54 from line 44. If line 54 is more than line 44, enter -0-

Other Taxes

56 Self-employment tax. Attach Schedule SE
57 Social security and Medicare tax on tip income not reported to employer. Attach Form 4137
58 Tax on qualified plans, including IRAs, and other tax-favored accounts. Attach Form 5329 if required
59 Advance earned income credit payments from Form(s) W-2
60 Household employment taxes. Attach Schedule H
61 Add lines 55 through 60. This is your total tax

Payments

If you have a qualifying child, attach Schedule EIC.

62 Federal income tax withheld from Forms W-2 and 1099
63 2002 estimated tax payments and amount applied from 2001 return
64 Earned income credit (EIC)
65 Excess social security and tier 1 RRTA tax withheld (see page 56)
66 Additional child tax credit. Attach Form 8812
67 Amount paid with request for extension to file (see page 56)
68 Other payments from: a [] Form 2439 b [] Form 4136 c [] Form 8885
69 Add lines 62 through 68. These are your total payments

Refund

Direct deposit? See page 56 and fill in 71b, 71c, and 71d.

70 If line 69 is more than line 61, subtract line 61 from line 69. This is the amount you overpaid
71a Amount of line 70 you want refunded to you
71b Routing number
71c Type: [] Checking [] Savings
71d Account number
72 Amount of line 70 you want applied to your 2003 estimated tax

Amount You Owe

73 Amount you owe. Subtract line 69 from line 61. For details on how to pay, see page 57
74 Estimated tax penalty (see page 57)

Third Party Designee

Do you want to allow another person to discuss this return with the IRS (see page 58)? [] Yes. Complete the following. [] No
Designee's name Phone no. Personal identification number (PIN)

Sign Here

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature Date Your occupation Daytime phone number
Spouse's signature. If a joint return, both must sign. Date Spouse's occupation

Paid Preparer's Use Only

Preparer's signature Date Check if self-employed [] Preparer's SSN or PTIN
Firm's name (or yours if self-employed), address, and ZIP code EIN Phone no.

Exhibit G 4 of 4

Civil Fiction

- A. We find Legal Fictions everywhere even when it comes to the Milwaukee Brewers Baseball team.
1. The first time we read this case back in the early 1990's it introduced us to several basic legal principles.
 2. We suggest you read this case carefully and use your highlighter to mark those parts you want to refer back to.
- B. Go to the first page; last sentence in the first column.
1. I ask you: "If a Federal Appeals Judge has a major problem sorting out the conflicting views of law in this tax case, how are we supposed to understand it?"
- C. Next page, last paragraph of the first column, "Although it is a "Legal Fiction", read it over and over again so it sinks in. Now go over and do the same with item 5.
- D. We know that a "Legal Fiction" has to be rebutted with evidence and that's exactly what the court said in the last actual page of this case at item 10.
1. "The taxpayer has introduced substantial evidence in support of his position and has established the wrongfulness of the Government's position; therefore any presumption in favor of the Government's determination disappeared, and this decision is based upon the preponderance of all credible evidence in this case."
 2. Reread that statement a few times and break it down into its basic elements.
 3. Start gathering your evidence together as soon as possible using FOIA requests and other administrative processes so you are prepared to rebut the fiction.

ALLAN H. SELIG, Plaintiff, v. UNITED STATES OF AMERICA,

Defendant

Civil Action No. 81-C-334

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
WISCONSIN

565 F. Supp. 524; 1983 U.S. Dist. LEXIS 16941; 83-2 U.S. Tax

Cas. (CCH) P9442; 52 A.F.T.R.2d (P-H) 5314

May 16, 1983

COUNSEL: David E. Beckwith, James P. Brody, and Nancy J. Sennett, Foley & Lardner, Milwaukee, Wisconsin, for Plaintiff.

Joseph P. Stadtmueller, United States Attorney, and Melvin K. Washington, Assistant United States Attorney, Milwaukee, Wisconsin, Lawrence L. Hoenig and Nancy Morgan, Trial Attorneys, Tax Division, Department of Justice, Washington, District of Columbia, for Defendant.

JUDGES: Reynolds

OPINION BY: REYNOLDS

OPINION: DECISION AND ORDER

The plaintiff taxpayer, proceeding under 28 U.S.C. § 1346(a), seeks a refund of income taxes that he paid under protest because the Government disallowed his proportionate share of the amortization (depreciation) of certain baseball player contracts of the Milwaukee Brewers Baseball Club, Inc. (Brewers). The Brewers obtained the player contracts in 1970 when the Brewers purchased the assets of the Seattle Pilots from Pacific Northwest Sports, Inc. (Seattle or Pilots). The Brewers allocated the \$10.8 million purchase price as follows: \$10.2 million to the 149 player contracts acquired; \$500,000 to the American League franchise; and \$100,000 to miscellaneous supplies and equipment. The allocation of \$100,000 to miscellaneous supplies and equipment is not in dispute. The issue in this case is whether the allocation made by the Brewers between the value of the player contracts and the value of the franchise was reasonable, and if it was not, what would constitute a reasonable allocation. For the reasons set forth in this decision, I find that the allocation made by the Brewers was reasonable.

This is a difficult case to sort out because of the conflicting views of law, accounting, economics, and human motivations as they relate to organized baseball. At trial, each side operated on premises inapposite to the other's

case. The taxpayer proceeded on the theory that operating a baseball club was a business, and the Government proceeded on the theory that operating a baseball club was, in part, a rich man's toy -- something akin to a yacht -- and that the Court's job was to decide what portion of the toy was not tax deductible. So at the outset I will set forth the assumptions (i.e., conclusions of law) that underlie my decision and which pretty much determine the outcome of the case, and second examine the general structure of professional baseball, especially the distinctions between the three markets in which player contracts are transacted -- the player market, the free agent market, and the club market. I will then summarize the history of the Brewers' early efforts to acquire a professional baseball club to play in Milwaukee, the creation and development of the Seattle Pilots, the Brewers' purchase of the Pilots, and the manner in which the Brewers allocated the purchase price for tax purposes. In the last two parts of this decision, I will discuss the factors which lead me to conclude that the allocation made by the Brewers was reasonable and that the Government's valuations of the player contracts are unreliable.

The case was tried to the Court and lasted for about a month. This decision constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

I. ASSUMPTIONS (i.e., LEGAL CONCLUSIONS)

1. Professional baseball is a business for tax purposes. The owners are therefore entitled to use generally accepted accounting principles in determining the profit or loss of a club and may take tax deductions that are available to other business enterprises.

The Government has argued that this is not so and that to an undetermined extent the operation of a professional baseball team is not for "business purposes" but is to give joy to the owners. It is further argued that this "joy" has a value and that this joy value should be attrib-

uted to the value of the franchise. Owners of baseball clubs, as well as owners of other enterprises, do receive a joy out of ownership. Allocation between the joy value and the business value is required for vacation homes and yachts that are partially used for business purposes, but this is not applicable here because professional baseball is a business, the allocation would be too speculative, and the tax laws do not recognize or tax the non-monetary motivations of human beings as important as those motivations are. (Adam Smith notwithstanding, not all human motivations can be reduced to monetary terms.) .

2. Baseball player contracts owned by the clubs are intangible assets which are known from experience to be of use for only a limited period, the length of which can be determined with reasonable accuracy. Thus, the cost of acquiring the contracts may be depreciated over their useful lives, and a tax deduction for that depreciation is allowed under § 167(a) of the Internal Revenue Code. The Government has not challenged the length of the useful life of five years over which the Brewers amortized their player contracts.

3. The mass asset theory which would have prevented professional sports clubs from deducting the depreciation of player contracts obtained as part of a bundle of assets has been rejected. *Laird v. United States*, 556 F.2d 1224 (5th Cir. 1977), cert. denied, 434 U.S. 1014, 54 L. Ed. 2d 758, 98 S. Ct. 729 (1978); *First Northwest Industries of America, Inc. v. Commissioner*, 70 T.C. 817 (1978), rev'd and remanded on other grounds, 649 F.2d 707 (9th Cir. 1981). From an economic point of view, the mass asset theory was and is correct. It is economically impossible to separate the value of the franchise from the value of the player contracts for, in fact, one is valueless without the other. It was for this reason that the Government urged the courts to adopt the mass asset theory in *Laird* and *First Northwest Industries*. The Government did not prevail in the mass asset theory, so it has abandoned it in this case.

Although it is a legal fiction that one can allocate part of the purchase price of a baseball club to the franchise and part to the player contracts in an economically sensible manner, it is the law that we have to allocate. (Legal fictions are not new to the law and are useful in solving legal problems. For example, we all know that it is a fiction that a corporation is a person, but in law we accept it as being true.) Once it is accepted that the allocation of the price among the assets is the law, then we are relieved of trying to explain it in rational economic terms and can proceed to test the reasonableness of the allocation in terms of generally accepted accounting principles and legal requirements. This process is necessarily arbitrary from an economic standpoint and depends on accepting legal and accounting definitions.

4. To allocate the purchase price among the individual assets purchased, it is proper to apply generally accepted accounting principles. Generally accepted accounting principles require the price to be allocated first to the tangible assets (bats and balls) and to the identifiable intangible assets (player contracts) based on the fair market value of each asset. The difference between the total amount allocated to those assets and the purchase price of the entire bundle of assets (the club) is allocated to a generalized intangible asset (the franchise). In this case, the tangible assets and the player contracts are depreciable while the franchise is not. The fair market value is the price at which an asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, in the economic market in which the asset was bought and sold. The economic market relevant to this case is the market in which entire professional baseball clubs are bought and sold, which I shall call the club market. Determining the fair market value of the player contracts through the use of appraisals is proper under generally accepted accounting rules.

5. Taxpayers have a right to know the tax laws and to consider the effect of these laws on their investments. The day has long since past, if it ever existed, that tax laws were enacted only to raise revenue. Tax laws always have been, are now, and in the future will be enacted to affect and direct the economic activity of taxpayers as well as to raise revenue. As far as being entitled to take tax deductions, those engaged in the baseball business are to be treated no differently than those engaged in other economic activities.

6. The Milwaukee Brewers Baseball Club, Inc., is the general partner of the Milwaukee Brewers Baseball Club, a limited partnership. The Brewers elected under §1372(a) of the Internal Revenue Code to have the Internal Revenue Service treat the corporation as a subchapter S corporation. This election was proper and permits the deductions for depreciation to be passed through to the owners.

7. The Government has urged the Court to find that the limited partnership was "set up in part to allow the investors to claim tax losses on their own returns in excess of equity contributions at risk," and by implication to draw certain inferences and conclusions from this which are not clear to me. I decline to do so for two reasons. First, even if this is true, it is not illegal; and second, the evidence does not support such an allegation.

8. Throughout this case the Government has intimated that there exists in organized baseball a conspiracy to deprive the Government of its taxes. This is said to be true because the tax lawyers for the American League, the old club owners, the club buyers and their lawyers and their appraisers have all been aware of the tax laws

and the tax effect of allowing the amortization of player contracts, and that with this unspoken and unwritten understanding they have appraised the player contracts artificially high so that the new club owners can write off a larger percentage of their purchase price. It is true that the American League and the club owners, past and present, including the Brewers, have sought the advice of lawyers and accountants who specialize in taxation and are aware of the tax laws and regulations. Further, it is true that the Brewer's appraisers understood the concept of depreciating player contracts. To the highly suspicious, these facts suggest a conspiracy, but there is no objective evidence of such a conspiracy in this case, and I find that one did not exist. The investors in baseball have the right to seek legal and accounting tax advice and counsel.

II. Structure of Professional Baseball

Baseball is good for Americans (who can argue with this), but from a business standpoint, much to my surprise, professional baseball generally is unprofitable. Recognizing that baseball is good for Americans, the courts and Congress have helped professional clubs by taxing them as businesses and by historically exempting professional baseball from the antitrust laws.

The potential profitability of a baseball club depends heavily on the characteristics of the club's local market. Baseball revenues are not generally shared by all league members. The league members do share revenues generated from national broadcasts, and visiting teams do receive 20 per cent of gate receipts. But much of a club's revenue comes from home gate receipts, local television and radio broadcasts, and concessions. The local market strongly influences the amount of revenue generated by these sources. Of course, the amount and distribution of broadcast revenues is constantly changing in response to technological developments, such as cable television.

The tax laws help baseball clubs survive despite their unprofitability. The tax laws permit owners to write off (deduct) the cost of the player contracts that they purchase and to write off as an expense the cost of developing new players. This in effect enables the owners to double up on expenses (i.e., tax deductions) during the first five years of operation (i.e., the period of amortization). While baseball is generally an unprofitable business in terms of income from an investment, club owners generally hope to make a capital gain when clubs are sold, and they generally have done so in the past.

Professional baseball has also benefited by organizing as a legal cartel. Membership in the two major baseball leagues -- the American League, of which the Brewers are a member, and the National League -- is limited. The leagues operate under a strict set of rules established by the cartel. Among other things, these rules control the

flow of new baseball talent into the major leagues and control the movement of players between members of the cartel.

Organized baseball controls new baseball talent through minor league farm systems operated by each major league club. Amateur players are drafted as free agents, and their talent is developed by their playing in the minor leagues. In this sense professional baseball is quite unlike professional football and basketball which rely primarily on colleges to develop their talent. The farm clubs generally lose money, about a million dollars per major league club per year. A club can expect to get two to four major league players a year out of its farm system.

The Government argues that the right to participate in organized baseball (i.e., to be a member of the cartel) is a valuable right which is nondepreciable because it enables the owners to buy players at a discount under the rules of the cartel. This is true as a matter of economics, but since the allocation of the purchase price is economically arbitrary, this does not help ascertain the amount to be allocated to the franchise under general accounting principles for tax purposes.

To determine the appropriate allocation of cost between the player contracts and the franchise, one must carefully distinguish the three markets in which player contracts are bought and sold. These are the "player market," the "free agent market," and the "club market." Each market has distinct characteristics, rules, and mediums of exchange, and the cartel's rules control each market to a varying extent.

A. The Player Market

The "player market" is the one that until 1975 we heard the most about, and it is still the one where most of the transactions take place. The player market is the one in which individual players are bought, sold, and traded. Players may move between the majors and the minors, between clubs, and between leagues.

There are two mediums of exchange in the player market: the player and the dollar. The player is the principal and dominant medium of exchange, and one cannot be active in the player market without a roster of players to draw from and to trade with. Players are traded for players now or in the future, for players and dollars now or in the future, and for dollars now.

Baseball rules establish an elaborate system of supply and price constraints in the player market. The most frequently discussed constraints are known as the reserve rules and the waiver rules. Under the reserve rules, each major league club is entitled to protect forty players from being drafted by other clubs. This is done by placing the players on the reserve list, also known as the 40-man

roster. During most of the playing season, only twenty-five players will be active. This 25-man roster is also known as the active roster. Players not placed on the 40-man reserve list may be drafted by other clubs at the annual December meeting, known as the Rule 5 draft. Dollar prices for players acquired in the Rule 5 draft are fixed according to the classification of the selecting team. A player drafted by a major league club is sold for \$25,000.

The waiver rules provide that during certain times of the year, a player cannot be assigned to another club without first offering the player to all other teams in his league. If all other teams waive the right to acquire the player, the assignment may take place. If instead one or more other clubs claim the contract, the offering club must either withdraw its offer or allow the player to go to the claiming club with the poorest record. The dollar price for a player acquired on waivers is fixed at \$20,000.

Because of the tight supply and price constraints imposed on the player market, the price at which a player would be transacted in this market has little correlation to (1) the price at which the player would be transacted in a free market, (2) the salary paid the player, or (3) the cost of developing a player through the farm system. Further, because of the constraints, the best players are seldom traded and almost never sold for dollars alone in the player market.

B. The Free Agent Market

The free agent market is the market in which the players, rather than an assigning club, negotiate for their contracts. The free agent market has two components: the free agent draft and the re-entry draft. In the free agent draft, major league and minor league clubs draft the right to negotiate exclusively with amateur players, meaning players who have not previously contracted with a major league or minor league club. This draft occurs at the winter and summer meetings. In the re-entry draft, clubs draft the right to negotiate exclusively with veteran players. Since 1976, the reserve rule has provided that after six years of major league service, a player no longer under contract may declare himself a free agent. The re-entry draft takes place in November.

The free agent market is more like a free market than is the player market. Its medium of exchange is the dollar. Although a number of the cartel's constraints affect the free agent market, the price at which free agents transact is not fixed. Because the best players can negotiate higher salaries, transactions involving the best players occur in the free agent market through the re-entry draft, whereas such transactions seldom occur in the player market.

The free agent market is relevant as a guide to the money value of a player in a free market, although comparing transactions in the free agent market with transactions in the player market is difficult.

C. The Club Market

The last market in which player contracts are transacted is the club market. This is the market in which entire baseball clubs are bought and sold at one time. The club includes player contracts, the league franchise, and physical assets. The medium of exchange in this market is the dollar.

The club market is essentially a free market. Where an existing club is sold to a new owner, the price is freely negotiated. Cartel approval is required to move a club, but the cartel does not have to approve the sale price. The purchase price for the club depends upon the value of the player contracts to the club, not upon cartel rules or the value of the contracts to the players. In the past, when clubs have been created through expansion of the league, the price was set by the league and the buyer could accept or reject it. If he was smart, he accepted it, for experience has demonstrated that the expansion prices have been less than later comparable negotiated prices.

The Brewers' purchase of the Pilots took place in the club market. Therefore, the Court's task is to determine the fair market value of the player contracts to the Brewers in this market, which is what the contracts would cost in a free market. Most of the Government's evidence of contract values pertained to the player market, which is not a free market. Further, the Government argued that that franchise is a club's most valuable asset, but I find that the main asset acquired in the club market is the roster of players, for the players are used not only to play ball but as a medium of exchange in the player market.

III. BREWERS' EARLY EFFORTS TO ACQUIRE A MAJOR LEAGUE CLUB 1965-1969

Allan H. Selig, the taxpayer and plaintiff, organized a group of Wisconsin investors and with them formed the Milwaukee Brewers in August 1965. In that year, the Milwaukee Braves of the National League of Baseball Clubs, over the objections of almost everyone in Milwaukee, moved its team to Atlanta, Georgia, leaving Milwaukee without a major league baseball club. Selig had been a shareholder in the Braves. One of the purposes of the Brewers was to acquire and operate a professional baseball club in Milwaukee. Selig has been the president of and a shareholder in the Brewers, and Edmund B. Fitzgerald was its vice-president and a shareholder. In May 1966, the Brewers elected to be treated as a small business corporation for federal income tax purposes under §1372(a).

Between 1965 and 1970, Selig and Fitzgerald were actively involved in trying to acquire a professional baseball club to operate in Milwaukee. Applications for a franchise were made with the American League in 1966 and 1967 and with the National League in 1966, 1967, and 1968, and efforts were made to purchase existing teams in either league with the intent of moving one to Milwaukee.

In the summer of 1969, Selig and Fitzgerald negotiated with Arthur Allyn for the purchase of the Chicago White Sox with the expectation that that team would be transferred to Milwaukee. A price of \$12,400,000 to \$12,500,000, which included the purchase of the White Sox ball park, was discussed. The negotiations fell through in August when Allyn's brother, a 50% shareholder, determined that he did not want to sell.

IV. CREATION AND DEVELOPMENT OF THE SEATTLE PILOTS 1967-1969

In 1967, the American League decided to expand by adding two franchises in 1968 with play to begin in 1969. Milwaukee's efforts to secure one of those franchises failed. The franchises were awarded to Kansas City and Seattle.

The Seattle franchise was sold to Pacific Northwest Sports, Inc. (Seattle or Pilots). The president of Seattle was Dewey Soriano, its treasurer was his brother Max Soriano, and its major shareholder was William Daley of Cleveland.

Seattle paid the price set by the American League for the new clubs. The league broke down the price as follows: (a) \$5,250,000 for 30 player contracts to be acquired in the October 1968 expansion draft from the ten existing clubs at \$175,000 each; (b) \$100,000 for the franchise; (c) a contribution of a prorata share to the operation of the commissioner's office and to the Major League Pension Fund (the Central League Fund) for three years; (d) foregoing of national television or radio revenues from the existing national contract for three years; and (e) 2% of their gate receipts for three years.

The \$175,000 price per player contract was established at a league meeting in Mexico City in November 1967. It was based in part on the costs incurred in connection with developing a player and in part on what the owners thought a buyer would pay. At that time the player development costs (i.e., costs of scouting in the minor leagues, etc.) were in excess of \$175,000 per player. The members of the American League who set the price at \$175,000 per player were generally aware that that figure, if accepted by the IRS, would enable the buyers to write off the cost of the players over a period of years.

In anticipation of being granted a major league franchise, Seattle acquired the California Angels, an AAA minor league team, in October 1967. Seattle paid \$75,000 for the Angels. Seattle also entered into a working agreement with a minor league club in Newark, New York; and in June 1968, Seattle participated in the majors' rookie draft.

Seattle hired Marvin Milkes as general manager; Robert (Bobby) Mattick; Karl Koehl, Bob Clemens, Bill Skiff, Earl Silverthorn, and Earl Torgeson as scouts; and Art Parrack and Ray Swallow as farm directors. (Milkes and Mattick would later move with the team to Milwaukee and would appraise the value of the player contracts acquired by the Brewers.) By the fall of 1968, Seattle not only had a scouting system and minor league farm system, including working agreements with Montreal, Clinton, Newark, and Billings, but had incurred team development expenses in the amount of \$1,114,419 in connection with the operation of the Angels and the operation of its Newark team and for scouting and signing players.

In October 1968, Seattle participated in the American League expansion draft. Milkes made initial draft decisions and then consulted Dewey Soriano about the final decisions. Kansas City also participated in the same draft with Cedrick Tallis (who later became one of the Brewers' appraisers) making its draft decisions. The players were selected from the ten existing American League teams. Initially each existing team protected a list of fifteen players. Seattle and Kansas City drafted one player each from the remaining players, and then the ten existing teams each protected three more players. This process continued until Seattle and Kansas City each had thirty players. Draft picks were made from both the major and the minor leagues. The last player drafted was the thirty-sixth man from an existing team. The League determined that this system would make available to the expansion teams higher quality players than would a system where each existing team provided a list of players who could be drafted, as was done in the past.

In 1969, Seattle added to its roster, developed its organization, and played ball from April to September. Except for the fact that they were losing money, they were doing very well. By June, the owners realized that they were in severe financial difficulty, that no additional money could be put into the team, and that it had to be sold. Their operating expenses in 1969 amounted to \$3,773,701.

V. THE PURCHASE OF SEATTLE BY MILWAUKEE

After the White Sox negotiations fell through, Selig remained determined to get a team for Milwaukee. He heard about Seattle's financial problems and contacted them. This resulted in a meeting with Selig, Fitzgerald,

and Max and Dewey Soriano in Seattle. This was followed by a meeting in Cleveland with William Daley, the major shareholder of Seattle, and further negotiations in the Bird Feed Room in the Baltimore stadium at the World Series in October 1969. Seattle asked for approximately \$13,000,000, and Milwaukee offered about \$9,500,000. During these negotiations, Dewey claimed that the value of the Seattle team was based on its players, farm system, scouts, and the fact that during the previous three years, Seattle had invested large sums of money in the team. It certainly was not based on the profitability of the team in Seattle.

The deal was closed with a handshake in October 1969 with Milwaukee agreeing to purchase Seattle, including its complete roster of 149 players, for \$10,800,000. The purchase price was negotiated in a free and open market (the club market) and the negotiations resulted in an arms-length transaction between a willing seller and a willing buyer. The purchase price was determined without any reference to rules of baseball or American League constraints which are present in "sales" of individual players in the players market. The deal was conditioned on American League approval of the club's transfer from Seattle to Milwaukee but not on approval of the sales price.

The American League failed to approve the transfer to Milwaukee but instead attempted to save the financially troubled Seattle team by putting more money into it. These efforts were unsuccessful. In March 1970, at the suggestion of the Brewers' attorneys, Seattle filed a petition for bankruptcy in the United States District Court for the Western District of Washington.

While this was going on, Milwaukee, through Selig and Fitzgerald, continued their efforts to close the deal which had been struck in October 1969. On March 8, 1970, an agreement for the purchase and sale of the assets of Seattle at \$10,800,000 was reduced to writing.

The bankruptcy court came to the rescue of the parties and ordered that the sale of the team to Milwaukee be completed by April 1, 1970, and on that date Milwaukee acquired the team which included membership in the American League, 149 player contracts, scouting and coaching contracts, and baseball equipment. The team started to play ball in Milwaukee six days later as the Milwaukee Brewers. On April 9, 1970, the Milwaukee Brewers Baseball Club, a Wisconsin limited partnership, was formed. The Milwaukee Brewers Baseball Club, Inc., became the general partner of the limited partnership and assigned to the Milwaukee Brewers Baseball Club all of the assets acquired by it from Seattle.

VI. ALLOCATION OF THE PRICE AND APPRAISALS OF THE PLAYER CONTRACTS

At the suggestion of Milwaukee, the contract between Milwaukee and Seattle allocated the purchase price of the club in the following manner:

(A) American League membership and franchise -- \$500,000;

(B) Player Contracts -- \$10,200,000; and

(C) Miscellaneous supplies, equipment, and other assets -- \$100,000.

Immediately after the transfer, Selig and his staff were so busy getting their team going that they did not get around to ordering appraisals for several months in spite of being urged to do so by their lawyer, but eventually they did so. Appraisals of the value as of April 1, 1970, of the 149 man roster were ordered and made in the fall of 1970. The individuals asked to perform the valuations were Frank Lane, Cedric Tallis, Bobby Mattick, and Marvin Milkes.

The following appraisals of the roster as of April 1, 1970, were made and submitted in the fall of 1970:

Lane	\$10,351,000
Tallis	\$10,358,000
Mattick	\$9,685,000
Milkes	\$9,778,000

The average was \$10,043,000. After discussion with the Brewers' auditors and others, Robert Schoenbachler, the Brewers' financial officer at the time, decided it was appropriate to take the \$10.2 million allocated to the player contracts by the purchase contract and apply it pro rata to the player contracts for amortization purposes.

VII. REASONABLENESS OF THE ALLOCATION MADE

The plaintiff has urged the Court to assess the reasonableness of the \$10.2 million allocation to the player contracts by reference to five items:

1. The appraisals;
2. Cost of player development;
3. Insurance on team's roster;
4. Small value of the franchise; and
5. Contracts of players who were free agents.

A. Appraisals

The Brewers contend that the four appraisals performed for them in 1970 provide a reasonable basis for their allocation. Appraisals by independent and knowledgeable persons is an appropriate method of determining the fair market value of an intangible asset according to generally accepted accounting principles. Appraisals made by persons who are not independent may be relied upon only to confirm appraisals made by independent persons.

I find that Lane and Tallis were knowledgeable and independent appraisers. Lane, who is now deceased, had long been associated with baseball in a variety of capaci-

ties, holding positions as a scout and general manager. He had been a longtime friend and confidant of Selig and had advised him in player personnel matters pertaining to the acquisition and purchase of a baseball club. After his appraisal in 1970, Lane, widely known in the industry as "Trader Lane," became the general manager of the Brewers, but there is no showing that he was not an independent appraiser in 1970. Lane's personal relationship with Selig was not such as to cast doubt on his independence as an appraiser. Tallis, who is now executive vice-president of the New York Yankees, was actively involved in baseball since the late 1930's. His knowledge of the roster acquired by the Brewers stems from the fact that during the 1968 expansion draft, he was the general manager of the Kansas City Royals and was drafting from the same list of available players as was Marvin Milkes for the Seattle Pilots. He relied not only on statistics but on personal observations, scouting, reports, and conversations with general managers. Kansas City potentially faced a dispute with the IRS over deductions for amortizing its player contracts similar to the present dispute with the Brewers, but this fact alone does not impugn Tallis' independence as an appraiser.

Milkes and Mattick were also knowledgeable appraisers, but they were not independent in 1970. Milkes, now deceased, had an extensive career in baseball. He was knowledgeable about the value of the players listed on the 149 man roster as he was the general manager of the Seattle Pilots from 1968 through 1970, and participated in the scouting and signing of players for Seattle, both for farm team acquisitions and for the 1968 expansion draft. Milkes moved with the team to Milwaukee in 1970 and became the Brewers' general manager. Since the 1940's, Bobby Mattick has served as a scout, a farm director, and a field manager for various baseball organizations. He was a scout with Seattle beginning in 1968 and continuing through his service with the Brewers to 1972. He is currently the director of baseball operations for the Toronto Blue Jays. He was a knowledgeable witness. Appraisals by persons who were not independent were received for the limited purpose of comparing them with appraisals made by independent persons. The appraisals made by Mattick and Milkes were lower than those made by Lane and Tallis.

The status of some of the players changed shortly after April 1, 1970. Some players whose contracts were valued fairly high were shortly thereafter released or sold in the player market for amounts less than their appraised value in the club market. The Government claims that impeaches the appraisals. It does not. Changes in player status is a continual process in baseball. A release of a player in order to acquire another player in the player market on April 15, 1970, does not indicate that the player had no value in the club market on April 1, 1970. It is like saying that because a Russian ballet dancer has

little value in Moscow, the dancer has little value in New York. The appraisals for the club market were estimates of the value of the player contracts to the club in a free market unconstrained by the rules of the American League; the releases and sales which took place in the player market were in a different market, one constrained by the rules of the American League. The Government's argument totally confuses the two markets.

The Brewers did not allocate the average appraised value to the player contracts but rather allocated the slightly higher amount allocated by the purchase contract. The allocation of \$10.2 million made in the purchase contract with Seattle must be ignored unless it is an indication of the fair market value of the assets. Although the purchase price of \$10.8 million was arrived at through negotiations and was the free market price for the club, the \$10.2 million allocated to player contracts was not arrived at through negotiation. While the appraisers did not know that the purchase contract had allocated \$10.2 million to the player contracts, they did know that the total purchase price was \$10.8 million, and it was common knowledge in the baseball industry that most of the purchase price for baseball clubs was allocated to player's contracts. These facts shifted the burden to the Brewers to prove that the allocation was reasonable.

They have met their burden. The \$10.2 million allocation was made by Thomas J. Donnelly who at the time was plaintiff's attorney. Donnelly decided upon the \$10.2 million figure after discussions with a number of baseball people, including Schoenbachler, Fitzgerald, Selig, and Max Soriano. Donnelly also had information on the allocations made by other clubs, and, in comparison, the amount the Brewers allocated to the franchise, i.e., \$500,000, was large. After the appraisals were made, it turned out that the \$10.2 million figure, while not the arithmetic mean of the appraised values, was within the range of appraised values.

B. Cost of Developing Major League Players

Another test of the reasonableness of the allocation is to analyze the costs of developing a player. Major League Combined Statements for 1970 and 1971 show player development costs of approximately \$31,000,000 for all twenty-four major league clubs or \$1,200,000 per club per year in 1970 and 1971. The total player development costs for the New York Yankees during the late 1960's and early 1970's were between \$1,000,000 and \$1,400,000 per year. Player development costs in 1969 were \$1,317,000 per team annually. By incurring these costs, each major league club can expect two to four players per year to move up from the minors to the twenty-five man major league roster.

If one computes the cost of developing a major league player by dividing the average annual player development costs by the average number of players who move up from the minor leagues, then a rough approximation of the cost to develop a major league player would be \$350,000. The experience of the Baltimore Orioles is that their average cost of developing a major league player from 1968-1971 was \$437,166. The Brewers' cost per player from 1970-1975 was \$294,304.

If we assume that the average development cost of \$350,000 per player approximates the fair market value of a major league player contract acquired in the club market, then the twenty-five man major league roster acquired by Milwaukee from Seattle would have a total fair market value of \$8.7 million. In addition to the twenty-five man major league roster, Milwaukee acquired seventeen other major league players and 107 minor league players. It seems reasonable to find that their contracts were worth at least \$1.5 million. This supports plaintiff's position that the 149 player contracts acquired by Milwaukee were worth about \$10.2 million.

The Government does not agree with this method of calculating the cost of developing a major league player. The Government urges the Court to divide the player development costs per team by the number of minor league players, which would yield a development cost of about \$30,000 per player. This assumes that the cost of a player who moves into the major leagues from the minors is the same as the cost of any minor league player, and that the purpose of the minor leagues is to give the boys an opportunity to play baseball. This is not true.

The primary purpose of the minor leagues is to develop talent for the major leagues. The Government argues that the minor league farm system serves many purposes. This is true in that the minor leagues bring players up to the major leagues; serve as a "hanger" by holding players with major league talent until there is room for them on the major league rosters; tie up baseball talent so as to hinder the formation of any competing baseball leagues; and keep major league players sharp through practicing or playing together. But the evidence establishes beyond a doubt that the main reason the major league clubs operate minor league clubs is to develop new major league players.

I find that dividing the average annual player development costs by the average number of players making it onto the major league roster is a helpful tool in estimating the value of a player contract purchased in the club market. The question is, after all, how much it would cost to obtain a major league player by alternative means. Presumably, that cost would be in the neighborhood of what it would cost to develop the players so acquired. The average development cost per major league

player is objective evidence that supports the appraisals of Lane, Milkes, Mattick, and Tallis.

C. Player Roster Insurance

It is also helpful to ascertain the reasonableness of the allocation and of the appraisals by checking the amount of insurance that clubs carry on their players. Presumably the clubs carry enough insurance to replace their rosters in the unfortunate event they are all lost in an airplane crash. The American League disaster insurance plan provided each team with \$3.5 million in coverage on loss of its players. During 1970, Seattle supplemented this with an insurance policy having an aggregate limit of \$7.8 million for a total of \$11.3 million for the team. Prior to February 1972, the Brewers' total player valuations for insurance purposes was approximately \$7.6 million in addition to the league insurance. While many factors other than fair market value are considered in determining insurance values, insurance values do bear a relationship to fair market values. Total insurance coverage on the player's contracts exceeded \$11 million both at Seattle and at Milwaukee.

D. Franchise Value

The allocation of \$10.2 million is also reasonable in view of the small value of the right to play baseball in Milwaukee, the franchise. The right to play baseball in Milwaukee is not worth much; everyone agrees on that. For instance, defendant's expert, Dr. Roger Noll, testified that in 1973, Milwaukee was not viable as a baseball market, and the franchise rights alone in Milwaukee had no value. Even with the doubling up of tax write offs of player contracts which occurs in the first five years of a club's existence, the Brewers lost money during their first five years of operation. Thus, as shown by plaintiff's trial Exhibit 111A, attached as Appendix I to this decision, the Brewers would not have shown a profit even if player contracts were not depreciated.

The small value of a major league franchise in Milwaukee results largely from the dependence of baseball revenues on the local market characteristics. In 1970, the Milwaukee market ranked seventeenth in population out of twenty cities in which major league baseball franchises were located. Based on the Rand McNally city rating of major league baseball cities which indicates the relative commercial importance of these cities, Milwaukee ranked eighteenth out of twenty. Milwaukee is located 89 miles north of Chicago where the White Sox and the Cubs are located. Milwaukee is on Lake Michigan, and to the northwest of Wisconsin is Minneapolis, Minnesota, where the Minnesota Twins are located. Fan interest in Milwaukee was and is high, but it is these demographics which severely limit the value of the franchise, the profitability and the return that it yields to the investor, and the earnings potential.

E. Free Agent Market Transactions

Transactions that occur in the free agent market are the plaintiff's final guide for assessing the reasonableness of the allocation. That evidence indicates that plaintiff's appraisals of the player contracts are within the range one might pay for a player contract.

Transactions in the free agent market are difficult to compare to those in the club or player markets because the cost of the free agent contract manifests itself in the salary paid to the free agent, not in a price paid to a current owner of the contract. Nonetheless, the salaries of free agents for one year are often dramatically higher than the cost of player contracts in the player market or the amounts the Brewers allocated to the contracts they acquired from the Pilots in the club market. The best players have received annual salaries on the order of a million dollars as free agents, indicating that their services are worth quite a bit. From this it is reasonable to conclude that the value of the contracts in the club market would be high because the salaries under the contracts are depressed. I find that this supports the reasonableness of the allocation made by the Brewers.

VIII. THE GOVERNMENT'S EVALUATIONS OF THE PLAYER CONTRACTS ARE UNRELIABLE AND IRRELEVANT

The United States used two approaches to prove that the proper allocation of the purchase price of the club was something other than the allocation made by the plaintiff. First, the United States tried to show that the value of the entire package was less than the \$10.8 million that the Brewers paid, and therefore that the excess payment should not be deductible as a business cost. Second, the United States tried to show that the true value of the player contracts was at most \$3.5 million. To prove that the \$10.8 million purchase price was excessive, the Government calculated the "going concern value" of the Brewers. To show that the player contracts acquired were not worth \$10.2 million, the Government relied on the following: a regression analysis; an income sensitivity analysis; recent appraisals by Government experts; and a comparison of the relative contract and salary levels for the Brewers with those levels for players whose contracts were bought and sold in the player market.

A. Going Concern Value

To show that the value of the entire package purchased by the Brewers was less than \$10.8 million, the Government's expert, Dr. Roger Noll, ascertained the going concern value of the Brewers. Dr. Noll calculated the going concern value in two ways. First, he calculated the going concern value as the discounted present value of the annual gross operating margins anticipated in the financial forecasts done for the Brewers prior to the pur-

chase of the Pilots. These financial forecasts were made to induce people to support and to invest in the baseball team. Because the forecasts assumed great attendance, great victories, and great profits, the going concern value calculated from them would tend to be high. Even so, at a 15% discount rate, which Dr. Noll estimated was reasonable given the risks inherent in operating a major league baseball club, the financial forecasts yielded a going concern value of between \$6.7 and \$7.2 million. Second, Dr. Noll performed a similar calculation based on the average American League annual gross operating margins. The average American League going concern value was \$3.2 million.

The defendant's argument that the difference between the \$10.8 million purchase price and the calculated going concern value cannot be treated as a business cost is without merit. I am unimpressed with the defendant's going concern analysis because the results it yields contradict experience in the marketplace. Where a free market exists for an item, the best method of determining its fair market value is to look at the free market price. A free market does exist for baseball clubs, and the prices for existing clubs have been uniformly higher than the going concern values calculated by Dr. Noll. See trial Exhibit 480 attached as Appendix II. That a taxpayer pays a higher price for a business than would some other "prudent investor" concerned solely with return on investment does not make the difference a nonbusiness cost. The market determines the fair market value of the club. Purchasing a major league baseball club is not a wise investment from the standpoint of rate of return on investment, but it is nevertheless still a business investment. For the reasons stated in my discussion of the assumptions that underlie this decision, this Court cannot allocate part of the \$10.8 million purchase price to the emotional aspects of the purchase, such as "civic pride" and the "joy of ownership."

The \$10.8 million was the fair market value of the Seattle Pilots Club in the club market when it was purchased by the Brewers. The purchase price was negotiated in a free and open market and the negotiations resulted in an arms-length transactions between a willing seller and a willing buyer. The transfer of the club was subject to American League approval, but this did not in any way affect the nature of the negotiations or the resulting price. An examination of the prices for which other clubs sold from 1966-1980 as well as the price discussed in the Brewers' negotiations the Chicago White Sox during the summer of 1969 establishes that the \$10.8 million figure was in the range of the going prices for baseball teams at that time.

B. Dr. Noll's Valuation of Player Contracts

Dr. Noll used two other approaches to arrive at a value for the player contracts. First, he developed a so-

phisticated theoretical model of how player contract values are determined and then used a multiple regression analysis to derive an equation that would predict the contract value of players. This equation was then used to estimate the value of the players obtained by the Brewers. His second approach was an income sensitivity analysis. In this approach, Dr. Noll estimated the proportion of the Brewers' revenues that were sensitive to player quality, and then allocated that proportion of the purchase price as the value of the player contracts.

I accept Dr. Noll's theoretical model of how player contract values are arrived at as an economically sensible model. However, the premise underlying both of Dr. Noll's analyses is that the purchase price can be allocated for tax purposes between the franchise and the player contract in an economically sensible manner. As stated earlier, such an allocation cannot be made in an economically sensible manner. Indeed, Dr. Noll adheres to the mass asset theory and testified that any allocation will be arbitrary. Further, his analyses were fundamentally flawed in that he used data from player market transactions to try to predict the fair market value of those contracts in the club market. Numerous practical difficulties in applying his theoretical model, including incomplete data, made his analyses even less reliable.

1. Regression Analysis

Regression analysis is a method of deriving an equation from which the expected value of a dependent variable (e.g., player's contract value) could be calculated based upon known values of the independent variables (e.g., player's age, batting average, at bats). In this case, the underlying assumption is that there is some correlation between a player's contract value (the dependent variable) and the player's statistics and salary level (the independent variables). The equation essentially says that if one knows that a player has certain playing statistics and a certain salary, one would expect his contract to be worth the amount predicted by the equation derived. By examining a sample group of players, noting each player's contract value, playing statistics, and salary level, one can use regression analysis to derive this equation which estimates the correlation between the contract value (dependent variable) and the player statistics and salary level (independent variables).

Dr. Noll's theoretical model of how contract values are determined begins with the concept of the marginal revenue product (MRP) of a player. The MRP is the amount of money that adding a particular player would contribute annually to the net revenues of a team, ignoring the cost of the player's salary. In a free market, a player's salary should equal his MRP. However, the player reserve system depresses salaries which, in theory, makes the contract rights to the player's (i.e., the slave's) services more valuable to the team. In addition, salaries

paid to players of comparable ability may vary depending on such things as negotiating skills and whether a player turns out to be better or worse than anticipated when his contract was signed. Comparable ability is in the eyes of the team owner and depends on subjective factors as well as objective factors, such as player statistics.

Dr. Noll testified that an economist would expect a player's contract value to be the present value of the expected annual difference between the salary a player is paid under the contract and the salary which a team would otherwise have to pay a player of comparable ability (the normal salary). For example, a player whose MRP was about \$60,000 may only have a contractual salary of \$30,000, while players with comparable ability would normally be expected to have a salary of \$40,000. Thus, having that player's contract instead of another's would be worth \$10,000 that year. Adding up the value of having that player's contract for each year the team expects to have the contract and then discounting that amount to take into account the time value of money would yield the value of the contract when acquired. Thus, the contract of a player whose salary is the norm for players of comparable ability would be worth \$0!

Dr. Noll performed a two-step regression analysis. The first step was to develop a "salary equation" which would predict the normal player salaries based on certain performance statistics. For pitchers, the performance statistics used were the lifetime ratio of strike outs to walks, the portion of a team's total innings pitched by the player, the changes in those ratios, the number of years in the major leagues, the pitcher's age, and a variable to take into account whether the pitcher averaged less than thirty innings pitched per year. For other players, the performance statistics used were the lifetime slugging average, the fraction of the team's total at bats accounted for by the player, changes in those statistics, the difference between the player's slugging average and the slugging average of players with the same batting average, variables to take into account whether the player plays infield, outfield, or both, and a variable to take into account whether the player averages less than forty at bats per year.

The second step of Dr. Noll's regression analysis was to develop a "transaction equation" which would predict the value of a player's contract (the player's transaction value) from certain player's statistics, from the player's expected salary as estimated from the salary equation, and from the difference between the player's actual salary and the expected salary. The player statistics used were age, number of years in the major leagues, and the win-loss percentage of the acquiring team in the last five years. If the player was a hitter, the player's average at bats as a fraction of the team's total and the change in

that statistic was also used. There was a variable to indicate whether a player was a pitcher, and if the player was a pitcher, the average innings pitched as a fraction of the team's total innings pitched and the change in that statistic was also used. Finally, there was a variable to indicate whether the data on a player was suspected of being incomplete. Calculations were also done using the win-loss record of the selling team over the last five years.

The main source of data used by Dr. Noll came from a document dubbed the "Master Chron List," i.e., Master Chronological List. This is a chronological list of all transactions in the player market indicated by the transaction records of the American League from March 1964 through 1974, except for transactions within a particular major league team or involving certain options and recall transactions. The list attempts to indicate the player traded, the date of the trade, the assigning team, the receiving team, and the consideration received. The consideration received could be either cash, one or more players, or a combination of both.

The salary equations were estimated, using data on 235 players whose transactions were shown on the Master Chron List near the time of the Pilot's sale, and data on thirty-five of the forty-two players on the Pilot's major league roster for whom performance statistics were available. The equation generated could reproduce the salaries contained in the sample data with reasonable reliability.

The transaction equation was then generated using data from the Master Chron List on thirty-six transactions involving thirty-five different players (not the thirty-five Pilots). The thirty-six transactions all involved cash consideration. However, some transactions involved, or may have involved, other consideration; and some that looked like cash transactions were suspected of being otherwise. These transactions were labeled "unclean."

The transaction equation generated was then used to predict the contract values for the thirty-five players on the Pilot's major league roster for whom performance statistics were available. These estimates were totaled to give an expected roster value of approximately \$1 million. Dr. Noll testified that one could be 98% confident that the true value of the acquired roster of thirty-five players was between \$.5 and \$1.5 million. Dr. Robert Nathan, for the taxpayer, later testified that Dr. Noll incorrectly determined this range, and that when the correct confidence interval for prediction purposes is used, the 98% confidence level extends from negative \$1.3 million to positive \$3.3 million. I decline to resolve this dispute between Drs. Noll and Nathan. Dr. Noll made no effort to evaluate the minor league contracts but guessed that they would be worth less than \$1 million. He observed that if they were equal in value to the major

league players (i.e., thirty-five players equals \$1 million), the remaining players would be valued at approximately \$5 million, placing an upper bound value for the team at \$6 million.

I find that the player roster value arrived at through this regression analysis is unreliable for the following reasons. First, the transaction equation was generated by using transactions observed in the player market, and then this equation was used to predict transaction values in a totally different market, i.e., the club market. The relevant market is the club market in which the bundle of assets was purchased. The club market is the market in which the price is determined primarily by free market forces. The transactions used to generate the transaction equation occurred in the player market, one highly controlled by the rules of the American League. Prices for players obtained on waiver or through the Rule 5 draft were fixed. While the transaction equation may predict the price for which a player will move in the player market subject to the rules of the American League, it would not predict the price for which that player would move as a member of a roster in the club market or in a free market.

Second, and related to the first reason, is that Dr. Noll erroneously attributes the amount by which the player reserve system had depressed the salary levels of the Pilots to the value of the franchise. To the Brewers, the value of participating in the reserve system, which is an attribute of having the franchise, is that in the future they could acquire player contracts that committed players to play for depressed salaries. However, the Brewers did not acquire the contracts of the Pilots through participation in the reserve system; they acquired them through the club market. The Pilot's contracts also committed the players to play for depressed salaries, but this resulted from the Pilot's participation in the reserve system, not the Brewers'. Even if the Brewers had not acquired a right to participate in the reserve system, the player contracts they acquired from Seattle would still have provided for depressed salaries. In a free market such as the club market, a buyer such as the Brewers would be willing to purchase a player's contract for an amount equal to the present value of the annual difference between the player's MRP and the salary provided for in the contract. The existence of this difference, not the initial reason for it, is what determines the value of the contract. Dr. Noll estimated that the depression of the Brewers' player salaries caused by the player reserve system was worth approximately \$3 million.

Third, Dr. Noll assumed that the observed sample, i.e., players transacted in the player market, was representative of the population for which prediction was desired, i.e., the thirty-five major league players from the Pilot's roster. Excepting the data on the thirty-five Pilots,

Dr. Noll had contract cost data only on those players who had been transacted in the player market, one governed by the rules of the American League. Testimony was unanimous that higher quality players are rarely transacted for cash in the player market. Dr. Noll assumed that the thirty-five Pilots evaluated were comparable to the players in the sample merely by comparing the player statistics of the thirty-five Pilots to the statistics of the players used in the sample. Yet there is nothing to indicate that a transaction equation derived from statistics on players who were transacted in the player market has any ability to predict the contract values of players who were never transacted in that market but who have similar performance statistics. The purchase of the Pilots was not a transaction similar to the transactions that constituted the sample observations because it occurred in the club market, and the thirty-five Pilots evaluated were not necessarily players who had been transacted in the player market subject to American League rules.

Fourth, the data base used by Dr. Noll was not reliable. The Master Chron List attempted to summarize the American League transaction records. Both parties at trial agreed that it lacked much information about the true substance of the transactions. To overcome the shortcomings of the American League records, the United States compared the list to transactions recorded in the Baseball Guide and the Baseball Register, and noted whether those references indicated that the transaction was somehow different than shown on the list. The United States finally referred to certain depositions of persons who had been affiliated with teams involved in transactions to attempt to verify the transactions as recorded.

Despite these efforts, the United States failed to develop a clean data base. Dr. Noll admitted that the data provided to them was not what he had wanted. The list was utterly confusing. Nowhere on the list were the verification codes used by the law clerk who put together the list defined. Furthermore, the corrected and verified Master Chron List still contained many inaccuracies, even in the thirty-six transactions that Dr. Noll used to develop his transactions equation. In fact, the list was still being corrected during the trial. While the errors created by these inaccuracies may not have led to a significantly different transaction equation, the inaccuracies are one more factor that suggests Dr. Noll's results are unreliable.

Fifth, the transaction equation generated has poor reliability. As testified to by Dr. Nathan, the R^2 statistic, which measures the extent to which the equation developed explains the variations in the dependent variable (the contract value), indicates that the transaction equation is not reliable. The adjusted R^2 statistic, which is the same as the R^2 statistic but which takes into account the

sample size as well as the number of variables, indicates even less reliability. Dr. Nathan testified that thirty-six observations are very few when deriving an equation involving twelve variables. Further, many of the observations used were determined to be "unclean."

A final reason for rejecting Dr. Noll's regression analysis is that the "normal" salary as described in his theoretical model is not actually predicted by his salary equations. Dr. Noll testified that the salary equation predicts the average salary of a player with certain playing characteristics. This average salary, he indicated, would actually be somewhere between the theoretical normal salary and the actual salary of a player because players with salaries above the normal salary would be cut and would not be observed. This deviation between the average salary predicted by the salary equations and the theoretical normal salary would result in an error on the side of underestimating the contract values. Further, Dr. Noll's salary equation uses only certain objective player statistics to predict the average salary and does not take into account subjective factors as a team's owner would in determining whether two players are comparable. Thus, the salary equation would be a poor predictor of the normal salary for a player of "comparable ability."

2. Income Sensitivity Analysis.

Dr. Noll's income sensitivity analysis is also unconvincing. The premise of this analysis is that one reasonable way to allocate the price among the assets in the bundle of assets purchased is to determine how sensitive revenues are to marginal changes in the various assets. Using the revenues projected by the financial forecasts done for the Brewers, which were unreliable, Dr. Noll estimated that approximately one-third of the revenues are sensitive to the quality of the team playing. Therefore, he would allocate one-third of the purchase price to the player contracts.

Dr. Noll's income sensitivity analysis is a less reliable method of evaluating the player contracts than the plaintiff's method of obtaining appraisals. The analysis looks only at the marginal impact of team quality, and it ignores the question of whether there is some baseline value for a team of minimum quality. Nonetheless, such a minimum quality team is as necessary to generating any revenue as is the franchise. As Dr. Noll testified, allocating the purchase price to parts of the team requires arbitrariness, and Dr. Noll's income sensitivity analysis may be a reasonable way of making that arbitrary allocation, but it bears no necessary relationship to the fair market value of the player contracts when they were purchased from Seattle in the club market.

C. Government Appraisals

The United States also tried to prove that the player contracts were not worth the \$10.2 million by producing

two appraisals by other experts in baseball. The first appraisal was performed by Dewey Soriano who was a very interesting fellow. He is an old baseball player who is now a pilot on ships on the West Coast. He has maintained his interest in baseball throughout his lifetime. He estimated that the player contracts were worth no more than \$3.2 million. This appraisal, unlike those relied upon by the plaintiff, was made twelve years after the fact and is based primarily on memory. The appraised value is significantly smaller than the value that he used for insurance purposes when he was president of the Seattle club, and, of course, this appraisal is inconsistent with his representations when he was selling the club to Milwaukee. Selig, Fitzgerald, and Donnelly all testified that during the negotiations, Dewey Soriano emphasized the value of his players. It is unlikely that his appraisals are reliable.

The second expert appraisal performed on behalf of the United States was made by Richard Walsh. Walsh's appraisal had almost no relationship to the club market and was based mainly on player market transactions. Walsh was the general manager of the California Angels from 1968 to the fall of 1971. Walsh appraised the roster at a low of \$3,257,600 and a high of \$5,102,600. Walsh made no effort to determine the market value for the contracts of certain players and instead simply valued them on the basis of the bonus they had received when they were signed as rookies or the amount that the Pilots paid for their contract in the player market. Thus, in the 35-man major league roster transferred from the Pilots to the Brewers, Walsh placed nominal values on players Kimball, Howard, and Parsons. He acknowledged that the Kimball contract had a fair market value of \$75,000, the Howard contract had a fair market value of \$25,000, and the Parsons contract had a fair market value of between \$75,000 and \$100,000. Thus, it would appear that between \$175,000 and \$200,000, at minimum, should be added to both the high and low end of Walsh's range. Furthermore, Walsh testified that a buyer might pay a premium to obtain an entire roster of players, but he did not estimate the value of this premium.

In his appraisal of the minor league players, Walsh, for the most part, made no attempt to determine the fair market value of players on the minor league roster when the players had less than three years experience. He failed to assess how a player's potential would affect his fair market value in any market. His appraisal was made in October of 1982, more than twelve years after the sale of the roster to the Brewers and eleven years after his last official connection with the baseball industry. He remembered some characteristics of some of the players, but much of his appraisal was based upon reading their statistics. He had a limited knowledge of the difference between evaluating players contracts when selling a ball-club in the club market and when selling individual play-

ers in the player market with all of its constraints. I cannot give his testimony much weight.

D. Comparison of Contract Values to Salaries

The Government's final analysis compared the relative contract price and salary level of the Brewers' contracts to the relative contract price and salary level of other American League contracts. This was done by computing the ratio of the contract price to the salary provided in the contract, and by examining the dollar difference between the contract price and the salary provided. These ratios and differences were higher for the Brewers' contracts than for other contracts. From this the Government urges the Court to conclude that the Brewers' contracts were overvalued.

This is a nonsequitor. Again the Government failed to distinguish between the player market and the club market. The American League contract prices were player market transaction prices taken from the Master Chron List. The problems with this data have already been considered in the discussion of Dr. Noll's regression analysis.

CONCLUSION

In conclusion I find that:

1. This court has jurisdiction over the parties and the subject matter of the action.
2. A reasonable allowance for the amortization of the player contracts of the Brewers, which were used in the business of a professional baseball club, is allowed as a depreciation deduction under §167(a) of the Internal Revenue Code of 1954, as amended.
3. Baseball contracts are intangible assets which are known from experience to be of use for only a limited period, the length of which can be determined with reasonable accuracy, and thus the cost of acquiring baseball contracts may be depreciated over their useful lives per §1.167(a)-3 of the Income Tax Regulations.
4. The costs of acquiring personal service contracts of professional athletes with a separate and distinct value may be depreciated over an ascertainable useful life. *Laird v. United States*, 556 F.2d 1224 (5th Cir. 1977), cert. denied, 434 U.S. 1014, 54 L. Ed. 2d 758, 98 S. Ct. 729 (1978); *KFOX, Inc. v. United States*, 206 Ct. Cl. 143, 510 F.2d 1365 (Ct. Cl. 1975); *First Northwest Industries of America, Inc. v. Commissioner*, 70 T.C. 817 (1978), rev'd and remanded on other grounds, 649 F.2d 707 (9th Cir. 1981); *Rev. Rul. 67-379, 1967-2 C.B. 127*.
5. The Milwaukee Brewers Baseball Club was entitled to amortize player contracts purchased from Pacific Northwest Sports, Inc., over their useful lives.

6. The "useful life" of a baseball contract is a reasonable estimate of the period over which it may be expected to be useful to the club in the light of the professional experience in baseball. 26 C.F.R. § 1.167(a)-1(b) (1982).

7. In the taxable purchase of the assets of a business, the purchase price is generally allocated first to cash and cash equivalents at their face values and then to the remaining tangible and identifiable intangible assets in proportion to their relative fair market values. See *Victor Meat Co.*, 52 T.C. 929 (1969).

8. Fair market value is defined as the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell. *Commissioner v. Marshman*, 279 F.2d 27, 32 (6th Cir. 1960). The fair market value to be determined is that in the market in which the property was acquired.

9. In an arm's length sale of assets, an explicit contractual allocation of the purchase price will usually be accepted for tax purposes where the allocation was subjected to bargaining, absent fraud, collusion, or an allocation so disproportionate as to be unreasonable. *Commissioner v. Patino*, 186 F.2d 962, 967 (4th Cir. 1950); *212 Corp. v. Commissioner*, 70 T.C. 788, 800 (1978). In this case the plaintiff has not shown that the allocation set forth in the contract was negotiated and, therefore, the allocation carries no weight. See *KFOX, Inc.*, 510 F.2d at 1370.

10. The taxpayer has introduced substantial evidence in support of his position and has established the wrongfulness of the Government's position; therefore, any presumption in favor of the Government's determination disappeared, and this decision is based upon the preponderance of all credible evidence in this case. *KFOX, Inc.*, 510 F.2d at 1369.

11. The evidence here indicates that the allocation of \$10.2 million to the player contracts acquired by the Brewers from the Pilots was a reasonable allocation, and that the appraisals performed for the Brewers provide a more reliable estimate of what the cost of the acquired player contracts would be in the market in which they were purchased, i.e., the club market, one unincumbered by the American League rules, than do the United States' appraisals or analyses.

12. The Milwaukee Brewers Baseball Club properly allocated \$10.2 million to player contracts and \$500,000 to the franchise as reasonable determinations of the fair market value of those assets. The allocation stated in the contract is reasonable because it is supported by appraisals which were in accord with it. Appraisals are a reasonable means of determining fair market value.

13. Adjustments made to plaintiff's federal income tax returns by the Internal Revenue Service for the years 1967 and 1968 and for 1970 through 1976 are improper.

14. Plaintiff has overpaid his federal income taxes for the years 1967 and 1968 and for 1970 through 1976 in the following amounts

1967	\$10,306.86
1968	\$2,476.35
1970	\$2195.80
1971	\$33,973.18
1972	\$4,482.57
1973	\$21,170.76
1974	\$29,124.40
1975	\$35,210.43
1976	\$6,218.43; and

plaintiff is further entitled to a refund of \$8,450 for overpayment of federal income taxes for 1975.

15. Plaintiff is entitled to judgment in his favor in the amount of \$151,608.78 plus statutory interest and his costs and disbursements as allowed by law.



APPENDIX I

Milwaukee Brewers Baseball Club Financial Highlights For Fiscal Years Ending 10/31 (000's omitted)

	<u>1970</u>	<u>1971</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>	<u>1975</u>
Operating Revenue						
Admissions ¹	2247	1926	1778	2830	2862	3792
Concessions	362	302	264	577	557	797
Radio & TV ²	600	600	1269	1319	1327	1151
Publications (Advertising)	22	38	33	33	55	61
Ushering Service	-	-	65	121	132	160
All - Star Game	-	-	-	-	-	177
Miscellaneous ³	<u>5</u>	<u>12</u>	<u>37</u>	<u>27</u>	<u>49</u>	<u>71</u>
Total Operating Revenue	<u>3236</u>	<u>2878</u>	<u>3446</u>	<u>4907</u>	<u>4982</u>	<u>6209</u>
Operating Expenses						
Major League Team	1104	1108	1061	1175	1390	1640
Player Development & Scouting	764	862	922	920	865	878
Spring Training	79	240	241	184	192	204
Amortization of Player Contracts	1128	1647	1387	1269	1161	556
Loss on Players Released or Sold	961	1649	728	307	177	5
Major League Central Fund	297	277	320	346	341	367
Park Operation						
Publicity and Promotion						
Ticket Department	985	1049	1171	1469	1298	1498
General and Administrative						
Ushering Service						65
All-Star Game						15
Miscellaneous ⁴						15
Total Operating Expenses	5318	6832	5830	5670	5424	5228
Operating Income [Loss]	[2082]	[3954]	[2384]	[763]	[442]	981
Non Operating Income[Expense]						
Interest, Net	[234]	[477]	[467]	[545]	[509]	[446]
Disposition of Equipment	[31]					
Extraordinary Charge			[205]			
	<u>[265]</u>	<u>[477]</u>	<u>[672]</u>	<u>[545]</u>	<u>[509]</u>	<u>[446]</u>
Net Income [Loss]	[2347]	[4431]	[3056]	[1308]	[951]	535
Less Amortization and Loss on Play-	<u>2089</u>	<u>3296</u>	<u>2115</u>	<u>1576</u>	<u>1338</u>	
	<u>[258]</u>	<u>[1135]</u>	<u>[941]</u>	268	387	
Miscellaneous Data:						
Capital Contributions	5000000	1000000	171065	2037369	200000	0
Home Attendance	933690	731531	600440	1092158	955741	213357
Won-Lost Records	65-97	69-92	65-91	74-88	76-86	68-94

[1,679,000] = Total Loss Before Amortization and Loss on Player Contracts

¹Total consists of net home game revenue, away game shares, and net ticket revenues from spring training and exhibition games.

²This amount shows gross revenues from the Central Fund Radio/TV operations plus Local Radio/TV net revenues. Central Fund expenses are shown separately under Operating Expenses.

The following related supplemental data is provided:

	Net Local Radio/TV*	Net Central Fund (i.e., Cash Received)
1970	\$600,000	N/A
1971	600,000	N/A
1972	600,000	\$370,000
1973	600,000	390,000
1974	600,000	413,000
1975	414,000	395,000

*Amount included as part of Radio & TV operating revenue on the Highlights Schedule

³Includes novelty item sales.

⁴Includes novelty cost of sales.

AMERICAN LEAGUE CLUB SALES 1965-1980

<u>Club Name</u>	<u>Year of Sale</u>	<u>Seller</u>	<u>Purchaser</u>	<u>Ap Sa</u>
Cleveland Indians	1966	Cleveland Indians, Inc. (William R. Daley)	Cleveland Indians, Inc. (Vern Stouffer)	\$8
Seattle Pilots	1967	Expansion Club	Pacific Northwest Sports, Inc.	\$6
Kansas City Royals	1967	Expansion Club	K. C. Royals Baseball Corp.	\$6
Washington Senators	1969	The Senators, Inc.	Washington Senators, Inc.	\$9
Milwaukee Brewers	1970	Pacific Northwest Sports, Inc. (Seattle Pilots)	Milwaukee Brewers Baseball Club	\$10
Cleveland Indians	1972	Cleveland Indians, Inc. (Vernon Stouffer)	Cleveland Indians Co. (Nick J. Mileti)	\$9
New York Yankees	1973	CBS Broadcasting	New York Yankees	\$10
Texas Rangers	1974	Texas Rangers, Inc	The Texas Rangers, Ltd.	\$9
Chicago White Sox	1975	John Allyn	Chicago White Sox, Inc.	\$9
Toronto Blue Jays	1976	Expansion Club	Metro Baseball Company	\$7
Seattle Mariners	1976	Expansion Club	Seattle Baseball Club	\$6
Boston Red Sox	1978	Estate of Thomas A. Yawkey	Boston Red Sox Baseball Club.	\$11
Baltimore Orioles	1979	Baltimore Baseball Club, Inc.	EBW, Inc	\$11
Oakland Athletics	1980	Charles O. Finley & Company	The Oakland Athletics Corp.	\$11

Sales prices as listed are approximate and are not comparable since there are variations in the assets sold; e.g. sometimes real property is included and sometimes not; also in the case of sales of stock sometimes less than 100% was sold.

The American League office has no information with respect to allocations of purchase prices made by either the sellers or the purchasers.

Source of data: 1965-1974 Official Baseball Guide published by The Sporting News, Baseball Blue Book 1975-1980 American

Political Fictions

- A. We thought that this speech by Sam Smith was short and to the point.
 - 1. As you read through it you will see that it is coming from a different point of view but reaches the same conclusion.
- B. On the second page, 3rd paragraph down we might turn what he quotes George Orwell around somewhat, and say that the IRS code and all writing's associated with it is nothing more than a cuttlefish squirting out ink.
- C. Then on the third page 5th paragraph down he brings us the term "Legal Fictions" and really nails it.
- D. LET'S MAKE EVERYONE AWARE OF WHAT A LEGAL FICTION IS.
- E. Freedom of speech and religion are both on their way out, make no mistake about it.
- F. George Orwell's fantasy has become the media's reality.
- G. Orwell and "War is Peace" – Today, we have wars to "keep the peace".
- H. Orwell said "Freedom is slavery" – Today we have a government that has convinced people to yield their "civil liberties" in the name of "domestic security".
- I. Orwell said, "Ignorance is strength" – Today the government accuses those who merely ask questions of being unpatriotic or anti-government.
- J. The new Legal Fiction definition of conservative means bigger government and more control, "NOT LESS".
- K. Liberals now contest with each other to find ways to give up our personal freedoms.

**CAMPAIGN FINANCING
SPEECH BY SAM SMITH
AT US CAPITOL RALLY, OCTOBER 26, 1999**

I have three objections to our current system of campaign financing.

The first is literary. Being a writer I try to show respect for words, to leave their meanings untwisted and unobscured.

This is alien to much of official Washington which daily engages in an activity well described by Edgar Allan Poe. Poe said, "By ringing small changes on the words leg-of-mutton and turnip, I could 'demonstrate' that a turnip was, is, and of right ought to be, a leg-of-mutton."

For example, for centuries ordinary people have known exactly what a bribe was. The Oxford English Dictionary found it described in 1528 as meaning to "to influence corruptly, by a consideration." Another 16th century definition describes bribery as "a reward given to pervert the judgment or corrupt the conduct" of someone.

In more modern times, the Meat Inspection Act of 1917 prohibits giving "money or other thing of value, with intent to influence" to a government official. Simple and wise.

But that was before the lawyers and the politicians got around to rewriting the meaning of bribery. And so we came to a time not so many months ago when the Supreme Court actually ruled that a law prohibiting the giving of gifts to a public official "for or because of an official act" didn't mean anything unless you knew exactly what the official act was. In other words, bribery

was only illegal if the bribee was dumb enough to give you a receipt.

The media has gone along with the scam, virtually dropping the word from its vocabulary in favor of phrases like "inappropriate gift," "the appearance of a conflict of interest," or the phrase which brings us here today: "campaign contribution."

Another example is the remarkable redefinition of money to mean speech. You can test this one out by making a deal with a prostitute and if a cop comes along, simply say, "Officer, I wasn't giving her money, I was just giving her a speech." If that doesn't work you can try giving more of that speech to the cop. Or try telling the IRS next April that "I have the right to remain silent." And so forth. I wouldn't advise it.

As George Orwell rightly warned, "When there is a gap between one's real and one's declared aims, one turns as it were instinctively to long words and exhausted idioms, like a cuttlefish squirting out ink."

My second objection to our system of campaign financing is economic. It's just too damn expensive for the taxpayer. The real cost is not the campaign contributions themselves. The real cost is what is paid in return out of public funds.

A case in point: Public Campaign recently reported that in 1996, when Congress voted to lift the minimum wage 90 cents an hour, business interests extracted \$21 billion in custom-designed tax benefits. These business interests gave only about \$36 million in campaign contributions so they got out of the public treasury nearly 600 times what they put in. And you helped pay for it.

Looked at another way, that was enough money to give 11 million workers a 90 cent an hour wage increase for a whole year -- or, to be more 1990s about it, to give 21,000 CEOs a million dollar bonus.

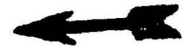
This is repeated over and over. For example, the oil industry in one recent year gave \$23 million in campaign contributions and got nearly \$9 billion in tax breaks.

The bottom line is this: if you want to save public money, support public campaign financing.

My final objection is biologic. Elections are for and between human beings. How do you tell when you're dealing with a person? Well, they bleed, burp, wiggle their toes and have sex. They register for the draft. They register to vote. They watch MTV. They go to prison and they have babies and cancer. Eventually they die and are buried or cremated.

Now this may seem obvious to you, but there are tens of thousands of lawyers and judges and politicians who simply don't believe it. They will tell you that a corporation is a person, based on a corrupt Supreme Court interpretation of the 14th Amendment from back in the robber baron era of the late 19th century -- a time in many ways not unlike our own.

Before this ruling, everyone knew what a person was just as everyone knew what a bribe was. States regulated corporations because they were legal fictions lacking not only blood and bones, but conscience, morality, and free will. But then the leg of mutton became a turnip in the eyes of the law.



Corporations say they just want to be treated like people, but that's not true. Test it out. Try to exercise your free speech on the property of a corporation just like they exercise theirs in your election. You'll find out quickly who is more of a person. We can take care of this biologic problem by applying a simple literary solution: tell the truth. A corporation is not a person and should not be allowed to be called one under the law.

I close with this thought. The people who work in the building behind us have learned to count money ahead of votes. It is time to chase the money changers out of the

temple. But how? After all, getting Congress to adopt publicly funded campaigns is like trying to get the Mafia to adopt the Ten Commandments as its mission statement. I would suggest that while fighting this difficult battle there is something we can do starting tomorrow. We can pull together every decent organization and individual in communities all over America -- the churches, activist organizations, social service groups, moral business people, concerned citizens -- and begin drafting a code of conduct for politicians. We do not have to wait for any legislature.

If we do this right, if we form true broad-based coalitions of decency, then the politicians will ignore us only at their peril.

At root, dear friends, our problem is that politicians have come to have more fear of their campaign contributors than they have of the voters. We have to teach politicians to be afraid of us again. And nothing will do it better than a coming together of a righteously outraged and unified constituency demanding an end to bribery of politicians, whether it occurs before, during, or after a campaign.

What is your status with the IRS?

Are you an Individual? Are you a person?

After reading a few certain pages out of the Internal Revenue Code and the Code of Federal Regulations you will probably have not a clue if you are a person or an individual. An Individual what? What Person?

Who is required?

IRC section 6012: Person required

(1)(A) Every individual

Are you a person or an individual?

Are you a “UNITED STATES person”?

Subtitle F, Chapter 61, Subchapter A, Section 6012(a) (*Exhibit A, 1 of 3*), of the Internal Revenue Code, reads as follows: “Returns with respect to income taxes under subtitle A shall be made by the Following:

(1)(A) Every individual having for the taxable year a gross income of \$1,000 or more....”

Now all you have to do is discover, who this “individual”, (or was). In the Internal Revenue Code there is a definition for most all the terms employed by the code. These definitions are based for the most part at,

Subtitle F, Chapter 79 Section 7701

Then at section 7701(a) (*Exhibit B*) is the definition for person:

“(1) Person- The term person shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.”
{snip}

Then glance down and read:

“(4) DOMESTIC- The term “domestic” when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State.”

Then what type of corporation is defined under 7701(a)(1) (*Exhibit B*)?

Section 7701(a) (4) (*Exhibit B*) makes it perfectly clear that if the “corporation” in 7701 (a) (1) (*Exhibit B*) was meant to include a corporation created in one of the States, say for instance the State of California, then the term “person” would have been defined as:

“(1) Person- The term “person” shall be construed to mean and include an individual, a trust, estate, partnership, association, company, or domestic corporation.”

If the “person” did not include a corporation created in the State of California, then why would it include me, under the definition of “individual?”

In researching all the definitions it’s discovered at section 7701(a)(5):

“FOREIGN- The term “foreign” when applied to a corporation or a partnership means a corporation or partnership that is not domestic.”

So the term “person” did not include a “foreign corporation.”

The term “person” did not even include a “foreign trust or foreign estate.”

See Section 7701(a)(31) (*Exhibit B*). Then look at Section 7701(a)(30) (*Exhibit B*):

“UNITED STATES PERSON”-

The term “United States person” means:

- (A) a citizen or resident of the United States,
- (B) a domestic partnership,
- (C) a domestic corporation, and
- (D) Any estate or trust (other than a foreign estate or foreign trust, within the meaning of section 7701(a) (31) (*Exhibit B*). So, now you know why the IRS computer will trigger the letter “NO LONGER LIABLE,” as not an “individual” required to file under section 6012.

Only an “individual as that term is defined at Section 7701(a) (1) (*Exhibit B*), is required to file. Section 6012 (*Exhibit A*) makes no mention of a “United States Person.”

Now, are you a “citizen of the United States” or a “resident of the United States?”

“FOREIGN PERSON- The term “foreign person” means any person who is not a United State Person.” {snip}

We've seen the definition of a "United States Person," so it is quite clear that the "person" who is defined at Section 7701(a)(1) (*Exhibit B*) is a "foreign person." Right?

So, who is liable for filing the tax return, pursuant to Section 6012(a)(1) (A)?

Section 6039C states that the definitions held there are for that section only. This still leaves, the citizen of the United States and the resident of the United States, a domestic corporation, a domestic partnership, etc., under the definition of a United States Person, and nowhere in this definition,

Section 7701(a)(30) (*Exhibit B*) is there found the term "individual?"

You know from Section 7701(a)(4) (*Exhibit B*) that if the definition at Section 7701(a)(1) included a "domestic corporation," then the definition would have stated "domestic corporation" and not just "corporation."

If the term United States Person was meant to mean an "individual," then the definition would have stated so. Right?

So who is the "person" at Section 7701(a)(1) (*Exhibit B*)?

Well, if it included a "foreign corporation," then the definition would have stated "foreign corporation" instead of just "corporation." Right?

Look at Section 3102(a) (*Exhibit C*):

"REQUIREMENT- The tax imposed by section 3101 (*Exhibit D*) shall be collected by the employer of the taxpayer..."

The term "taxpayer" is defined a Section 7701(a)(14) (*Exhibit B*): "The term "taxpayer" means any person subject to any internal revenue tax."

Doesn't use the term "United States Person" does it? It uses the term "any person subject to any internal revenue tax." So to be a "taxpayer" takes more than just being in the definition at Section 7701(a)(1) (*Exhibit B*), doesn't it?

Are you subject to any internal revenue tax imposed by Section 3101 (*Exhibit D*)? If you're not, your employer cannot withhold. Section 3101:

“In addition to other taxes, there is hereby imposed on the income of every individual...”

So the tax imposed by Section 3101, which is to be withheld by the employer, Section 3103 (*Exhibit E*), is for the “individual” and not the “United States Person” At Section 3231(b):

“EMPLOYEE- For purposes of this chapter, the term “employee” means any individual in the service of one or more employers...”

The internal revenue code is still talking about the “individual” at Section 7701(a)(1) (*Exhibit B*), which does not include the “United States Person” as defined at Section 7701(a)(30) (*Exhibit B*).

So, are you an “employee?”

Section 3231(d) (*Exhibit F*) defines when an “individual” is in the service of an employer:

“SERVICE- For the purpose of this chapter, an “individual” is in the service of an employer...” {snip}

By the way. There appear to be no parallel authorities in CFR for this section (26 USC 3102) (*Exhibit C*). Ditto for 3101 (*Exhibit D*).

Then look at the definition for “person” in the Secretary’s Regulations:

[Code of Federal Regulations]

[Title 26, Volume 17]

[Revised as of April 1, 2001]

From the U.S. Government Printing Office via GPO Access

TITLE 26--INTERNAL REVENUE

CHAPTER I--INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY--

(Continued)

Discovery of Liability and Enforcement of Title

Sec. 301.7701-6 Definitions; person, fiduciary.

- (a) **Person.** The term person includes an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization or group. The term also includes a guardian, committee, trustee, executor, administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, conservator, or any person acting in a fiduciary capacity.

Doesn't mention a "United States person" DOES IT?

Doesn't even mention a "domestic" corporation, "domestic" partnership, etc... DOES IT?

-
- (b) **Fiduciary--(1) In general.** Fiduciary is a term that applies to persons who occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators. A fiduciary is a person who holds in trust an estate to which another has a beneficial interest, or receives and controls income of another, as in the case of receivers. A committee or guardian of the property of an incompetent person is a fiduciary.

(2) **Fiduciary distinguished from agent.** There may be a fiduciary relationship between an agent and a principal, but the word agent does not denote a fiduciary. An agent having entire charge of property, with authority to effect and execute leases with tenants entirely on his own responsibility and without consulting his principal, merely turning over the net profits from the property periodically to his principal by virtue of authority conferred upon him by a power of attorney, is not a fiduciary within the meaning of the Internal Revenue Code. In cases when no legal trust has been created in the estate controlled by the agent and attorney, the liability to make a return rests with the principal.

- (c) **Effective date.** The rules of this section are effective as of January 1, 1997.

[T.D. 8697, 61 FR 66593, Dec. 18, 1996] {emphasis added}

Where are the taxes on "United States Persons"?

1.643(d)-1 Definition of ``foreign trust created by a United States person''.
1.643(d)-1

1.956-3T Certain trade or service receivables acquired from United States persons (temporary). 1.956-3T

1.957-4 United States person defined. 1.957-4

1.959-1 Exclusion from gross income of United States persons of previously taxed earnings and profits. 1.959-1

1.959-4 Distributions to United States persons not counting as dividends. 1.959-4

1.989(c)-1 Transition rules for certain branches of United States persons using a net worth method of accounting for taxable years beginning before January 1, 1987. 1.989(c)-1

1.1297-3T Deemed sale election by a United States person that is a shareholder of a passive foreign investment company (temporary). 1.1297-3T

1.6038-2 Information returns required of United States persons with respect to annual accounting periods of certain foreign corporations beginning after December 31, 1962. 1.6038-2

1.6038-3 Information returns required of certain United States persons with respect to controlled foreign partnerships (CFPs). 1.6038-3

Part 31 -- Employment taxes and collection of income tax at source. (NOT INCOME TAXES)

NO UNITED STATES person

Sec. 31.0-1 Introduction.

(a) In general. The regulations in this part relate to the employment taxes imposed by subtitle C (chapters 21 to 25, inclusive) of the Internal Revenue Code of 1954, as amended.

Part 301 -- Procedure and administration

NO UNITED STATES person

1.956-3T Certain trade or service receivables acquired from United States persons (temporary). 1.956-3T

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Part 301 -- Procedure and administration

NO UNITED STATES person

Material facts were withheld, which caused me to be unaware of the legal effects of signing and filing income tax returns, as shown by the decision of the United States Court of Appeals for the 9th Circuit in the 1974 ruling in the case of Morse v. U.S., 494 F.2d 876, 880, wherein the Court explained how a State Citizen became a "taxpayer" by stating:

"Accordingly, when returns were filed in Mrs. Morse's name declaring income to her for 1944 and 1945, making her potentially liable for the tax due on that income, she became a taxpayer within the meaning of the Internal Revenue Code."

Sec. 6012. Persons required to make returns of income

TITLE 26, Subtitle F, CHAPTER 61, Subchapter A, PART II, Subpart B, Sec. 6012

Next Previous Contents Sections Search Help

STATUTE

a) General rule

Returns with respect to income taxes under subtitle A shall be made by the following:

(1)

- (A) Every individual having for the taxable year gross income which equals or exceeds the exemption amount, except that a return shall not be required of an individual -
- (i) who is not married (determined by applying section 7703), is not a surviving spouse (as defined in section 2(a)), is not a head of a household (as defined in section 2(b)), and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual,
 - (ii) who is a head of a household (as so defined) and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual,
 - (iii) who is a surviving spouse (as so defined) and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual, or
 - (iv) who is entitled to make a joint return and whose gross income, when combined with the gross income of his spouse, is, for the taxable year, less than the sum of twice the exemption amount plus the basic standard deduction applicable to a joint return, but only if such individual and his spouse, at the close of the taxable year, had the same household as their home. Clause (iv) shall not apply if for the taxable year such spouse makes a separate return or any other taxpayer is entitled to an exemption for such spouse under section 151(c).
- (B) The amount specified in clause (i), (ii), or (iii) of subparagraph (A) shall be increased by the amount of 1 additional standard deduction (within the meaning of section 63(c)(3)) in the case of an individual entitled to such deduction by reason of section 63(f)(1)(A) (relating to individuals age 65 or more), and the amount specified in clause (iv) of subparagraph (A) shall be increased by the amount of the additional standard deduction for each additional standard deduction to which the individual or his spouse is entitled by reason of section 63(f)(1).
- (C) The exception under subparagraph (A) shall not apply to any individual -
- (i) who is described in section 63(c)(5) and who has -
 - (I) income (other than earned income) in excess of the sum of the amount in effect under section 63(c)(5)(A) plus the additional standard deduction (if any) to which the individual is entitled, or
 - (II) total gross income in excess of the standard deduction, or
 - (ii) for whom the standard deduction is zero under section 63(c)(6).
- (D) For purposes of this subsection -
- (i) The terms "standard deduction", "basic standard deduction" and "additional standard deduction" have the respective meanings given such terms by section 63(c).
 - (ii) The term "exemption amount" has the meaning given such term by section 151(d). In the case of an individual described in section 151(d)(2), the exemption amount shall be zero.

(2) Every corporation subject to taxation under subtitle A;

(3) Every estate the gross income of which for the taxable year is \$600 or more;

(4) Every trust having for the taxable year any taxable income, or having gross income of \$600 or over, regardless of the amount of taxable income;

(5) Every estate or trust of which any beneficiary is a nonresident alien;

Exhibit A 1 of 3

- (6) Every political organization (within the meaning of section 527(e)(1)), and every fund treated under section 527(g) as if it constituted a political organization, which has political organization taxable income (within the meaning of section 527(c)(1)) for the taxable year; and (FOOTNOTE 1) (FOOTNOTE 1) S in original.
- (7) Every homeowners association (within the meaning of section 528(c)(1)) which has homeowners association taxable income (within the meaning of section 528(d)) for the taxable year. (FOOTNOTE 1)
- (8) Every individual who receives payments during the calendar year in which the taxable year begins under section 3507 (relating to advance payment of earned income credit). (FOOTNOTE 1)
- (9) Every estate of an individual under chapter 7 or 11 of title 11 of the United States Code (relating to bankruptcy) the gross income of which for the taxable year is not less than the sum of the exemption amount plus the basic standard deduction under section 63(c)(2)(D). (FOOTNOTE 1) except that subject to such conditions, limitations, and exceptions and under such regulations as may be prescribed by the Secretary, nonresident alien individuals subject to the tax imposed by section 871 and foreign corporations subject to the tax imposed by section 881 may be exempted from the requirement of making returns under this section.
- (b) Returns made by fiduciaries and receivers
- (1) Returns of decedents
If an individual is deceased, the return of such individual required under subsection (a) shall be made by his executor, administrator, or other person charged with the property of such decedent.
- (2) Persons under a disability
If an individual is unable to make a return required under subsection (a), the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual. The preceding sentence shall not apply in the case of a receiver appointed by authority of law in possession of only a part of the property of an individual.
- (3) Receivers, trustees and assignees for corporations
In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.
- (4) Returns of estates and trusts
Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.
- (5) Joint fiduciaries
Under such regulations as the Secretary may prescribe, a return made by one of two or more joint fiduciaries shall be sufficient compliance with the requirements of this section. A return made pursuant to this paragraph shall contain a statement that the fiduciary has sufficient knowledge of the affairs of the person for whom the return is made to enable him to make the return, and that the return is, to the best of his knowledge and belief, true and correct.
- (c) Certain income earned abroad or from sale of residence
For purposes of this section, gross income shall be computed without regard to the exclusion provided for in section 121 (relating to one-time exclusion of gain from sale of principal residence by individual who has attained age 55) and without regard to the exclusion provided for in section 911 (relating to citizens or residents of the United States living abroad).
- (d) Tax-exempt interest required to be shown on return
Every person required to file a return under this section for the taxable year shall include on such return the amount of interest received or accrued during the taxable year which is exempt from the tax imposed by chapter 1.
- (e) Consolidated returns
For provisions relating to consolidated returns by affiliated corporations, see chapter 6.

Exhibit # 2 of 3

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1, 882, 911, 6014, 6032, 6034A, 6037, 6062, 6072, 6513 of this title; title 20

SOURCE

CROSS REFERENCES

AMENDMENTS

EFFECTIVE DATE OF 1988 AMENDMENT

EFFECTIVE DATE OF 1986 AMENDMENT

EFFECTIVE DATE OF 1984 AMENDMENT

EFFECTIVE DATE OF 1981 AMENDMENT

EFFECTIVE DATE OF 1980 AMENDMENT

EFFECTIVE DATE OF 1978 AMENDMENT

EFFECTIVE DATE OF 1978 AMENDMENT; ELECTION OF PRIOR LAW

EFFECTIVE DATE OF 1977 AMENDMENT

EFFECTIVE DATE OF 1976 AMENDMENT

EFFECTIVE AND TERMINATION DATES OF 1975 AMENDMENTS

EFFECTIVE DATE OF 1974 AMENDMENTS

EFFECTIVE DATE OF 1971 AMENDMENT

EFFECTIVE DATE OF 1969 AMENDMENT

EFFECTIVE DATE OF 1964 AMENDMENT

EFFECTIVE DATE OF 1958 AMENDMENT

ADJUSTMENT OF SUBSECTION (A)(1)(A), (D) AMOUNTS FOR TAXABLE YEARS BEGINNING AFTER 1984

NO RETURN REQUIRED OF INDIVIDUAL WHOSE ONLY GROSS INCOME IS GRANT OF \$1,000 FROM STATE

EXEMPTION FROM FILING REQUIREMENT FOR PRIOR YEARS WHERE INCOME OF POLITICAL PARTY WAS \$100 OR LESS

Web edition produced by John Walker

Exhibit A 3 of 3

**IRS Attorneys use “Legal Fiction” to COMMIT
FRAUD**

- A. Dixon v. Commissioner of Internal Revenue.
- B. Going overboard with the use of Legal Fictions and getting caught in the act.

This case will long be remembered for the Ninth Circuit's scathing rebuke of two IRS lawyers, Kenneth McWade and William Sims, who engineered quite a fraud on the Tax Court and on 1,300 taxpayers that almost worked. Without mincing words, the Ninth Circuit charged the two Government lawyers with "extreme misconduct" for converting a legitimate adversarial dispute into "a charade fraught with concealed motives, hidden payments, and false testimony"; that their actions "were plainly designed to corrupt the legitimacy of the truth-seeking process; and that their actions "defiled the sanctity of the court and the confidence of all future litigants."

The origins of this case was an IRS investigation and prosecution arising out of a number of tax shelters sold in the 1970's and early 1980's, by Henry Kersting, a former German U-boat commander in World War II. Kersting sold those tax shelters, principally to airline pilots, from his office in Hawaii until his death some three years ago. The IRS discovered that the tax shelter deductions rested in major part on debts that had been fabricated by Kersting. As a result, the IRS disallowed the deductions taken and, in 1981, it sent tax bills for additional taxes and penalties to some 1,800 airline pilots who had purchased the fraudulent tax shelters.

Recognizing that the sheer number of affected taxpayers made it impractical to try each case individually, the bulk of the parties (some 1,300 pilots) agreed to employ a "test case" approach to determine their individual liability. Under that approach, pilots who signed a special stipulation agreed that their liability would be fixed and determined by the outcome of a "test case" trial in Hawaii involving two "representative" participants in the Kersting's tax shelter schemes. The two "representative" test case pilots were John Thompson and John Cravens, both of whom had participated in the tax shelters; and they were chosen in large part because the IRS presented papers to the Tax Court which stated that each of them had agreed to settle with the IRS by paying ten cents on the dollar of the taxes owed.

However, at the conclusion of a one-month trial, the Tax Court decided that a far more onerous penalty was appropriate. Ignoring the ten-cents-on-the-dollar deal that Thompson said he had, the Tax Court concluded that each of the 1,300 taxpayers involved would be held liable for all assessed deficiencies and would also be required to pay "additional negligence and tax-motivated transaction penalties." Crucial to that ruling was the testimony of Thompson, the only taxpayer who testified. During his testimony, Thompson testified that he had always believed that the debt instruments underlying the tax shelter were not real - a statement that went to the heart of the tax shelter's validity.

What neither the Tax Court nor the other participants knew at that time was that, prior to the test case trial, the two IRS lawyers in charge of the case, McWade and Sims, had entered into secret settlement agreements with both Thompson and Cravens under which they would escape all liability for taxes provided they gave testimony against the other pilots that was favorable to the IRS. In fact, Thompson's deal was really a sweetheart package. Not only did he pay nothing to the IRS in settlement of its claims against him, he also received an undisclosed \$60,000 "refund" through falsified tax returns that were prepared with the help of the IRS!

The details of the secret deals finally came out when Thompson and Cravens pressured McWade and Sims to make good on the secret deals that had been negotiated. To keep Thompson and Cravens quiet, McWade and Sims had to file motions to set aside the Tax Court judgments against Thompson and Cravens - and those set aside motions required McWade and Sims to obtain first the approval of senior IRS officials. At that point, the jig was up and McWade and Sims were forced to disclose the details of their secret deals to senior officials at the IRS.

To their credit, those senior IRS officials determined that McWade and Sims had engaged in "active misconduct" and they informed the Tax Court of the secret agreements. To their discredit, as the Ninth Circuit pointedly noted, the "IRS has done little to punish the misconduct and even less to dissuade future abuse."

After those revelations become public, the 1,300 pilots moved for a rehearing of the Tax Court's onerous ruling based on the evidence of blatant Government misconduct. Astonishingly, despite all the evidence before it, the Tax Court decided to play hard ball. As the Ninth Circuit explained: "After making extensive findings concerning the government's misconduct, the Tax Court surprisingly concluded that what had occurred was harmless error." (*Emphasis added*). The Tax Court then summarily reaffirmed the bulk of the decision from the original test case proceeding, although it did relieve the taxpayers of that portion of the original judgment which imposed increased interest penalties for negligence and "tax motivated transactions" and imposed costs and attorneys' fees on the IRS.

The 1,300 pilots then appealed to the Ninth Circuit from the Tax Court's refusal to vacate the balance of the adverse judgments against them - and an angered and appalled Ninth Circuit concluded that it possessed the inherent power to vacate or amend a judgment obtained by a fraud on the court and to fashion an appropriate remedy. It also concluded that due to the "persistence and concealment" of the fraud, no showing of prejudice was required to be made by the taxpayers and that it would be "unjust" to remand the case for a new trial. In the end, the Court concluded that the only appropriate remedy was to grant all 1,300 pilots the same ten-cents-on-the-dollar deal that the IRS had represented had been given to Thompson.

There is a sequel to this decision. Although the IRS initially blew the whistle on its two renegade lawyers, it is apparent that, having been blasted by the Ninth Circuit, it is now doing everything possible to cut its losses - even by thwarting any effective sanctions against its two lawyers. In an article about this case on January 19, 2002, The New York Times reported that Michael Minns, a Houston tax lawyer who represented some of the 1,300 pilots, was seeking to have the two lawyers disbarred for their misconduct. However, he was having great difficulty determining where to commence that process: in response to a written request from attorney Minns, the IRS has claimed that it "can't find" a record of the law licenses of attorneys McWade and Sims!! In the meantime, the only punishment imposed by the IRS was a two-week suspension for both McWade and Sims!!!

IRS Disclosure office uses Legal Fiction responses

- A. Exhibit A, 1 of 3, a usual boilerplate response letter from an IRS Disclosure Officer used to side step your request.

- B. Exhibit B, 1 of 6, you ask for a one-page Form 23c which is referred to in many IRS Manuals and instead they send you a RACS Report- 006.
 - 1. Let me see if we can get this right. We pull up to McDonalds drive through and on the menu is a Big Mac, which we order, but when we get up to the window they hand us a Bean Burrito from Taco Bell and tell us it is the same thing.

 - 2. Now McDonalds has greatly increased their profits by making this switch and are able to put lots of money in the election campaigns of a number of political officials plus provide them with many fine perks.

 - 3. People get upset with the switch and take McDonalds to court and the Judge rules in McDonalds favor.



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

January 24, 2003

RE: Regulations Prescribed by Attorney General relevant
To 18 USC 3613

Dear Mr. [redacted]:

This is in response to your Freedom of Information Act request dated December 23, 2002, and received in our office January 6, 2003.

One of the Freedom of Information Act's requirements is that requestors sufficiently identify the records solicited to locate them. To the extent you are seeking records that establish the authority of the Internal Revenue Service to assess, enforce and collect taxes, the Sixteenth Amendment to the Constitution authorized Congress to impose an income tax. Congress did so in the Internal Revenue Code that may be found at Title 26 of the United States Code. The Internal Revenue Service administers the Internal Revenue Code. The Code contains information that may be responsive to portions of your request. It is available at many bookstores, public libraries and on the Internet at www.irs.ustreas.gov. Income tax filing requirements are supported by statute, and implementing regulations, which may be challenged through the judicial system, but not through the Freedom of Information Act.

If you have any questions regarding this correspondence, Case Control Number 2003-00000, contact Anne [redacted] #28- [redacted] at Internal Revenue Service, P. O. Box [redacted], [redacted] or at [redacted] between the hours of 7:00 a.m. and 3:30 p.m. Eastern Time.

Sincerely,

Darlene O'Neill
Disclosure Officer



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

January 3, 2003

Dear Mr.

We must ask for additional time to locate and consider releasing the Internal Revenue Service records covered in your Freedom of Information Act (FOIA) requests dated November 1 and 16, 2002. We are sorry for any inconvenience the delay may cause.

The Freedom of Information Act, 5 USC 552(a)(6)(B) and 26 CFR 601.702(c)(11) allow agencies to extend the 20 business day time limit for responding to requests by an additional 10 business days. This extension is permitted when additional time is needed to search for, collect the requested records from other locations, review a large volume of records that are responsive to your request, or consult with business submitters about proprietary information.

Although the FOIA and its implementing regulations permit the extension of time, we will not be able to respond to your request by January 3, 2003. Therefore, we must ask for additional time to respond to your request. We plan to provide you with our response by February 14, 2003.

IF YOU AGREE TO THIS VOLUNTARY EXTENSION

If you agree to this extension of time, no reply to this letter is necessary. You will still have the right to file an appeal of our determination if we subsequently deny your request. You may want to consider limited the scope of your request so that we can process it more quickly. If you want to limit your request, please contact the person whose name and number are shown below.

The FOIA process is not an additional avenue of recourse during tax administrative proceedings. It solely provides for access to records. Your agreement to extend the time for our response to your FOIA request will have no bearing on any ongoing tax matter such as Collection Due Process or examination appeal.

IF YOU DO NOT AGREE TO THIS VOLUNTARY EXTENSION

If you do not agree to this extension and do not want to modify the scope of your request, you may not appeal this letter administratively to the IRS. You may, however, you may file suit. See 5 USC 552(a)(6)(C)(i), 26 CFR 601.702(c)(10).

To file suit, you must petition the U.S. District Court in the district in which you live or work, or where the records are located, or in the District of Columbia, to obtain a response to your request. You may file suit no earlier than (date). Your petition will be treated according to the Federal Rules of Civil Procedure, which may apply to actions against any agency of the United States. These procedures require that the IRS be notified of the pending suit, through service of process, which should be directed to:

Commissioner of Internal Revenue
Attention: CC:PA
1111 Constitution Avenue NW
Washington, DC 20224

If the court concludes you have unreasonably refused to limit your request or to accept the alternate time frame for response, it may find that our failure to meet the statutory time frames in the FOIA is justified. See 5 U.S.C. 552(a)(6)(C)(iii).

We hope you will agree to allow us more time to process your request. If you wish to contact us, please call the person whose name and telephone number are shown below.

If you have any questions regarding this correspondence, please contact the Internal Revenue Service, Ogden Campus Disclosure Office, M/S 7000, PO Box 9941, Ogden, UT 84409 or call D. Haldeman, ID #7916307368, at 801-620-7650 between the hours of 8:00 a.m. and 4:30 p.m. Mountain Time. Please include our Case Control Number DAH03-00849 and DAH03-00850 with your inquiry.

Sincerely,


JaNean Ellis
Disclosure Officer

Attachments:

Internal Revenue Service
Appeals Office
6377A Riverside Ave, #110
RIVERSIDE, CA 92506

Department of the Treasury

Person to Contact:

Employee ID Number: 33
Tel: 951 Ext.
Fax:

Date: **APR 28 2003**

Refer Reply to:

AP:FW:RIV:HP

In Re:

Freedom of Information Act

Tax Period(s) Ended:

2000-2002

Dear Mr.

This letter is in response to your January 28, 2003 Freedom of Information Act (FOIA) appeal. The letter appeals the unidentified response of an unidentified Disclosure Office to your November 6, 2002 request for a copy of the 23C for the 2000 and 2001 tax years as well as documents which would support the assumption that you would have a tax liability in 2002, and information concerning your W-4.

Because you failed to provide a copy of the Disclosure response with which you are in disagreement, we conducted a search of the Disclosure database to try to determine which Disclosure Office response you referred to in your appeal. Unfortunately, because you have filed multiple identical requests to as many as four different Disclosure Offices, we are unable to determine to which response your appeal applies.

We noticed that you have requested and received assessment documents several times. You must be aware that the IRS has been automated for a number of years, and numerous forms, which were previously created manually, are no longer produced except in special circumstances. Forms 23C (Summary Records of Assessment) are not manually created unless the Revenue Accounting Control System (RACS) computer is not functioning. The Form 23C has been replaced by the RACS Report 006. This report is not taxpayer specific, *i.e.*, it contains the total amount of assessments made against numerous taxpayers on a particular day for different tax classes (*e.g.* income, estate, *etc.*). The assessments against a specific taxpayer cannot be identified on the RACS Report 006. Ordinarily, when taxpayers request copies of the 23C (summary record of assessment), the IRS provides a copy of the taxpayer's Individual Master File (IMF) transcript, which, of course, is taxpayer specific. The dates and amounts of the assessments appear on the IMF transcript, which, read in conjunction with the RACS-006, provide the date of the assessment, the category and the signature of the assessment officer. These meet the requirements of I.R.C. Section 6203 and the regulations. We note that the Disclosure Office has provided you with copies of RACS Report 006 and transcripts for the years requested. This was an appropriate response to your request for the 23C's.

In regard to the remainder of the request, it appears that you are seeking copies of documents which concern your personal liability to file federal income tax returns and/or

Exhibit B 1 of 6

pay federal income tax. Your request is not a request for existing documents, but is a request for the creation of personalized and specific statements concerning your tax liability. The FOIA does not require agencies to provide explanations or answers in response to questions. Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985); Hudgins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987), cert. denied, 484 U.S. 803 (1987) ("FOIA created only a right to access to records, not a right to personal services"). In addition, the FOIA does not require agencies to create records in response to a request. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975).

The FOIA requires us to advise you of the judicial remedies granted in the Act. You may file a complaint in the United States District Court for the District in which you reside, or have your principal place of business, or in which the agency records are located, or in the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard L. Behm', written in a cursive style.

Richard L. Behm
Appeals Team Manager

A

OGDEN

Certificate Number 13320020225003 Assessment Type Regular Assessment Date 02252002

Current Assessments

Class of Tax	Items	Tax	Penalty	Interest
WITHHOLDING	243363	\$10,184,221,344.02	\$39,295,314.90	\$4,263,903.31
INDIVIDUAL	16432	\$3,229,034,139.68	\$5,182,224.83	\$7,318,276.29
CORPORATION	7476	\$623,814,348.50	\$5,050,578.68	\$1,632,874.07
EXCISE	4206	\$19,767,492.80	\$5,780,788.86	\$293,450.02
ESTATE & GIFT	93	\$4,007,883.87	\$261,275.50	\$709,764.18
CTA	0	\$0.00	\$0.00	\$0.00
FUTA	196134	\$124,555,175.34	\$562,843.40	\$369,079.58
Total Current Assmts	467704	\$14,185,400,384.21	\$56,133,026.17	\$14,587,347.45

Deficiency Assessments

WITHHOLDING	105	\$729,203.31	\$361,338.97	\$511,833.87
INDIVIDUAL	2757	\$11,245,923.33	\$2,340,837.04	\$4,205,419.68
CORPORATION	93	\$12,425,834.00	\$111,027.05	\$1,529,019.66
EXCISE	34	\$1,277.11	\$392.70	\$137.43
ESTATE & GIFT	2	\$0.00	\$2,906.89	\$0.00
CTA	0	\$0.00	\$0.00	\$0.00
FUTA	23	\$169,336.08	\$4,408.60	\$102,671.54
Total Deficiency Assmts	3014	\$24,571,573.83	\$2,820,911.25	\$6,349,082.18
Total Assessments	470718	\$14,209,971,958.04	\$58,953,937.42	\$20,936,429.63

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Exhibit B 3 of 6

B

OGDEN

Certificate Number 13320020225003 Assessment Type Regular Assessment Date 02252002

Tax Class Summary

Tax Class	Items	Amount
WITHHOLDING	243468	\$10,229,382,938.38
INDIVIDUAL CORPORATION	19189	\$3,259,326,820.85
EXCISE	7569	\$644,563,681.96
ESTATE & GIFT	4240	\$25,843,538.92
CTA	95	\$4,981,830.44
FUTA	0	\$0.00
	196157	\$125,763,514.54

Principal Taxpayers And Amounts Number Amount
Related to Jeopardy Assessments 0 \$0.00

Certification

I certify that the taxes, penalty, and interest of the above classifications, hereby assessed, are specified in supporting records, subject to such corrections as subsequent inquiries and determinations in respect thereto may indicate to be proper.

Signature (For Submission Processing Center Director of Internal Revenue Service)

Sharilee Code
Assessment-Officer

Date 02-25-02

161

Exhibit B 48 6



OGDEN

Certificate Number 13320020225003 Assessment Type Regular Assessment Date 02252002

Document Locator Number	Account Date
-----	-----
91655033192	02252002
91655026950	02252002
91655040193	02252002
91655040192	02252002
91655040191	02252002
91655040190	02252002
91655033950	02252002
91655033194	02252002
91655033193	02252002
91655033191	02252002
91655033190	02252002
91658038400	02252002
91658036400	02252002
84658036400	02252002
86658042400	02252002
86658038300	02252002
84658037200	02252002
86658037200	02252002
91624247262	02252002
91624247263	02252002

162

Exhibit B5 of 6

D

OGDEN

Certificate Number 13320020225003 Assessment Type Regular Assessment Date 02252002

Document Locator Number	Account Date
91658037200	02252002
91658039200	02252002
91658038200	02252002
91627043200	02252002
86658039200	02252002
84658036100	02252002
RRECP 200207	02252002
BRECP 200207	02252002
IRECP 200207	02252002

163

Exhibit B of 6

RACS and Manual
 Summary Record of Assessments
 02/22/2002
 07:44:41

AMDISA Disclosure Legal Fiction

- A. In Exhibit A, 1 of 1, at the second sentence they tell our hero that there is “no data on the module AMDISA that pertains to you.”
- B. It look like someone didn't get the message because look what he got back (Exhibit B) his AMDISA.
- C. The date of the Disclosure letter is November 15, 2002 and the date they pulled his AMDISA off the IRS System is 11/13/02 so the right had never got the word of what the left hand was doing.



COMMUNICATIONS AND LIAISON

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

November 15, 2002

Dear M.

This is in response to your Freedom of Information Act request dated October 05, 2002, and received in our office November 06, 2002.

→ There is no data on the module for AMDISA that pertains to you.

We have not certified the lack of record because certification services are not required by the FOIA. Certification merely means that the document is a true copy of a document in IRS records. It does not speak to the accuracy or validity of the contents of the document. The fee for certification is \$1.00 for each document certified. Certification services normally will involve copy and search charges. The fee is exclusive of the free search time granted under FOIA or any other FOIA fee that may be waived.

If you wish to contact us, you may call _____ or write to Internal Revenue Service, Disclosure Office, Stop 820, P. O. Box 30309, Memphis, TN 38130. Please refer to case number _____

Sincerely,

Tim D. Christian
Disclosure Officer
ID No. 62-09241

Exhibit A

DISA MFT>30 TX-PRD>200012 NM-CTRL>
MARY-NAME>NO NAME FOUND JULIAN-DT>2002317
ID> / / OPNG-CRTN/TRANSFR-DT>11/12/2002
JRCE-CD>24 REFUSAL TO FILE TDI

TY-CD>533 TC 424 RECORD
ATUTE-XTRCTN-IND>0 PARTIAL-AGRMT-IND>0 TC-300-IND>0
C>298 SEC>00000
C/DT>5241 11/12/2002 PRIOR-EGC/DT>0000 00/00/0000
CURRENT-STATUS-CD/DATE PRIOR-STATUS-CD/DATE
06 AWAITING CLASSIFICATION 11/12/2002
ROJ-CD>311 RET-NOT-REQ PICF-CD>0
XREF-DLN>29277316200002
RET-PSTNG-YR> UPDT-CD>A
TC-424-CD>2

M-LN-YR>0000 PRIMARY-NM-LN> NAME-ADDRESS SECTION NOT PRESENT
CONTINUATION-OF-PRIMARY-NAME>
ACT-IND>1 STREET>
CITY> STATE> ZIP>
SC>29 OSC

Employee #7917159267 Page 001 of 002 PAGE 002

AMDISA MFT>30 TX-PRD>200012 NM-CTRL>
PRIMARY-NAME>NO NAME FOUND JULIAN-DT>2002317
LAST-AMT-PUT-IN-CUM> \$ 0.00
EXAM-CUM-ASSMNT-AMT> \$ 0.00
MAN-ASSMNT-AMT> \$ 0
UNAGREED-AMT> \$ 0 EXAM-NAICS-CD>000000
EXAM-ADJ-AMT> \$ 0
AIMS/EXAM-RESULTS> \$ 0

EXAM-CLAIM-AMT-DISALLOWED>
CLAIM-REJN-DT>

BOD-CD> CLIENT-CD> SC>29 OSC
Employee #7917159267 Page 002 of 002 PAGE 001

Exhibit B

AMDISA! MFT>30 TX-PRD>199912 NM-CTRL>
PRIMARY-NAME>NO NAME FOUND JULIAN-DT>2002317
ASED> / / OPNG-CRTN/TRANSFR-DT>11/12/2002
SOURCE-CD>24 REFUSAL TO FILE TDI

ACTY-CD>533

TC 424 RECORD
STATUTE-XTRCTN-IND>0 PARTIAL-AGRMT-IND>0 TC-300-IND>0
PBC>298 SEC>00000
EGC/DT>5241 11/12/2002 PRIOR-EGC/DT>5243 11/12/2002
CURRENT-STATUS-CD/DATE PRIOR-STATUS-CD/DATE
06 AWAITING CLASSIFICATION 11/12/2002
PROJ-CD>311 RET-NOT-REQ PICF-CD>0
XREF-DLN>29277316200002
RET-PSTNG-YR> UPDT-CD>E PR-UPDT-CD>A
TC-424-CD>2

NM-LN-YR>0000 PRIMARY-NM-LN> NAME-ADDRESS SECTION NOT PRESENT
CONTINUATION-OF-PRIMARY-NAME>
ACT-IND>1 STREET>
CITY> STATE> ZIP>
SC>29 OSC

Employee #7917159267 Page 001 of 002 PAGE 002

AMDISA! MFT>30 TX-PRD>199912 NM-CTRL>
PRIMARY-NAME>NO NAME FOUND JULIAN-DT>2002317
LAST-AMT-PUT-IN-CUM> \$ 0.00
EXAM-CUM-ASSMNT-AMT> \$ 0.00
MAN-ASSMNT-AMT> \$ 0
UNAGREED-AMT> \$ 0 EXAM-NAICS-CD>000000
EXAM-ADJ-AMT> \$ 0
AIMS/EXAM-RESULTS> \$ 0

EXAM-CLAIM-AMT-DISALLOWED>
CLAIM-REJN-DT>

BOD-CD> CLIENT-CD>
Employee #7917159267 Page 002 of 002 PAGE 001

SC>29 OSC

Exhibit B

The Legal Fiction of the System

- A. The hearing testimony of Jennifer Prager Sodaro, Attorney at Law, on April 10, 2002 before the Senate Finance Committee.
- B. Wealthy taxpayers ^{use} tax loopholes through special legislation.
- C. When unfairness is perceived, rebellion seems the only option.
- D. IRS Agents fail to adhere to mandated administrative procedures.
- E. IRS is making criminals of middle class business owners.
- F. Fat Cat corporations cheat our country out of more taxes than all the small business combined.

Jennifer Prager Sodaro
Attorney at Law
April 10, 2002
Senate Finance Committee

I am an attorney who has practiced law for 16 years, the last 7 or so exclusively as defense counsel for individuals accused of tax crimes, primarily by virtue of using offshore trusts and novel business structures to minimize their tax burden.

I must say novel rather tongue in cheek because while many attorneys and taxpayers are not familiar with business trusts, constitutional trusts and asset protection trusts, these schemes have proliferated for decades, as this body well knows.

I represented Dr. Bullock in his criminal case. A man from Bountiful, Utah, named Lonnie Crockett sold Dr. Bullock an "asset management" tax "avoidance" trust package, then falsely claimed he had a law degree and presented attorney recommendation letters and extensive legal authority. He claimed that Dr. Bullock could legitimately distribute income to an offshore trust and deduct that amount from his taxable gross income. He was to "lose control" of the money and in fact he did not control or communicate with the foreign trustees. However, ultimately the funds came back to the U.S. and were not reported as income. This was because Bullock was shown the section of the tax code which allows a legitimate gift from a foreign individual or entity to be received tax free. Unfortunately he wasn't told that he could not receive such a gift under these circumstances, this being a circular transaction. He was convicted of conspiracy to defraud the U.S. by defeating the lawful functions of the IRS and for filing false tax returns. He received an 18 month sentence in federal prison and lost his medical license.

There is a persistent and rather successful anti-tax movement whether it expresses itself as tax patriot or asset protection. Armed with case law and attorney recommendation letters, they present false credentials and flawed conclusions about tax laws. Yet, tax avoidance is big business and making claims of asset protection and lowering the tax bite is a siren song to independent business owners and intelligent professionals, especially physicians.

Why are these promoters so successful, despite the previous convictions and publicity?

First: Perception that wealthy are not only using tax loopholes, they are doing so with impunity. Taxpayers are told that all the wealthy families use blind trusts and offshore trusts to shelter income.

As an attorney, how can I refute this?

This is difficult when Marc Rich is pardoned and a \$45 million tax bill is forgiven. When Citizens for Tax Justice tell us that GE, Ford and AT&T took even greater advantage of tax breaks and offshore trusts than Enron. It is rumored that these companies appear to have set up offshore entities solely to avoid income tax. I'm speaking obviously not of a statement of fact, but of the perception of the public. The taxpayers, middle class self-employed business owners, farmers and professionals are often backed against the wall, fighting to survive and make payroll, pay their commercial rent bills and provide for their families.

The backbone of our country, I would say.

When unfairness is perceived, rebellion seems the only option. Survival, the inviolate law of nature, kicks in. The taxpayer becomes more susceptible to the promoter's claim of the conspiracy of privilege and corruption within the tax system.

Another reason promoters continue to attract new clients is that as Dr. Bullock's case demonstrates, some IRS enforcement activities continue to include agents in flak jackets, refusal

to adhere to mandated administrative procedures and tactics that are not designed to enhance collection efforts but to humiliate, embarrass and harass the taxpayer.

If taxpayers continue to experience what appears to be a corrupt system administered by bureaucrats who never had to make a payroll and who refuse to engage in good faith offers in compromise, there will continue to be no respect for the rule of law.

We can all agree that the right to plan your affairs within the limits of the law is one of the underpinnings of the rule of law, but for that to be respected taxpayers need to clearly know that those limits are and know that those limits are enforced uniformly.

A third reason the peddlers of bogus tax schemes succeed is that lawyers are often uninformed of how the schemes work and are therefore unsuccessful in specifically refuting the positions taken. Without a detailed and complete explanation, the taxpayer aligns with the promoter and believes the claim of their “secret knowledge of the loopholes” and further claims that the unknowing CPA’s and lawyers are brainwashed members of the conspiracy team. The promoters use pieces of truthful statements and string them together in a way that is plausible within this climate. For example, while it is true that a taxpayer could in some circumstances, receive a tax free gift from a foreign entity, the bogus trust scam usually involves cycling the taxpayers own income through foreign trusts which is ultimately money laundering.

Rather than rely so heavily on fear to encourage compliance, the IRS must do a better job of educating the public and making the tax code more comprehensible. I am aware of the bulletins offered to the public which discuss these devices in some detail.

However, taxpayers desperately need a qualified and informed professional to examine and discuss the plan they are contemplating or have used. One suggestion that could be implemented is a group taxpayer ombudsmen somehow connected to the IRS, but operating independently who are qualified CPAs and attorneys who can individually advise the public at a reasonable cost. Naturally, if they are paid by the taxpayer, attorney client privilege applies and the taxpayer can

get confidential and candid advice. So far, there are only a small number of us that could claim a degree of expert status and clients have difficulty finding us.

We should not be making criminals of middle class business owners but concentrating on stopping the promoters. The process of criminal indictment is too slow to stop the promoters who continue under indictment by filing suit against the government and other similar tactics. An injunction against the promoter for violating §6700 of the IRS Code which prohibits promoting abusive tax shelters would stop the promoter on the day of the hearing and save more taxpayers.

Let me emphasize that in no way do I excuse or condone tax cheating and counsel all clients to make truthful and complete disclosure of any past mistakes. We can be effective in this approach if the Service takes the position that amnesty for past violators is a win-win situation. Revenue is captured, and the client may be penalized civilly and financially, but not criminally. For us to make criminals of otherwise responsible, successful members of the middle class seems wasteful and misguided. Resources should concentrate on improved information and education, more competent professional help and a goal of prosecuting promoters.

Resources should be directed to the huge corporations and promoters who cheat our country out of more taxes than thousands of hard working small business owners combined.

Citizens are enraged with corporate giants fed fat on their sacrifices and tax reform can greatly contribute to a restoration of confidence in our government and compliance with the law.

Thank you.

Rense.com

By Jim Traficant

June 4, 2003

Dear (anonymous),

Thank you!

Thank you for thinking of me and my family. Life is hectic and fast-paced-- and for you to have thought of me, and then to stop and take time from your precious life to write me-- is an honor. And once again, I thank you!

Most of the people who write me say they cannot understand why the government targeted me with such a passion. Every rumor and innuendo that any political opponent would plant and foster became public and, before long, developed into an indictment without any physical evidence-- only the testimony of subjects who were able to avoid jail by fabricating falsehoods about me. Lies and half-truths became 'facts'; and ultimately became a 10 count indictment. My evidence, that would have proved they were lying, was not allowed to be presented -- either before the Congress or the Federal Court! However, I know why I was targeted: I was not afraid of the government, and I had learned too much!

The U.S. Dept. of Justice & the John Demanjuk Case

The beginning of all of this was my first trial, in 1983, when I became the only American in history to defeat the U.S. Department of Justice in a RICO case-- pro se (representing myself), and me not being an attorney. They were embarrassed! The straw that broke the camel's back was when I proved that John Demanjuk was not the infamous Ivan the Terrible of the Treblinka death camp in Poland. The government was stunned and in shock. The real Ivan was nine years older, taller, and had black hair and a scar on his neck; his name was Ivan Marchenko. My investigation, in conjunction with John Demanjuk's beautiful family, proved not only that John was innocent, but also that the Justice Department knew he was not guilty-- even before they took him to

court! Shame, shame!! They lied to the court-- gave false testimony and presented false witnesses-- knowing that he would be put to death! Shame!! The Justice Department then came after me with revenge, and a passion! I lost my respect and my faith in our government. Because this case was 'too sensitive,' Congress would not even hold a hearing on my evidence... Congress, all of them, at the time-- turned their back, worried about reelection!! The Democrats were in charge then, and they knew of my investigation in Congress... hoping I would abandon it! I did not! I sent my findings to the Israeli Supreme Court-- and they had no choice: They released John Demanjuk! In fact, they delivered him to me at the airport in Tel Aviv, Israel, and I personally brought him home, along with his son, his son-in-law, and Israeli bodyguards! I am proud of what I did. No one else, in the House or the Senate, would even talk to the family-- afraid of media power and the vindictiveness of the Justice Department. But even today, John Demanjuk is still being persecuted. Shame!

Other Skeletons

The government agents that destroyed Demanjuk's life should be in jail! That was just the tip of the iceberg. When people saw what I had done for the Demanjuk family they came to me with unbelievable information. The information is so powerful that it is hard to believe, and the government knew I was getting sensitive information that could damage the American people's confidence in the government. People came to me with facts about Waco, Ruby Ridge, Pan Am Flight 103, Jimmy Hoffa, and the assassination of President John F. Kennedy. It may all sound far-fetched, but I do know what happened to Hoffa and J.F.K. The government knows that I know-- and so they had to ruin my voice by destroying my credibility. I may yet divulge this information if I can get the proper forum. As you know, I was the dreaded enemy of the I.R.S. My legislation in the last I.R.S. Reform Bill changed the Burden of Proof law. Before that, you had to prove you were innocent in a tax court. The burden of proof was on the taxpayer. The I.R.S. said you owed... but the I.R.S. did not have to prove it. Unbelievable! Now that the I.R.S. has to prove their charges, the following statistics tell the true story. Comparing One Year Before the changes to One Year After:

1. Wage Garnishments dropped from 3.1 million to 560,000;
2. Taxpayer Property Liens dropped from 680,000 to 161,000;

3. Foreclosures on individual family-owned homes dropped from 10,063 to 57! That's right: only 57 homes in all 50 states! Fact is, the I.R.S. was seizing our homes-- over 10,000 every year-- when they had neither proof nor the right to do so! Congress allowed the I.R.S. to intimidate us and frighten us. Think about it! And then maybe you can begin to understand why I love America, but hate the Government -- and why the Government hates me. The Justice Department had to get rid of me, but I'll be damned if I would back down!

America is in trouble... not from without, but from within! The Central Government has become too powerful. Citizens fear the Government. This is wrong. This is dangerous! I know the Government covered-up and promulgated LIES about Waco, Ruby Ridge, Pan Am Flight 103, Hoffa, and J.F.K. The Government knew I was right when I called Janet Reno a traitor. Janet Reno sold us out when she refused to investigate a \$10-million payoff to the Democratic Party from a general in the Red Chinese Army (no less!). Think about it! And the Government knew that I had known why Reno was forced to

betray America! I'm proud that I tried to do something about it! Someday the truth will come out. (I hope China never attacks us!)

Many of you have asked what you can do for me. I appreciate this. You can help my family: Mrs. Tish Traficant 429 N. Main Street Poland, OH 44514

Thank you for remembering me... for thinking of me... for caring!

God Bless!

(Signed)

Jim Traficant

<<http://educate-yourself.org/cn/railroadingjamestraficant3jul02.shtml>>

Taking Out a Patriot: The Railroading of James Traficant (<http://educate-yourself.org/cn/railroadingjamestraficant3jul02.shtml>)

<<http://educate-yourself.org/cn/railroadingjamestraficantpartII17jul02.shtml>>

Railroading James Traficant, Part II (<http://educate-yourself.org/cn/railroadingjamestraficantpartII17jul02.shtml>)

<<http://educate-yourself.org/cn/railroadingjamestraficantpartIII14aug02.shtml>>

Railroading James Traficant, Part III, Rescue Plan B (<http://educate-yourself.org/cn/railroadingjamestraficantpartIII14aug02.shtml>)

<<http://educate-yourself.org/cn/matterofintegrity4jul02.shtml>>

America, Law, and Freedom - A Matter of Integrity (<http://educate-yourself.org/cn/matterofintegrity4jul02.shtml>)

If you found this article of interest, please consider perusing
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<http://www.sianews.com/modules.php?name=News&file=article&sid=870>

(Our thanks to D for the forward)

<http://educate-yourself.org/cn/jimtraficantletter04jun03.shtml>

IRS Spokesman Denounces IRS for Stupid Rules

The Internal Revenue Service is an instrument to control and oppress American citizens, but an ombudsman's report concludes it is staffed by some very incompetent employees.

EXCLUSIVE TO AMERICAN FREE PRESS

By James P. Tucker Jr.

The Internal Revenue Service's "national taxpayer advocate," a position created in legislation first proposed by the court-killed Liberty Lobby, believes she is on the payroll of a bunch of idiots who oppress American workers, according to her new report.

Nina Olson, the "advocate," cited such familiar criticisms as being unable to reach the IRS on the phone and, if you do, getting wrong information from ignorant bureaucrats and the complexity of tax laws that leave experts both inside and outside of government confused.

The ombudsman position was created as part of the Taxpayer Bill of Rights, which was enacted in 1989. It was first proposed by Liberty Lobby, which published the defunct *Spotlight*, in May 1977 during hearings before a House Ways and Means subcommittee. Several congressmen promptly introduced the proposal and George Bush the Elder called for it to pass in his 1988 campaign.

But in addition to the familiar laundry list of IRS abuses and stupidity, Olson denounced eagerness of bureaucrats to impose unfair penalties on taxpayers. Among her anecdotes:

A taxpayer's return was late because his accountant used insufficient postage. The man had paid his bill in full, but the IRS required a penalty of more than \$10,000 for his first-time "offense."

"Traffic cops, everyone [in law enforcement] is able to give warnings, yet the IRS has to slap a \$10,000 fine," she said. "This is not really sane; this is not common sense, and it really does have a negative effect" on taxpayers' willingness to comply with the law.

One motive for abuse of citizens, which the IRS denies but is a fact, is that agents work on a quota system—they must extort sufficient funds from taxpayers to keep their jobs or be promoted.

An agent named Paul Lyons, in the process of auditing a *Spotlight* reporter, admitted under close questioning that he had to bring in 17 times the amount of his salary or risk being "assigned to Billings, Mont."—an apparent reference to cold climates.

"Too many taxpayers are impacted by the problems . . . for Congress not to act," Olson said. "We really tried to write this so it would be actionable"—or, in a way that even a congressman might understand.

She said she was aware that tax simplification is widely endorsed but rarely enacted.

Last April, the staff of Congress's Joint Committee on Taxation produced a three-volume study pointing out many of the same deficiencies and urging reform. A month later, Congress passed a big tax-cut bill to stimulate the economy, which was in a downturn later aggravated by the Sept. 11 terrorist attacks.

While any tax reduction is welcome—although eliminating the income tax is feasible and desired by most Americans—the legislation passed by Congress was so full of twists and turns and phase-ins and other oddities that, after 10 months, many accountants are still trying to understand it even as they start preparing returns for their clients. ★

Morse vs. U.S 494 F. 2d 876 (9th Cir 03/27/1974)

- A. If you turn back to page 147 we wanted to add this entire case but we didn't get it until we had the Dispatch finished so we put it here at the end.

Morse v. United States, 494 F.2d 876 (9th Cir. 03/27/1974)

[1] UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

[2] No. 72-1671

[3] 1974.C09.40484 <<http://www.versuslaw.com>>; 494 F.2d 876

[4] March 27, 1974

[5] **CLAIRE MORSE, PLAINTIFF-APPELLANT,**
v.
UNITED STATES OF AMERICA, DEFENDANT-
APPELLEE

[6] Appeal from the United States District Court for the Central
District of California.

[7] Wright, Kilkeny and Wallace, Circuit Judges.

[8] Author: Wallace

[9] WALLACE, Circuit Judge:

- [10] Mrs. Morse filed this action in the district court seeking a refund of tax overpaid in her name. On cross-motions for summary judgment, the district court dismissed Mrs. Morse's complaint with prejudice, holding that the decision of the tax court in *Claire Morse*, 1960 T.C. Memo 73, 19 T.C.M. 393 (1960), was res judicata, barring the district court from having jurisdiction to order a refund. The District Court further held that since the tax court found that Mrs. Morse was not the taxpayer, she could not receive a refund of the tax. We reverse.
- [11] During the years 1944 and 1945, income tax returns were filed in Mrs. Morse's name declaring an income of \$32,239.42 with tax due in the amount of \$14,925.62 for 1944 and income of \$46,028.35 with tax due in the amount of \$24,596.39 for 1945. The tax was paid by someone other than Mrs. Morse. Mrs. Morse filed a timely claim for refund for those years and the Commissioner mailed her a notice of deficiency for the same years. Mrs. Morse subsequently filed a petition in the tax court requesting it to find that there were overpayments and no deficiencies. Prior to the trial in the tax court, the Commissioner conceded that Mrs. Morse owed no deficiencies. At the conclusion of the trial, the tax court found that there were overpayments in the amounts of \$14,925.62 for 1944 and \$24,569.39 for 1945. When the Commissioner failed to refund the overpayments, Mrs. Morse filed the present action.
- [12] The government argues that the district court correctly held that it lacked jurisdiction because section 6512(a) of the Internal Revenue Code of 1954^{*fn1} precludes a taxpayer from bringing a suit for the recovery of tax in any other court once he has filed a timely petition with the tax court. The government concedes that subsection (1) of that section allows an exception for overpayments determined by a decision of the tax court which has become final, but argues that this exception does not apply to Mrs. Morse because the tax court declined to find that she had

made the overpayments. The government's construction limits the language of the exception more than is reasonable or necessary. Section 6512(a) (1) excepts from the general preclusion of suits in other courts, suits to recover tax "as to overpayments determined by a decision of the Tax Court which has become final." The language does not require that the overpayments must have been made by the taxpayer.

[13] The government further argues that even if suits for refund of overpayments do fall within the exception to section 6512(a), Mrs. Morse's suit in the district court is barred by the doctrine of res judicata since the issues of this case were adjudicated and decided by the tax court. Although the doctrine of res judicata does bar subsequent litigation between the same parties on identical claims that have previously been decided by the tax court, it has no application where the legal matters raised in the second case differ from those determined in the earlier case. *Commissioner v. Sunnen*, 333 U.S. 591, 600 (1948). The doctrine also has no application where the issues to be litigated in the subsequent suit were beyond the jurisdiction of the tax court. *Erickson v. United States*, 159 Ct. Cl. 202, 309 F.2d 760, 765 (1962); *Empire Ordnance Corp. v. Harrington*, 102 U.S. App. D.C. 14, 249 F.2d 680, 682 (1957).

[14] While the tax court found that an overpayment had been made, it declined to order a refund to Mrs. Morse or to determine who was entitled to the refund. This was proper since it lacked jurisdiction to order a refund or to determine who was entitled to the refund. The tax court's jurisdiction, which exists only to the extent specifically enumerated by statute, is confined to determining the amount of deficiency or overpayment for the particular tax year for which the commissioner has sought a deficiency and the taxpayer has filed a petition for review. *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 88 L. Ed. 139, 64 S. Ct. 184 (1943). The tax court has no jurisdiction to order or to deny a refund, *United States ex rel.*

Girard Trust Co. v. Helvering, 301 U.S. 540, 542, 81 L. Ed. 1272, 57 S. Ct. 855 (1937), or to decide equitable questions. Commissioner v. Gooch Milling & Elevator Co., 320 U.S. 418, 88 L. Ed. 139, 64 S. Ct. 184 (1943). Thus, the tax court has no jurisdiction to decide which of several claimants is entitled to a refund, Huntington National Bank, 13 T.C. 760 (1949), to decide who is entitled to the refund when someone other than the person named in the deficiency notice has paid the tax, John A. Snively, Sr., 20 T.C. 136 (1953), or to resolve disputes as to a right to a refund that may hinge upon some contingency beyond mere overpayment. Robbins Tire and Rubber Co., Inc., 53 T.C. 275, 279 (1969); see Empire Ordnance Corp. v. Harrington, 102 U.S. App. D.C. 14, 249 F.2d 680, 682 (1957). The taxpayer must resort to the district court or the court of claims for a resolution of such disputes or for an order granting a refund. United States ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540, 542, 81 L. Ed. 1272, 57 S. Ct. 855 (1937); Thelma Rosenberg, 1970 T.C. Memo 201, 29 T.C.M. 888, 892 (1970). Accordingly, the tax court was without jurisdiction to decide whether Mrs. Morse, the person who actually paid the tax, or someone else was entitled to the refund. Once it had determined that there was no deficiency and that there had been an overpayment in a certain amount, it had no jurisdiction to consider or resolve any other issue. Thus, the tax court's decision could not bar the district court from deciding the very issues that the tax court was without jurisdiction to determine. The district court had jurisdiction under 28 U.S.C. 1346(a) (1) and it was error to dismiss the suit on the grounds of res judicata.

- [15] The district court also erred in holding that the tax court had found that Mrs. Morse was not the taxpayer. The tax court made no such finding, but found only that Mrs. Morse did not pay the tax and that a person unknown to the court had paid the tax. 19 T.C.M. at 395. There is a big difference between the factual conclusion that Mrs. Morse did not pay the tax and the legal conclusion that Mrs. Morse was not the taxpayer. Under section

3797(a) (14) of the Internal Revenue Code of 1939,^{*fn2} "the term 'taxpayer' means any person subject to a tax imposed by this title." Under this definition it is not necessary that a person actually be liable for the tax; it is sufficient that he is potentially liable for it, even if it is ultimately determined that he in fact owes no tax. Accordingly, when returns were filed in Mrs. Morse's name declaring income to her for 1944 and 1945, and making her potentially liable for the tax due on that income, she became a taxpayer within the meaning of the Internal Revenue Code. When she was subsequently named in the commissioner's notice of deficiency, she became the only person who could petition the tax court for review of her tax liability. *Cincinnati Transit, Inc.*, 55 T.C. 879 (1971); *Bond, Inc.*, 12 B.T.A. 339 (1928). The fact that someone else had paid the tax in her name and that she was ultimately found to owe no tax does not affect her claim to the overpayments as between her and the government. If Mrs. Morse had paid the tax herself, the government could not assert that since she ultimately was found to have had no tax liability, she was not a taxpayer and was not entitled to a refund. Similarly, the government should not be able to defeat her claim to a refund by claiming that, simply because someone else paid the tax in her name, she had no tax liability and was not a taxpayer. If the person who actually paid the tax has a claim to the refunded money, that dispute is between Mrs. Morse and that person, not between Mrs. Morse and the government.

[16] Section 322(d) of the Internal Revenue Code of 1939 provided:

[17] If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has

become final, be credited or refunded to the taxpayer.

- [18] The government contends that under this section, a person is entitled to a refund only if the tax was paid by him or by someone else in his behalf. The tax cannot be paid in a person's behalf, the government argues, where that person has not consented to having the return filed in his name. We find no merit in this contention since one may bestow a benefit upon another person without that person's consent. Even if the person who paid Mrs. Morse's tax had no intent to benefit her, he paid the tax in her name and that should be sufficient to give Mrs. Morse better title than the government since the tax court found that no tax was due.
- [19] Nevertheless, we express no opinion as to whether Mrs. Morse is actually entitled to the refund, but remand the case to the district court for further proceedings to consider other relevant tax laws, including sections 322(a) (1) and 3770(a) (1) of the Internal Revenue Code of 1939.
- [20] REVERSED AND REMANDED.
- [21] Disposition
- [22] Reversed and remanded.

Opinion Footnotes

[23] *fn1 Whether or not the district court had jurisdiction must be determined under the statutes in effect when the refund action was filed, but whether or not a taxpayer is entitled to a refund must be determined under the statutes in effect when the tax was paid. Therefore, as to the jurisdiction issue, the Internal Revenue Code of 1954 applies.

[24] *fn2 See note 1. On this issue the Internal Revenue Code of 1939 applies.

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