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B-158699, May 16, 1968

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TO MR. SECRETARY:

BY LETTER OF APRIL 12, 1967, THE HONORABLE SHELDON S. COHEN, COMMISSIONER OF INTERNAL REVENUE, REQUESTED RECONSIDERATION OF THE ACTION TAKEN BY OUR CIVIL DIVISION IN ITS LETTER TO HIM DATED SEPTEMBER 7, 1966, DENYING RELIEF TO MR. LAURIE W. TOMLINSON, FORMER DISTRICT DIRECTOR OF INTERNAL REVENUE AT JACKSONVILLE, FLORIDA, FOR A LOSS OF FUNDS WHICH OCCURRED AS A RESULT OF ROBBERY IN HIS FORT LAUDERDALE COLLECTION AREA OFFICE.

THE RECORD ON WHICH THE DETERMINATION TO DENY RELIEF TO MR. TOMLINSON WAS MADE INDICATED THAT THE SAFE AT THE FORT LAUDERDALE OFFICE WAS ROBBED BY SOMEONE WHO HAD A KEY TO THE OFFICE AND THE COMBINATION TO THE SAFE, SINCE NEITHER THE OFFICE DOOR NOR THE SAFE SHOWED ANY SIGN OF FORCIBLE ENTRY AND, IN ADDITION, TWO LOCKED MONEY BAGS IN THE SAFE HAD BEEN OPENED WITH THE APPROPRIATE KEYS (KEPT IN THE CASHIER'S DESK DRAWERS). THE RECORD ALSO SHOWED THAT ALL 60 EMPLOYEES OF THE OFFICE, AS WELL AS EMPLOYEES OF THE MAINTENANCE COMPANY THAT CLEANED THE OFFICE, HAD KEYS TO THE OFFICE DOORS. MOREOVER, SIX PERSONS IN THE OFFICE WERE KNOWN TO HAVE THE COMBINATION TO THE SAFE AND ONE PERSON, CASHIER PAULINE A. PETTIS, HAD THE COMBINATION WRITTEN IN RED PENCIL ON A PAPER WHICH SHE KEPT IN THE REAR OF THE CENTER DRAWER OF HER DESK. MRS. PETTIS STATED THAT SHE OPENED THE SAFE, BY USE OF THE WRITTEN COMBINATION, PRIOR TO WORKING HOURS EACH MORNING AND THAT ONLY EMPLOYEES OF THE IRS COULD POSSIBLY HAVE SEEN HER USING THE COMBINATION; HOWEVER, IT WOULD APPEAR THAT ALL THE OFFICE EMPLOYEES WOULD OR COULD HAVE SEEN HER USING THE COMBINATION AT ONE TIME OR ANOTHER, AND LIKEWISE COULD HAVE SEEN WHERE SHE KEPT IT.

IT WAS OUR VIEW THAT SUCH A WIDESPREAD POSSESSION OF DOOR KEYS AND THE COMBINATION TO THE SAFE, AS WELL AS THE LOOSE HANDLING OF THE WRITTEN COMBINATION, CONSTITUTED A SECURITY PRACTICE WHICH WAS LESS THAN ADEQUATE. IT ALSO WAS OUR VIEW THAT THE DISTRICT DIRECTOR, AS THE PERSON ULTIMATELY RESPONSIBLE FOR THE SAFETY OF GOVERNMENT FUNDS IN THE OFFICE, EITHER KNEW OR SHOULD HAVE KNOWN OF SUCH SECURITY PRACTICE. IF HE KNEW AND FAILED TO MAKE NECESSARY CHANGES HE WAS NEGLIGENT; IF HE DID NOT KNOW, HE WAS NEGLIGENT FOR NOT KNOWING OF THESE SECURITY PRATICES, SINCE IT WAS HIS DUTY TO KNOW THE FACTS AND CIRCUMSTANCES AFFECTING THE SECURITY OF GOVERNMENT FUNDS FOR WHICH HE WAS RESPONSIBLE. THE POOR SECURITY PRACTICE WAS DEEMED TO BE THE PROXIMATE CAUSE OF THE LOSS. RELIEF WAS DENIED MR. TOMLINSON ON THE ABOVE BASIS.

MR. COHEN, IN HIS REQUEST FOR RECONSIDERATION OF OUR DETERMINATION, STATES THAT DISTRICT DIRECTOR TOMLINSON WAS THE TOP INTERNAL REVENUE EXECUTIVE IN THE STATE OF FLORIDA. THE ORGANIZATION UNDER MR. TOMLINSON WAS MADE UP OF SOME 1100 PEOPLE

DISPERSED IN 23 LOCATIONS THROUGHOUT THE STATE OF FLORIDA. BETWEEN MR. TOMLINSON AND THE TELLERS IN THE FORT LAUDERDALE OFFICE, THERE WERE SEVERAL LAYERS OF SUPERVISION, I.E., ASSISTANT DISTRICT DIRECTOR; CHIEF AND ASSISTANT CHIEF, COLLECTION DIVISION; CHIEF AND ASSISTANT CHIEF, DELINQUENT ACCOUNTS AND RETURNS BRANCH; COLLECTION MANAGER; AND OFFICE COLLECTION FORCE SUPERVISOR.

MR. COHEN FURTHER STATED THAT SINCE THE JACKSONVILLE DISTRICT WAS DIVIDED GEOGRAPHICALLY INTO EIGHT MAJOR COLLECTION AREAS -- EACH HAVING CASHIER OR WINDOW TELLER FACILITIES, HE HAS SERIOUS DIFFICULTY WITH OUR CONCLUSION THAT THE DIRECTOR OF A MAJOR GOVERNMENT ORGANIZATION OF THIS KIND AND SIZE, WITH SUCH A WIDELY DISPERSED BRANCH SETUP, "EITHER KNEW OR SHOULD HAVE KNOWN" OF THE INADEQUATE SECURITY PRACTICES REVEALED IN THIS CASE. DISTRICT DIRECTORS ARE HIRED TO BE EXECUTIVE DIRECTORS OF INTERNAL REVENUE DISTRICTS. WHILE THEY NATURALLY LIKE TO KNOW WHAT IS GOING ON IN THEIR DISTRICTS, THE REALITIES REQUIRE THAT THEY DEVOTE THEIR TIME TO TOP LEVEL MANAGEMENT PROBLEMS OF BROAD SCOPE AND RELY ON SUBORDINATES TO KEEP THEM ADVISED AND TO TAKE CARE OF SUCH DETAIL AS THE SECURITY PRECAUTIONS HERE INVOLVED.

HE CONCEDES THAT SECURITY MEASURES AT FORT LAUDERDALE WERE INADEQUATE AND DEPLORES SUCH SHORTCOMINGS. HE STATES THAT KEEPING THE COMBINATION OF THE SAFE IN THE DESK DRAWER OF ONE OF THE EMPLOYEES IS STRICTLY CONTRARY TO INTERNAL REVENUE SERVICE MANUAL INSTRUCTIONS. HE INDICATES THAT THIS EMPLOYEE WAS STILL IN AN ON-THE-JOB TRAINING STATUS. SHE HAD NO PREVIOUS EXPERIENCE WITH THIS KIND OF WORK AND REQUIRED DAILY ASSISTANCE IN PERFORMING HER DUTIES. HE HAS BEEN ASSURED THAT POSSESSION OF THE WRITTEN COMBINATION WAS WITHOUT THE KNOWLEDGE OF HER SUPERVISOR. HE MAINTAINS THAT WE CAN HARDLY BLAME THE DISTRICT DIRECTOR AT JACKSONVILLE, OVER 300 MILES AWAY, WHEN HER IMMEDIATE SUPERVISOR RIGHT IN THE FORT LAUDERDALE OFFICE DID NOT REALIZE IT.

AS TO THE CRITICISM THAT A NUMBER OF KEYS TO THE PREMISES WERE IN THE HANDS OF EMPLOYEES OF THE OFFICE, MR. COHEN ADVISES THAT THIS IS NOT UNUSUAL AND FINDS NOTHING WRONG IN IT. REVENUE OFFICERS AND INTERNAL REVENUE AGENTS, AS WELL AS THE ESTATE AND GIFT TAX EXAMINERS AND SPECIAL AGENTS (ALMOST 80 PERCENT OF THE FORCE) WORK OUT OF THE OFFICE MUCH OF THE TIME. THEY HAVE KEYS SO THAT THEY CAN COME INTO THE OFFICE AFTER HOURS, ON WEEKENDS, ETC. HE DOES NOT REGARD ISSUING KEYS TO THEM AS POOR SECURITY PRACTICE.

MR. COHEN FURTHER ADVISES THAT ELMER GOIKE, ONE OF THE MAINTENANCE EMPLOYEES, CONFESSED COMMITTING THE ROBBERY, INDICATING THAT HE GAINED ENTRANCE TO THE OFFICE BY USE OF STOLEN KEYS. GOIKE ALSO CONFESSED TO SEVERAL OTHER ROBBERIES AND WAS SENTENCED TO FIVE YEARS IMPRISONMENT AT HARD LABOR. MR. COHEN ALSO ADVISES THAT THE MATTER OF RECOVERING THE LOSS FROM THE BONDING COMPANY WHICH BONDED THE EMPLOYEES OF THE NATIONAL MAINTENANCE COMPANY, GOIKE'S EMPLOYER, HAS BEEN REFERRED TO THE REGIONAL COUNSEL AT ATLANTA, AND THAT WE WILL BE ADVISED OF SUBSEQUENT DEVELOPMENTS.

ON THE BASIS OF THE EXPLANATION NOW FURNISHED BY MR. COHEN, WE WILL NOT CONSIDER THE ISSUANCE OF KEYS TO THOSE EMPLOYEES WHO MUST HAVE ACCESS TO THE OFFICE DURING NONWORK HOURS AS CONSTITUTING SUCH NEGLIGENCE AS WOULD WARRANT DENYING RELIEF OF LIABILITY FOR THE LOSS HERE INVOLVED. LIKEWISE, SINCE THE EMPLOYEES OF THE MAINTENANCE COMPANY WERE BONDED, AND SUCH EMPLOYEES WHO CLEANED THE OFFICE NECESSARILY MUST HAVE HAD ACCESS THERETO DURING NONWORK HOURS, THE ISSUANCE OF KEYS TO SUCH EMPLOYEES NEED NOT BE CONSIDERED AS SUCH NEGLIGENCE AS WOULD WARRANT DENIAL OF RELIEF.

ALSO FOR CONSIDERATION IS THE FACT THAT THE RECORD INDICATES THAT SIX PERSONS IN THE OFFICE WERE KNOWN TO HAVE THE COMBINATION TO THE SAFE AND ONE PERSON, CASHIER PAULINE A. PETTIS, ACTUALLY HAD THE COMBINATION WRITTEN IN RED PENCIL ON A PAPER WHICH SHE KEPT IN THE CENTER DRAWER OF HER DESK. THIS IS OBVIOUSLY A VERY POOR SECURITY PRACTICE, AND MR. COHEN ACKNOWLEDGES THAT THE KEEPING OF SUCH A WRITTEN COMBINATION IN A DESK DRAWER IS STRICTLY CONTRARY TO SECURITY INSTRUCTIONS IN THE INTERNAL REVENUE SERVICE MANUAL. IT IS APPARENT THAT THE THIEF OPENED THE SAFE BY MEANS OF ITS COMBINATION, SINCE THE SAFE SHOWED NO SIGNS OF FORCIBLE ENTRY. ALSO, IT IS CLEAR THAT THE THIEF OPENED THE DRAWERS OF THE CASHIER'S DESK SINCE THE RECORD STATES THAT TWO LOCKED MONEY BAGS IN THE SAFE WERE OPENED WITH THE APPROPRIATE KEYS, WHICH WERE KEPT IN THE CASHIER'S DRAWERS. SINCE THE COMBINATION TO THE SAFE, WRITTEN IN RED PENCIL ON A PIECE OF PAPER, ALSO WAS KEPT IN A DRAWER OF THE CASHIER'S DESK, IT IS REASONABLE TO CONCLUDE THAT SUCH WRITTEN COMBINATION WAS USED TO OPEN THE SAFE. HENCE, IN THE ABSENCE OF EVIDENCE THAT THE THIEF DID NOT USE THE WRITTEN COMBINATION TO OPEN THE SAFE, WE ARE OF THE OPINION THAT THE KEEPING OF THE WRITTEN COMBINATION IN THE DESK DRAWER WAS THE PROXIMATE CAUSE OF THE THEFT.

IN AN ORGANIZATION OF THE SIZE AND COMPLEXITY OF THE JACKSONVILLE, FLORIDA, INTERNAL REVENUE DISTRICT, SOMEONE AT THE AREA COLLECTION OFFICE MUST HAVE HAD RESPONSIBILITY FOR SECURITY MEASURES USED TO SAFEGUARD MONEY COLLECTED. MR. COHEN'S LETTER INDICATES THAT MR. TOMLINSON WAS REQUIRED TO RELY ON SUBORDINATES TO TAKE CARE OF SUCH DETAIL AS SECURITY PRECAUTIONS. SOMEONE IN THE ,CHAIN OF COMMAND" OR LAYERS OF SUPERVISION - - TO USE MR. COHEN'S WORDS -- HAD THE RESPONSIBILITY FOR CORRECT SECURITY PRACTICE, TO ADVISE THE CASHIER OF THE INTERNAL REVENUE MANUAL INSTRUCTIONS, AND TO SEE THAT THE CASHIER COMPLIED THEREWITH. THAT PERSON AS WELL AS THE CASHIER MAY BE JOINTLY AND SEVERALLY LIABLE FOR THIS LOSS. SINCE THERE IS NOTHING IN THE RECORD BEFORE US TO ESTABLISH WHICH SUBORDINATE OR SUBORDINATES ARE LIABLE, WE MUST HOLD LIABLE FOR THE LOSS THE DISTRICT DIRECTOR, AS THE PERSON ULTIMATELY RESPONSIBLE FOR THE SAFETY OF GOVERNMENT FUNDS IN THE CUSTODY OF HIS OFFICE. THE LIABILITY OF THE DISTRICT DIRECTOR IS REINFORCED BY CHAPTER 2100, SUBCHAPTER 212, SECTION 3.02 OF THE INTERNAL REVENUE SERVICE MANUAL, WHICH PROVIDES THAT ,DISTRICT DIRECTORS * * * ARE ACCOUNTABLE FOR LOSSES OCCURRING WITHIN THEIR JURISDICTIONS UNTIL RESTITUTION IS MADE OR RELIEF IS GRANTED.' HOWEVER, SINCE THE CITED MANUAL SECTION FURTHER PROVIDES THAT "THEY (THE DISTRICT DIRECTORS) IN TURN MAY HOLD SUBORDINATE OFFICERS OR EMPLOYEES ACCOUNTABLE FOR LOSSES CAUSED BY NEGLIGENCE OR MISAPPROPRIATION," WE SEE NO REASON WHY FORMER DIRECTOR TOMLINSON MAY NOT HOLD ACCOUNTABLE FOR THIS LOSS WHICHEVER SUBORDINATE OFFICER HAD BEEN DELEGATED THE DUTY OF OVERSEEING SECURITY PRECAUTIONS IN HIS FORT LAUDERDALE COLLECTION AREA OFFICE. OF COURSE, IF THE AMOUNT OF THE LOSS IS RECOVERED FROM THE NATIONAL MAINTENANCE COMPANY'S SURETY, THERE WILL BE NO FURTHER LIABILITY ON THE PART OF ANY OFFICER OR EMPLOYEE OF THE INTERNAL REVENUE SERVICE.