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B-65821, May 29, 1947

Number: B-65821

Date: 1947-05-29

B-65821, MAY 29, 1947

THE HONORABLE, THE ATTORNEY GENERAL:

MY DEAR MR. CLARK:

REFERENCE IS MADE TO LETTER DATED APRIL 22, 1947, FROM THE ASSISTANT TO THE ATTORNEY GENERAL, AS FOLLOWS:

"THE DEPARTMENT OF JUSTICE, IN COMMON WITH OTHER AGENCIES WITH LAW ENFORCEMENT POWERS, HAS EXPERIENCED DIFFICULTY IN CARRYING OUT ITS STATUTORY DUTIES IN CONSEQUENCES OF THE PROHIBITION OF ADVANCE PAYMENTS CONTAINED IN SECTION 3648, REVISED STATUTES, (31 U.S.C. 529). IT HAS BEEN NECESSARY MANY TIMES TO REQUIRE OUR OFFICERS AND EMPLOYEES TO ADVANCE PERSONAL FUNDS TO SECURE REQUIRED DOCUMENTS AND SERVICES IN THE FURTHERANCE OF OFFICIAL BUSINESS.

"THE REASONING IN YOUR DECISION OF JUNE 9, 1943, B-34946, APPEARS TO JUSTIFY THE CONCLUSION THAT IF AN AGENCY REQUIRES THE FURNISHING OF SERVICES, ETC., UNDER CIRCUMSTANCES IN WHICH THEY CANNOT BE PROCURED EXCEPT BY PAYMENT IN ADVANCE, SUCH PAYMENTS WILL NOT BE DEEMED TO BE IN VIOLATION OF SECTION 3648, REVISED STATUTES. THE DECISION, OF COURSE, IS CONFINED TO PAYMENT OF COURT COSTS AND INDIVIDUAL EXPENSES IN ADVANCE WHEN THE LITIGATION IS IN STATE COURTS IN STATES WHICH REQUIRE PAYMENT IN ADVANCE.

"THE DEPARTMENT PROPOSES TO ISSUE A CIRCULAR TO ITS FIELD EMPLOYEES, PRINCIPALLY UNITED STATES ATTORNEYS AND THEIR STAFFS, AND THE DISBURSING OFFICERS OF THE COURTS, SUBSTANTIALLY ALONG THE LINES OF THE ENCLOSED DRAFT. IT WILL BE OBSERVED THAT THE CIRCULAR IS PREDICATED UPON COMPLIANCE WITH LOCAL LAW. YOUR DECISION IS LIMITED TO THE RESTRICTIONS ON FEDERAL ACTIVITIES BY STATE LEGISLATION. HOWEVER, IT OFTENTIMES HAPPENS THAT FEDERAL OFFICERS ARE REQUIRED TO PROCURE OFFICIAL TRANSCRIPTS FROM STATE EMPLOYEES, NOT NECESSARILY CONNECTED WITH THE COURTS, WHO DEMAND PAYMENT IN ADVANCE. MANY TIMES, THESE DOCUMENTS ARE REQUIRED IN PREPARATION FOR A CASE OR DURING THE COURSE OF AN INVESTIGATION OUT OF WHICH A CASE MAY GROW. IN THE LATTER SITUATION, IT MAY TURN OUT THAT THE FACTS DEVELOPED DO NOT JUSTIFY THE FILING OF AN INFORMATION OR THE PROCUREMENT OF AN INDICTMENT. YOUR ADVICE IS THEREFORE RESPECTFULLY REQUESTED ON THE FOLLOWING QUESTIONS:

"1. WILL YOUR OFFICE BE REQUIRED TO OBJECT TO THE ISSUANCE OF A CIRCULAR IN THE FORM AND WITH THE CONTENT OF THE PRESENT SUGGESTED DRAFT?

"2. MAY THE REASONING OF THE DECISION OF JUNE 9, 1943, B-34946, BE EXTENDED TO PROCUREMENT OF SERVICES FROM OTHER THAN COURT OFFICIALS, SUCH AS THE SECRETARY OF STATE IN FURNISHING CERTIFIED COPIES OF ARTICLES OF INCORPORATION OR OF OTHER

OFFICIALS IN SUPPLYING RECORDS OF BIRTHS, DEATH, MARRIAGES, ETC.?

"3. CAN THE REASONING OF THE CITED DECISION BE EXTENDED TO THE PROCURING OF DOCUMENTS AND RECORDS WHEN NEEDED IN THE COURSE OF AN INVESTIGATION, REGARDLESS OF WHETHER A CASE HAS BEEN OR IS ULTIMATELY FILED?

"4. IT IS ASSUMED THAT IF A STATE RECORD IS REQUIRED FOR USE IN A FEDERAL COURT AND PAYMENT IN ADVANCE IS DEMANDED, THERE WILL BE NO OBJECTION TO SUCH ADVANCE PAYMENT. IT THIS CORRECT?

"YOUR RESPONSE TO THESE SEVERAL QUESTIONS WILL BE APPRECIATED."

THE REFERRED-TO DRAFT OF A PROPOSED CIRCULAR READS AS FOLLOWS:

"IN MANY PLACES THE STATE LAW REQUIRES THAT THE FEES OF STATE, COUNTY OR MUNICIPAL OFFICERS FOR CERTAIN SERVICES BE PAID IN ADVANCE. SINCE SECTION 3648, REVISED STATUTES OF THE UNITED STATES, (31 U.S.C. 529) FORBIDS ADVANCE PAYMENTS BY THE FEDERAL GOVERNMENT, IT HAS BEEN NECESSARY FOR FEDERAL OFFICERS TO PAY THESE FEES FROM THEIR PERSONAL FUNDS FOR LATER REIMBURSEMENT.

"IT WILL NO LONGER BE REQUIRED THAT UNITED STATES ATTORNEYS AND MARSHALS PAY THESE FEES FROM THEIR PERSONAL FUNDS. IT IS REASONABLE TO ASSUME THAT IN AUTHORIZING THE AGENCY TO PARTICIPATE IN SUITS OR LEGAL PROCEEDINGS IN STATE COURTS, THE CONGRESS INTENDED THAT PAYMENT OF COURT COSTS SHOULD BE MADE AS REQUIRED BY THE STATE LAW, NOTWITHSTANDING THE PROVISIONS OF SECTION 3648, REVISED STATUTES.

"ADVANCE PAYMENTS MAY BE MADE FROM APPROPRIATED FUNDS WHEN AUTHORIZED UPON A SHOWING OF NECESSITY. THE VOUCHER SHOULD BE SUPPORTED BY THE AUTHORIZATION AND A REFERENCE TO THIS CIRCULAR, AS WELL AS THE REFERENCE TO THE STATE STATUTES) PRESCRIBING THE FEE AND REQUIRING THE ADVANCE PAYMENT. IN ADDITION, THE VOUCHER SHOULD CONTAIN THE CERTIFICATE, SIGNED BY THE OFFICIAL PROCURING THE SERVICES, 'I CERTIFY THAT THIS ADVANCE PAYMENT IS NECESSARY IN THE PUBLIC INTEREST.'

"ADVANCE PAYMENTS ARE TO BE MADE ONLY WHEN SO REQUIRED BY LOCAL LAW. PAYMENTS MAY BE MADE AFTER THE SERVICES HAVE BEEN RENDERED, THERE CAN BE NO CHANGE IN THE PRESENT METHOD OF PAYMENT FOLLOWING COMPLETION OF SERVICE."

IN THE CITED DECISION OF JUNE 9, 1943, B-34946, IT WAS POINTED OUT THAT, AS THE FEDERAL AGENCY THERE INVOLVED WAS AUTHORIZED BY STATUTE TO RESORT TO LITIGATION IN THE STATE COURTS AND THAT IN DOING SO IT WAS CONFRONTED WITH HE NECESSITY OF ADVANCING CERTAIN FEES AND COURT COSTS IN COMPLIANCE WITH THE REQUIREMENTS OF THE STATE LAWS, IT WAS REASONABLE TO ASSUME THAT, IN AUTHORIZING THE AGENCY TO PARTICIPATE IN SUITS OR LEGAL PROCEEDINGS IN STATE COURTS, THE CONGRESS INTENDED THAT PAYMENT OF COURT COSTS SHOULD BE MADE IN CONFORMITY WITH STATE LAW, NOTWITHSTANDING THE PROVISIONS OF SECTION 3648, REVISED STATUTES. ACCORDINGLY, THERE WAS AUTHORIZED THE PAYMENT IN ADVANCE OF FEES AND OTHER ITEMS OF EXPENSE REQUISITE TO LITIGATION IN STATE COURTS IN COMPLIANCE WITH THE REQUIREMENTS OF STATE LAW.

THE MATTERS PRESENTED IN THE ABOVE-QUOTED LETTER WOULD NOT APPEAR TO DIFFER IN ANY SUBSTANTIAL RESPECT FROM THOSE INVOLVED IN THE DECISION OF JUNE 9, 1943. IT IS RECOGNIZED THAT YOUR DEPARTMENT, IN CONNECTION WITH THE PROSECUTION OF ITS LAW ENFORCEMENT FUNCTIONS, NECESSARILY REQUIRES OFFICIAL TRANSCRIPTS OF DOCUMENTS AND RECORDS IN THE CUSTODY OF STATE, COUNTY OR MUNICIPAL OFFICERS, AND

THAT SUCH FUNCTIONS SUBSTANTIALLY WILL BE IMPEDED UNLESS PAYMENT IN ADVANCE FOR SUCH TRANSCRIPTS WHERE REQUIRED BY LOCAL LAW MAY BE MADE. WHILE THE SAID DECISION OF JUNE 9, 1943, WAS RESTRICTED TO PAYMENTS IN ADVANCE TO COURT OFFICIALS, NO REASON IS PERCEIVED WHY THE PRINCIPLE THEREOF MAY NOT PROPERLY BE EXTENDED TO OTHER STATE AND LOCAL OFFICIALS. IN THAT CONNECTION, THERE WOULD APPEAR TO BE APPOSITE HERE STATEMENT MADE IN DECISION OF JULY 19, 1943, B-35670, AS FOLLOWS:

"SECTION 3648, REVISED STATUTES, PROHIBITS THE DISBURSEMENT OF PUBLIC FUNDS IN ADVANCE OF THE RENDERING OF SERVICES OR DELIVERY OF MATERIALS FOR WHICH PAYMENT IS MADE. THE PRIMARY PURPOSE OF SAID STATUTE, OF COURSE, IS OBVIOUS. THE DANGER INHERENT IN AN ADVANCE OF MONEYS PRIOR TO THE RENDERING OF SERVICE OR DELIVERY OF MATERIALS UNDER A CONTRACT IS THE POSSIBILITY OF FAILURE OF PERFORMANCE ON THE PART OF THE CONTRACTOR AND HIS REFUSAL OR INABILITY TO REFUND THE MONEYS SO ADVANCED. HOWEVER, HAVING REGARD FOR THE ESTABLISHED RESPONSIBILITY OF A STATE, THAT DANGER WOULD SEEM TO BE LESS REAL WHERE A STATE IS THE CONTRACTOR UNDERTAKING TO RENDER SERVICES UNDER AN AGREEMENT WITH THE UNITED STATES ***." SEE, ALSO, 25 COMP.GEN. 834.

ACCORDINGLY, I HAVE TO ADVISE THAT, SO FAR AS THIS OFFICE IS CONCERNED, NO OBJECTION WILL BE INTERPOSED TO THE ADVANCE PAYMENT PROCEDURE CONTEMPLATED BY THE PROPOSED CIRCULAR, ABOVE QUOTED, IT BEING NOTED THEREFROM THAT SUCH PAYMENTS ARE TO BE MADE ONLY WHEN REQUIRED BY LOCAL LAW, IN THE ABSENCE OF WHICH PAYMENTS IN ARREARS WILL CONTINUE TO BE MADE. THE FIRST QUESTION SET FORTH IN THE LETTER OF APRIL 22, 1947, IS ANSWERED ACCORDINGLY, AND QUESTIONS 2, 3 AND 4 ARE ANSWERED IN THE AFFIRMATIVE.