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Trade Regulation

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on the basis of income,[28] three tax income if it yields more than an alternative tax,[29] and four, like Massachusetts, employ an income tax as well as other forms of franchise tax.[30] Straight taxation of income alone is probably the simplest method of corporate taxation and also the most equitable, all other things being equal. In Massachusetts, however, things are something less than equal. Large amounts of corporate property are exempt from local taxation. Therefore, if they are not taxed by the state government, they will escape taxation altogether. Their inclusion within the purview of the corporate excise tax is a fiscal necessity.

In conclusion, the Massachusetts General Court has taken a step in the right direction both as to simplifying and equalizing the tax laws and as to providing an investment incentive. It is a step that could well be emulated by her sister states.

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TRADE REGULATON

Congress has recently enacted the Antitrust Civil Process Act[1] which enables the Department of Justice to obtain compulsory production of documentary evidence in civil antitrust investigations. The act thus places the Department on a parity with other federal agencies which have the power to obtain documents for purposes of investigation.[2] This seems eminently desirable since the Department is the primary enforcer of the antitrust laws. Nonetheless, similar proposals had been submitted, without success, to Congress for the last four years.[3]

Prior to this enactment, the Department had three methods to obtain evidence in civil antitrust investigations, all of which were generally unsatisfactory and inherently unenforceable.[4] First, voluntary cooperation of prospective defendants could be sought. This procedure is subject to obvious defects and needs no extended discussion, suffice it to say that there were many instances where cooperation was not forthcoming.[5] As the applicable House Report points out, "this method . . . is unsatisfactory since it leaves

[28] California, Hawaii, Idaho, Minnesota, Montana, North Dakota and Wisconsin.
[29] Connecticut, New York and Utah.
[30] Iowa, New Jersey, Pennsylvania and Tennessee.

[1] Pub. L. No. 87-664, 76 Stat. 546 (1962); 15 U.S. Code Cong. & Ad. News 3095 (1962).

[2] A partial list of such agencies is contained in H.R. Rep. No. 1386, 87th Cong., 2d Sess. (1962). They include the Departments of Agriculture, the Army, Labor, Treasury, as well as the Veterans Administration and the Federal Maritime Commission.

[3] For a legislative history of these proposals, see H.R. Rep. No. 1386, supra note 2.

[4] Dissatisfaction with the evidence producing powers of the Department was the main topic of the Hearing on Current Antitrust Laws, Att'y Gen. Nat'l Comm. Antitrust Rep. 345 (1955). For additional discussion concerning the previous inadequacies of civil antitrust enforcement by the Department of Justice, see H.R. Rep. No. 2966, 84th Cong., 2d Sess. 267 (1956), cited in 59 Colum. L. Rev. 1089 (1959); 19 Md. L. Rev. 326 (1959).

[5] See Hearings on S. 167 Before Senate Subcommittee on Antitrust & Monopoly, 87th Cong., 1st Sess. (1961) (remarks of Asst. Att'y Gen. Loevinger).

the public interest in the enforcement of the antitrust laws subject to the will of those who violate the laws."[6]

Second, pursuant to Section 6(c) of the Federal Trade Commission Act[7] the Commission, upon petition of the Attorney General, may conduct investigations in certain instances and transmit all findings and recommendations to the Department. However, this procedure is very limited; it applies only when a final decree has been entered in a government action to enjoin a violation of the antitrust laws. Furthermore, only corporations are subject to this method, whereas the new act applies to partnerships and associations as well. The House Report categorically states that this procedure has never been used in aid of an investigation.[8]

Third, the Department could bring suit based on all available evidence and then invoke the discovery provisions of the Federal Rules of Civil Procedure to obtain evidence unavailable prior to commencement of the suit. This method places the cart before the horse since the purpose of an investigation is to determine whether suit should be brought in the first place. Similarly, evidence could be obtained by use of the grand jury subpoena, but this method was curtailed when the Supreme Court held it to be an abuse of process to instigate a grand jury investigation where there is no intent to bring a criminal action.[9] While the lack of such intent may be difficult to prove, such affords no reason for "flouting the policy of the law."[10]

Whenever the Attorney General "has reason to believe that any person under investigation may be in possession of any documentary material relevant to a civil antitrust investigation," he may, prior to commencement of a civil or criminal action, make written demand for production of such material.[11] A "person" is "any corporation, association, partnership or other legal entity not a natural person."[12] The act provides the recipient of the demand with adequate safeguards against possible abuse of process by the Department. Section 3(b)(1) requires that each demand "state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto." The documents to be produced must be described, according to section 3(b)(2), "with such definiteness and certainty as to permit such material to be fairly identified." A reasonable time for production must be allowed,[13] and the custodian to whom the documents are to be made available must be identified.[14] Any requirement which would be unreasonable, or any document which would be privileged, if demanded by a subpoena duces tecum in aid of a federal grand jury investigation is outside the scope of the act.[15]

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[6] H.R. Rep. No. 1386, supra note 2.

[7] 38 Stat. 721 (1914), 15 U.S.C. 46 (1958).

[8] H.R. Rep. 1386, supra note 2. One reason for this development was the internal friction in the FTC over its use because of the large drain it would create on the Commission's budget and manpower. See 2 CCH Trade Reg. Rep. ¶ 8590 (1962).

[9] United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

[10] Id. at 683.

[11] Section 3(a).

[12] Section 2(f).

[13] Section 3(b)(3).

[14] Section 3(b)(4).

[15] Sections 3(c)(1) & (2).

The act also imposes some restrictions as to the extent that the documentary materials may be used and examined by other governmental agencies. They can be examined only by duly authorized members of the Justice Department,[16] and such information cannot be given to the FTC for it to conduct its own investigation on the matter.[17] However, the Department is authorized under section 4(d) to use these documents in any court or grand jury proceeding involving an alleged antitrust violation. Furthermore, the act does not affect the Department's power to lay evidence obtained by the demand before a grand jury or any power with respect to such proceeding.[18]

Enforcement of any demand, in the event voluntary compliance is not forthcoming, is left to the district courts where the "person" resides, conducts its principal place of business or, if the parties agree, transacts business.[19] Similarly, under Section 5(b), any "person" served with a demand may challenge its validity in the district courts. The federal courts have full authority to enter any order which may be necessary to carry out the provisions of the act,[20] disobedience being punishable by contempt.[21] In addition, criminal penalties are provided for any natural person who, with the intent to evade any demand made pursuant to the act, conceals or destroys any document which is the subject of the demand.[22]

An unusual aspect of the act is the creation of the office of Antitrust Document Custodian.[23] The Custodian is made responsible for the use to which documents under his care are put,[24] but, unlike the Federal Trade Commission Act,[25] for example, no specific sanctions are provided for violations. He may deliver documents to any attorney acting on behalf of the United States in an antitrust proceeding.[26] Upon termination of such proceeding, however, any material not under the control of a court or grand jury must be returned to the Custodian.[27] If, after a reasonable time for inspection of these documents has elapsed, no antitrust proceeding has been instituted, the person who produced the documents is entitled to their return upon written demand made to the Attorney General or to the head of the Antitrust Division.[28]

Thus far the background which gave rise to the need for the act and, in general terms, the act itself have been examined. Attention is now directed to specific problems likely to arise under the act and the law applicable thereto.

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[16] Section 4(c). However, see note 26 infra.

[17] The bill as originally introduced in Congress and passed by the Senate would have provided otherwise. For the full text of this bill, see H.R. Rep. No. 2291, 87th Cong., 2d Sess. (1962).

[18] Section 7.

[19] Section 5(a).

[20] Section 5(d).

[21] Ibid.

[22] Section 6(a), thereby amending 18 U.S.C. 1505 (1958).

[23] Section 4(a).

[24] Section 4(c).

[25] 38 Stat. 723 (1948), 15 U.S.C. 50 (1958).

[26] Section 4(d).

[27] Ibid.

[28] Section 4(f).

Despite early decisions to the contrary,[29] there is presently no requirement that a demand for production of documentary material, to be enforceable, must be based on a showing of probable violation of a law. "It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command."[30] This view is reflected in the provisions of the act itself. A demand may be made whenever there is reason to believe that a "person" has documents which are "relevant to a civil antitrust investigation."[31] An "antitrust investigation" is "any inquiry . . . for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation."[32] Obviously then, the statute does not require a showing of probable cause since the whole purpose of the act is to aid the Department in ascertaining whether the law has been violated. Clearly, this is well within the scope of the modern decisions.[33]

Section 3(c)(1) of the act provides that no demand shall "contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum . . . in aid of a grand jury investigation. . . ." It is important to note, however, that a grand jury "can investigate merely on suspicion that the law is being violated or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to any administrative body, it too may take steps to inform itself as to whether there is probable violation of the law."[34]

In *Hale v. Henkel*[35] it was stated that a subpoena duces tecum which contains a sweeping demand for documentary material, with no showing of necessity or materiality to justify such demand, "is equally indefensible as a search warrant would be if couched in similar terms."[36] In *Brown v. United States* the Court, without overruling *Henkel*, indicated that a showing of "probable materiality" was sufficient.[37] More recently, the Court has stated that "law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."[38] Moreover, a demand for information will be sustained even if prompted by "official curiosity" so long as it is not "of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power."[39] Compare the language of Mr. Justice Holmes: "It is contrary to

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[29] See, e.g., FTC v. Baltimore Grain Co., 284 Fed. 886 (D. Md. 1922), aff'd per curiam, 267 U.S. 586 (1924), holding that Congress could not confer upon the FTC power to compel production of documents in aid of a general investigation where there is no showing of a probable violation of law. See also, Harriman v. ICC, 211 U.S. 407 (1908); Davis, Administrative Law § 3.04 (1958).

[30] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 209 (1946). Compare the quoted language with the *Baltimore Grain* case, supra note 29.

[31] Section 3(a).

[32] Section 2(c).

[33] See, e.g., the *Walling* case, supra note 30; United States v. Morton Salt Co., 338 U.S. 632 (1950); Davis, op. cit. supra note 29, §§ 3.04, 3.06.

[34] United States v. Morton Salt Co., supra note 30, at 642.

[35] 201 U.S. 43 (1905).

[36] Id. at 77.

[37] 276 U.S. 134, 143 (1927).

[38] United States v. Morton Salt Co., supra note 30, at 652.

[39] Ibid.

the first principles of justice to allow a search through all the respondent's records, relevant and irrelevant, in the hope that something will turn up."[40]

Section 3(c)(2) provides that no demand shall "require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum . . . in aid of a grand jury investigation. . . ." With respect to the privilege against self incrimination, it is not clear what exclusionary effect, if any, this provision will have. The subpoena provisions of the act apply to "any corporation, association, partnership, or other legal entity not a natural person."[41] It has long been held that this privilege does not apply to corporations,[42] and that an individual in possession of corporate records may not claim the privilege as if they were his own private property.[43] In *United States v. White*[44] it was held that an officer of an unincorporated labor union may not claim the privilege with respect to production of union records in his possession even though they might tend to incriminate him. "[I]ndividuals, when acting as representatives of a collective group, cannot be said to be excercising their personal rights and duties nor to be entitled to their purely personal privileges. . . . And the official records and documents . . . that are held by them in a representative rather than a personal capacity cannot be the subject of the personal privilege against self incrimination."[45] Whether this reasoning will apply to partnerships and other such arrangements remains to be seen.[46] With respect to other privileges, not personal in nature, there seems to be no reason why the act should not be effective.

The result of the Antitrust Civil Process Act is to extend to the Department of Justice a weapon with which it can now procure documentary evidence for investigative purposes—a weapon which has been enjoyed by the Federal Trade Commission and many other governmental agencies over the past years. This new legislation should enable the Department to proceed fairly, yet effectively, in its future enforcement of the federal civil antitrust laws.

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[40] FTC v. American Tobacco Co., 298 U.S. 298, 306 (1924). See Note, Resisting Enforcement of Administrative Subpoenas Duces Tecum, 69 Yale L.J. 131 (1959).

[41] Section 2(f).

[42] Hale v. Henkel, supra note 35; Brown v. United States, supra note 37; Wilson v. United States, 221 U.S. 361 (1911).

[43] Wilson v. United States, supra note 42.

[44] 322 U.S. 694 (1944).

[45] Id. at 699.

[46] For an affirmative answer, see Davis, op. cit. supra note 29, § 3.07.