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Filing and Publication of Administration Rules and Regulations in Montana

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absence of a sale (or even negotiations toward a sale) refused to find them to be income assets, saying that mere ownership of property is not enough. It is likely that the Ninth Circuit would find otherwise. Congress should be called upon to give a workable definition to the concept of income in respect of a decedent.

CONCLUSION

It is submitted that in defining this concept, the general rule should be that all items will be included as income in respect of a decedent that the accrual basis taxpayer would normally consider in determining his income. This would include interest income and accounts receivable as well as inventory items purchased or produced by the decedent whose cost would not properly be deductible as current expense by the accrual basis taxpayer. This provision would insure equitable treatment for both cash and accrual basis taxpayers, in that the basis of the decedent in inventory items would be the basis in the hands of the successor. While this would equalize the related positions of both the cash and the accrual basis taxpayers—as no taxable realization occurs until actual sale—it would not have the effect of damaging the cash position of the estate.

With this general rule as a foundation, it would then be desirable to specify other items that should be includible only because of the death of the taxpayer. Included in this category would be items such as unfinished work, employee bonuses and other income benefits, income from litigation such as patent infringement, income earned but payable over a period of years such as life insurance commissions, and any other items earned during the lifetime of the decedent which Congress believes should be included but which were not reported for income tax purposes by the decedent.

ROBERT C. JOHNSON

FILING AND PUBLICATION OF ADMINISTRATIVE RULES AND REGULATIONS IN MONTANA

Mr. Justice Jackson observed recently that, "the rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart."¹ This language confirms a similar observation made in 1938 by Lester Jaffee: "Despite its many defects, administrative law threatens soon to overshadow the activities of our courts because it seems to be necessary to meet the needs of our present-day complex society."²

A good share of the development in the field of administrative law has come about in the last twenty five years. The New Deal, with its expansion into new areas of governmental activity, necessitated a vast increase in the number of governmental agencies and departments. While the federal government has led in the growth of administrative law, state

¹FTC v. Ruberoid, 343 U.S. 470 (1952).

²Jaffee, *Publication of Administrative Rules and Order*, 24 A.B.A.J. 393 (1938).

administrative bodies have experienced a comparable growth and development.

The growth of administrative law has not been smooth. The field, by its very nature, defies a uniform approach. Procedures for rule making, enforcement of rules when made, and quasi-judicial activities have varied widely with the agency involved. The fact that there was little precedent on which to base uniform administrative procedures led to further diversity.

One problem which early arose in federal administrative law was the lack of adequate means of ascertaining what rules were currently in force for any given agency. Further, there were no ready means of keeping abreast of rules as they were promulgated. The problem rapidly became acute as the number of agencies with authority to promulgate rules and regulations swelled during the early days of the New Deal.³ The consequences were far reaching. One might well be subject to the provisions of an administrative rule and have no knowledge of this fact and no means of obtaining it. Further, many administrative regulations carried criminal penalties to which one might become subject, again without notice that such rule even existed.

Two embarrassing encounters in the United States Supreme court pointed up the acute lack of information concerning administrative materials. The first occurred in the "Hot Oil" case.⁴ Mr. Chief Justice Hughes there noted that the prosecuting authorities and the courts alike were ignorant of the fact that a certain paragraph of the petroleum code, on the basis of which the proceedings were tried in the courts below, had theretofore been eliminated by executive order. In the course of the argument, the matter of lack of publication of federal administrative law came under scathing inquiry in a colloquy between government counsel and Mr. Justice Brandeis. It came to light that the only copy of the Petroleum Code which appellants' counsel had ever seen had been in the hip pocket of a government agent. Government counsel admitted it would have been difficult to find out what was contained in executive orders when they were issued. The second revelation came in *United States v. Smith*,⁵ where the officers of the government did not know the applicable regulations. An indictment had been brought and an appeal taken by the government to the Supreme Court before it was found that the regulation on which the proceeding was based did not exist.

In 1935 Congress passed the Federal Register Act,⁶ thereby providing an available source of information about federal administrative law. Even this publication, though a marked improvement over the previous situation, apparently is still susceptible to improvements in both its form and content.⁷

In the states, what has heretofore been said about the federal government, prior to the enactment of the Federal Register Act, still applies in

³See Griswold, *Government in Ignorance of Law*, 48 HARV. L. REV. 198 (1934); Jaffee, *supra* note 2.

⁴*Panama Refining Company v. Ryan*, 293 U.S. 388 (1934).

⁵393 U.S. 633 (1934).

⁶44 U.S.C. §§ 301-314 (1953).

⁷See Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929 (1950).

large measure. Progress in state administrative reform has been slower, due to apathy toward the problems raised by the relatively recent development of administrative law at the state level and, of course, to budgetary limitations. Yet there is probably not a more trackless morass in the whole range of American legal bibliography than the administrative materials of the states.⁸

The need for filing and publication of administrative rules and regulations can hardly be over-emphasized. Due process does not require that there be notice and hearing before the promulgation of general rules and regulations, in the absence of a statute so providing.⁹ Though, in fact, many statutes and also many agencies by their own rules require such notice and give a right to a hearing, such provisions may be omitted without militating against the binding effect of these rules. Contrast this with the methods by which statutes are created. They go through a highly formal procedure, which is intended to preclude hardship caused by surprise to the interests concerned.

Even the least significant statute must be formally introduced as a bill, printed, referred to a committee and reported on, after a hearing, read three times before each house, discussed in committee of the whole, passed by each house and approved by the executive. Administrative rule-making is in striking contrast. The first knowledge that those affected have of a rule is usually after it has gone into effect. The first opportunity they have to challenge it is usually after it is enforced against them and they can attack it in the courts.¹⁰

Administrative rules and regulations have the force and effect of law,¹¹ yet it is apparent that there is an excellent chance that such laws will go unnoticed by those concerned. This is comparable to the practice attributed to Caligula of writing his laws in small characters and hanging them upon high pillars "the more effectively to ensnare the people."¹²

As of 1953, only four states required agencies themselves to publish their rules, and only 24 states had any statutes pertaining to the mere filing of rules with a central state office, usually the secretary of state.¹³ Yet this is the very minimum for providing any publicity whatever for administrative rules. Fourteen of these states provide for the codification and publication of rules which have been filed in a central office.¹⁴ Montana has no general provision governing either filing or publication.

Perhaps the most serious consequence of inadequate publication is that an individual may be subjected to criminal penalties provided for by an

⁸Abel, *The Double Standard in Administrative Procedure Legislation, Model Act and Federal Act*, 33 IOWA L. REV. 228 (1947).

⁹*Bi-Metallic Investment Company v. Colorado*, 239 U.S. 441 (1915). The reasoning of this and other like cases is epitomized by Mr. Justice Holmes: "When a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting as an assembly of the whole." *Id.* at 445.

¹⁰POUND, ADMINISTRATIVE LAW 66 (1942).

¹¹*Maryland Casualty Co. v. United States*, 251 U.S. 342 (1919).

¹²CARR, COMMITTEE ON MINISTERS POWER, MINUTES OF EVIDENCE 208 (1932).

¹³HARRIS, *Administrative Practice and Procedure, Comparative State Legislation*, 6 OKLA. L. REV. 29 (1953).

¹⁴*Ibid.*

administrative rule. During argument in the "Hot Oil"¹⁵ case counsel opposing the government complained that his client "was arrested, indicted and held in jail for several days and then had to put up bond for violating a law that did not exist, but nobody knew it."¹⁶ Where no provisions for filing and publication exist, and there is no publication in fact, quere whether one may be prosecuted for violating a regulation of which he had no prior knowledge and no reasonable means of obtaining such knowledge. Would due process be afforded under such circumstances? And if due process requires publication, what minimum standards of publication would the court require to insure that adequate notice had been afforded?

In the recent case of *United States v. Howard*,¹⁷ the United States Supreme Court reaffirmed the basic proposition that regulations of state commissions are the "law" of the state and sustained a federal criminal information filed against one Howard for transporting fish across the Florida border in violation of Florida laws. The "law" referred to was a rule of the Florida Game and Fresh Water Fish Commission prohibiting transportation out of the state of certain species of fish. This "law" was incorporated into the Federal Black Bass Act prohibiting transportation of fish from any state contrary to the state's law. The court specifically held that the "law of the State" is sufficiently broad to encompass the type of regulation used in Florida. Florida law provided that such rules were effective 30 days after filing with the secretary of state, and that any changes must be filed with county judges and be published in each county in a newspaper of general circulation. Further, the Florida commission made a practice of compiling its rules in a code book which it circulated without cost to county judges and to principal sporting goods and license dealers. The Court noted these factors in sustaining the validity of these rules as "laws." In other words, the United States Supreme Court seems to have inquired into what actual publication a rule had been given before it was willing to sustain a criminal information based on the validity of such a rule.

As to the adequacy of publication, once it is required, in *Whitman v. Wisconsin Department of Taxation*,¹⁸ a taxpayer contended that there was not sufficient publication of an administrative regulation as required by the state constitution.¹⁹ The court had to go all the way back to its 1850 decision of *Sholes v. State*²⁰ for a standard. That case, obviously referring to statutes passed by the legislature and not to administrative regulations, held that the constitutional requirement would be satisfied by publication in public journals, in pamphlet form, by proclamation at courthouse doors, or by publishing in a bound book. Quere how useful such a standard of publication really is in relation to the needs of modern administrative law.

The *Howard* decision was not based on due process, but it has implications for that concept. It therefore becomes even more important to ascer-

¹⁵*Panama Refining Company v. Ryan*, 293 U.S. 388 (1934).

¹⁶DAVIS, *CASES ON ADMINISTRATIVE LAW*, 81-82 (1951).

¹⁷77 Sup. Ct. 303 (1957).

¹⁸240 Wis. 564, 4 N.W.2d 180 (1942).

¹⁹Article VII, Section 21, of the Wisconsin constitution provides that "no general law shall be enforced until published."

²⁰2 Pinney 499 (Wis. 1850).

tain to what extent administrative regulations are publicized in Montana, and to ascertain how adequate notice to the public can be insured.

There is no general statute for filing or publication in Montana and an examination of the statutes covering some ninety-seven boards and agencies of the state which are concerned with the public at large, or particular segments thereof, reveals that ninety-four are not required to file their rules, and for two of the three required to file, failure to comply does not make the regulations ineffective.²¹ Only one of these, the State Unemployment Compensation Commission, is required to file such rules as a condition precedent to their effectiveness. Some nine boards and agencies require varying degrees of publication.²² But agencies such as the State Board of Equalization, the Registrar of Motor Vehicles and the State Highway Commission, to note only a few, are under no statutory obligation to file or publish their rules and regulations.

It is submitted that the situation needs correction. Adequate publicity would increase public confidence in agency action as well as insure against any such injustices as occurred in the "Hot Oil" case. It is impossible to hold agencies to established procedures if they are free to change rules according to whim and circumstance. "Procedural uncertainties lead to distrust of agency actions."²³

In order to remedy this serious situation in Montana, there should be enacted a uniform method of filing and publication of administrative rules. To this end, we have as a yardstick the provisions of the Model State Administrative Procedure Act.²⁴ This is the product of joint efforts of special committees of the American Bar Association and the National Conference on Uniform Laws.

"Agency" is defined in the model act in terms of power to make rules or to adjudicate contested cases other than in the legislative and judicial branches, exclusive of special agencies, such as parole boards.²⁵ "Rules" are defined as every regulation, standard, or statement of policy, or interpretation of general application and future effect adopted by an agency to implement the law or to govern its organization or procedure, except regulations concerning only the internal management of the agency.²⁶

²¹State Aeronautics Commission, REVISED CODES OF MONTANA, 1947, § 1-204; (Hereinafter the REVISED CODES OF MONTANA are cited R.C.M.) Oil and Gas Commission of the State of Montana, R.C.M. 1947, § 60-132; Unemployment Compensation Commission of Montana, R.C.M. 1947, § 87-121.

²²State Board of Health of the State of Montana, R.C.M. 1947, § 69-107; Montana State Board of Entomology, R.C.M. 1947, § 69-1008; State Fish and Game Commission, R.C.M. 1947, §§ 26-125, 128, 129; Milk Control Board, R.C.M. 1947, § 27-413; Public Service Commission, R.C.M. 1947, § 70-116; Board of Railroad Commissioners of the State of Montana, R.C.M. 1947, § 72-117; State Board of Food Distributors, R.C.M. 1947, § 27-306; Unemployment Compensation Commission of Montana, R.C.M. 1947, § 89-120.

²³Harris, *Administrative Practice and Procedure, Comparative State Legislation*, 6 OKLA. L. REV. 29 (1953).

²⁴NATIONAL CONFERENCES OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 329-333 (1944).

²⁵See Harris, *Administrative Practice and Procedure, Comparative State Legislation*, 6 OKLA. L. REV. at 32-34 for state modifications of the definitions herein discussed.

²⁶MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1.

Section three of the model act²⁷ provides for filing of all rules promulgated by state agencies as a condition precedent to their effectiveness. They are to be filed in a central state office where they are open to the public. This makes it possible for parties affected by administrative action to ascertain applicable rules and regulations by going to a single source. Section four,²⁸ requiring publication, goes to the very heart of the matter, since filing rules without more is of limited value. Experience with such filing has indicated that officials charged with this duty fail to maintain the files suitably for easy reference. Furthermore, such central collections for rules are inconvenient and are rarely used by the public.²⁹

Under the provisions of the act, the Secretary of State or whatever agency is designated, is to compile, index and publish all rules adopted by each agency and remaining in effect. Compilation is to be supplemented as often as necessary, and at least once every two years. Thus, we see the act providing for an organ of central publication like the Federal Register Act. Further, it provides for a monthly bulletin of rules newly filed as required by section three. It should be noted that all rules need not be published if processed copies are made available upon application to the issuing agency, and if the subject matter of such rules is indicated in the bulletin. Note also that the published rules are to be distributed free to state officials and on a non-profit basis to all other persons.

It is recognized that each state must adopt these provisions to fit its own particular needs and budgetary limitations. For example, the matter of when rules should become effective varies from state to state. Some states provide that the effective date shall be the date upon which the rule is filed; some provide for effectiveness a specified number of days after filing; and some make publication a condition precedent to effectiveness. The model act leaves it entirely up to the issuing agency to determine whether the rules shall go into effect upon filing or at a later time. Even those states which provide for delayed effectiveness frequently have escape

²⁷*Id.* § 3:

"(1) Each agency shall file forthwith in the office of the [Secretary of State] a certified copy of each rule adopted by it, including all rules now in effect. The [Secretary of State] shall keep a permanent register of such rules open to public inspection.

(2) Each rule hereafter adopted shall become effective upon filing, unless a later date is required by statute or specified in the rule."

²⁸*Id.* § 4:

"(1) The [Secretary of State] shall, as soon as practicable after the effective date of this act, compile, index, and publish all rules adopted by each agency remaining in effect. Compilations shall be supplemented or revised as often as necessary [and at least once every two years].

(2) The [Secretary of State] shall publish a [monthly] bulletin in which he shall set forth the text of all rules filed during the preceding [month], excluding rules in effect upon the adoption of this act.

(3) The [Secretary of State] may in his discretion omit from the bulletin or the compilation rules the publication of which would be unduly cumbersome, expensive or otherwise inexpedient, if such rules are made available in printed or processed form on application to the adopting agency, and if the bulletin or compilation contains a notice stating the general subject matter of the rules so omitted and stating how copies thereof may be obtained.

(4) Bulletins and compilations shall be made available upon request to [officials of this state] free of charge, and to other persons at a price fixed by the [Secretary of State] to cover publication and mailing costs."

²⁹See Heady, *State Administrative Procedure Laws: An Appraisal*, 12 PUB. ADMIN. REV. 10 (1952).

provisions permitting an earlier effective date for rules of an "emergency" nature.

The model act would resolve only a part of the problem of providing really adequate administrative information. In addition to contemplating publication of substantive rules of general application, it also provides for similar publication of the agencies' procedural²⁰ and organization²¹ regulations, but "rules and regulations are not the only materials of administrative law."²² There are, in addition, many other forms of needed information. The Attorney General's Committee on Administrative Procedure listed the following which it thought should receive the same publicity as rules and regulations: (1) statements of internal agency organization; (2) statements of general policy; (3) agency interpretation of the enabling act; (4) directions as to practice and procedure; (5) forms for complaints, applications, reports and the like; (6) instructions for examinations, statements and reports.²³ Publication of the various items listed above would be of great value to practitioners as well as the public.

In conclusion, the model act appears to be easily adaptable to the needs of any particular state and provides comprehensive provisions to be adjusted according to the needs of the adopting state. It is recognized that the legislation proposed here will not solve entirely the problem of informing the public about administrative rules. "Every state should provide in an official source in convenient form, and at a reasonable cost the body of administrative rules which its citizens must observe. The administrative code cannot be depended upon however, to do the whole job of publicity. Each regulatory agency must be aware of the groups who need to be informed and must act positively to keep them informed. The central administrative code is a minimum source of information; agencies must also be concerned with adequate dissemination of the content of the rules."²⁴

It would, nevertheless, represent a major step forward for a state which has only nominal legislation on this subject. The existing situation clearly requires immediate attention, for "until some measure is adopted it may well be said that our government is not wholly free from Bentham's censure of the tyrant who punished men 'for disobedience to laws or orders which he had kept them from the knowledge of'."²⁵

It is submitted that the cited provisions of the Model State Administrative Procedure Act, modified to fit the needs of Montana's administrative system, would be the most practicable means of achieving freedom from such censure.

ROSS W. CANNON

²⁰MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 2 (1).

²¹*Id.* § 2 (2).

²²ATTORNEY GENERAL, COMMITTEE ON ADMINISTRATIVE PROCEDURE, REPORT 26 (1941).

²³*Id.* at 26-28.

²⁴Heady, *op. cit. supra* note 29.

²⁵Griswold, *Government in Ignorance of Law*, 48 HARV. L. REV. 198 (1934).