CONSTITUTIONAL LAW-DOUBLE JEOPARDY-ACQUITTAL IN PRIOR CRIMINAL PROSECUTION AS BAR TO ACTION FOR PENALTIES BASED IN FRAUD

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Constitutional Law — Double Jeopardy — Acquittal in Prior Criminal Prosecution as Bar to Action for Penalties Based in Fraud — Defendant had been acquitted of a criminal charge of wilfully attempting to evade or defeat an income tax under section 146(b) of the Federal Revenue Act of 1928. Subsequently this action was initiated for the collection of an additional fifty per cent of the total amount of the deficiency under section 293(b) of the same act, which provides that if any deficiency is due to fraud with intent to evade the tax, fifty per centum of such deficiency in addition to the amount of the deficiency shall be collected. Plaintiff brought certiorari from an order of modification eliminating the fifty per cent additional penalty. Held, that the previous criminal acquittal of the defendant is no bar to the assessment of the additional fifty per cent penalty, which is in the nature of a civil sanction. Judgment reversed. Helvering v. Mitchell, 303 U. S. 391, 58 S. Ct. 630 (1938).

The prohibition of the double jeopardy clause of the Federal Constitution bars a subsequent criminal suit arising out of the same facts as a prior penal action. But neither acquittal nor conviction on a criminal charge is a bar to a civil suit, remedial in essence, based upon the same fact situation from which the criminal action arose. Thus, though it be admitted in the instant case

1 The Fifth Amendment of the United States Constitution reads in part: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” See 22 Minn. L. Rev. 1054 (1938); 13 Va. L. Rev. 410 (1927); 1 Chitty, Criminal Law, 3d Am. ed., 452 (1836).

2 Murphy v. United States, 272 U. S. 630, 47 S. Ct. 218 (1926), held that a prior acquittal on a criminal charge of maintaining a nuisance under §21 of the National Prohibition Act is not a bar to subsequent proceedings by the government to abate the same alleged nuisance under §22 of the same act, on the grounds that the purpose of the latter section and suit was not additional punishment but was merely preventive. In Stone v. United States, 167 U. S. 178, 17 S. Ct. 778 (1897), the Court held that an acquittal under a criminal charge of unlawfully cutting timber on government lands did not bar a subsequent civil action for conversion of the same timber.

that there can be no act of fraudulent evasion under section 293(b) of the Federal Revenue Act of 1928 that would not also be a wilful evasion under section 146(b), the subsequent suit for a civil penalty would not be barred by the prior criminal acquittal any more than the prior acquittal under the criminal charge would bar an action by the United States to recover only the amount of the evaded tax. The entire problem in the case would therefore seem to be one of statutory construction involving the civil or penal nature of the sanction. Inasmuch as the double jeopardy clause merely provides against punishing twice for the same offense, it is clearly within the congressional power to impose both a criminal and civil sanction for the same offense. That a distinctly civil procedure was provided by Congress for the collection of the additional fifty per cent penalty indicates that that body intended a civil, and not a penal, sanction. Congress cannot, within the Constitution, provide a civil procedure for the enforcement of a purely criminal sanction, although it can constitutionally enforce a remedial sanction by means of a criminal form of proceeding. Again, the very fact that the act contains two separate and distinct

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3 This was defendant's contention, on the ground that fraud presupposes a plan conceived before its execution and therefore must of necessity be wilful. See instant case, 303 U. S. at 392, and cases there cited by counsel for defendant. But see White v. United States, (D. C. Ky. 1937) 20 F. Supp. 623, where the view is advanced that fraud may be inferred where a person makes a statement recklessly, intending it to be acted upon, without regard to its truth or falsity; and see 22 Minn. L. Rev. 1054 (1938).

But defendant argued further that if evidence of a crime is essential to the imposition of a tax, the courts do not hesitate to pronounce it a criminal penalty, even if it incidentally brings in revenue, citing Regal Drug Co. v. Wardell, 260 U. S. 386, 43 S. Ct. 152 (1922), and Lipke v. Lederer, 259 U. S. 557, 42 S. Ct. 549 (1922).

4 See cases cited supra, note 2. The defense of double jeopardy is inapplicable if the subsequent suit is for an administrative or civil sanction, as defendant would not be liable to be subjected a second time to defending himself against a possible criminal punishment for the same offense. The defense of res judicata is inapplicable, as the prior criminal action does not show that the state could not prove the liability or complicity of defendant by a preponderance of the evidence. See 22 Minn. L. Rev. 1054 (1938); 13 Va. L. Rev. 410 (1927).

5 Ibid.


7 Coffey v. United States, 116 U. S. 436, 6 S. Ct. 437 (1885); "Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions" stated in Helvering v. Mitchell, 303 U. S. 391 at 402, 58 S. Ct. 630 (1938); Lipke v. Lederer, 259 U. S. 557, 42 S. Ct. 549 (1922); Regal Drug Corp. v. Wardell, 260 U. S. 386, 43 S. Ct. 152 (1922); United States v. Chouteau, 102 U. S. 603 (1880) (but see language used by the Court at p. 611); Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524 (1886); Lees v. United States, 150 U. S. 476, 14 S. Ct. 163 (1893), where the Court held that an action to recover a penalty, though civil in form, was unquestionably criminal in nature, wherefore defendant could not be forced to testify against himself. But see United States v. Regan, 232 U. S. 37, 34 S. Ct. 213 (1914).

8 The only effect of enforcing a remedial sanction by means of a criminal form of procedure would be to place the greater burden of proof beyond a reasonable doubt
provisions applying sanctions, and that the one invoking the obviously criminal sanctions of fine and imprisonment is under the title of "penalties," while the sanction in question is under the innocuous title of "additions to the tax in case of deficiency," indicates the intended civil nature of the sanction. In accordance with the traditional rule, the Court ought if possible, to construe the statute so as to achieve a constitutional result. To do so here would seem to require that the additional tax be found to be a civil or administrative sanction provided as a means of reimbursing the government for the expense of investigation and loss occasioned by the taxpayer's fraud instead of a fine inflicted as punishment. It is submitted that the Court in the instant case reached the correct decision by means of a clear and lucid reasoning process.

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and other incidents of a criminal action upon the government, and correspondingly give defendant a greater quota of protection.

It is interesting to note that if the subsequent action is considered penal in nature, but only as a means of enforcing by a civil action, a portion of the entire punishment for the commission of the crime, even though a prior acquittal would be a bar to the later action, supra note 7, yet a prior conviction would not be a bar to such action. See Hanby v. Commissioner of Internal Revenue, (C. C. A. 4th, 1933) 67 F. (2d) 125; 22 MINN. L. REV. 1054 (1938).


12 See notes 1, 5, and 7 supra.