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INFORMATION ACT SUITS TYING UP IRS

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Zale Corp., the country's largest retail jeweler, is the subject of a massive criminal tax investigation by the Internal Revenue Service, which says the company and its subsidiaries may owe more than \$100 million in back taxes.

"Recommendations for prosecution are likely," the government says in court papers.

So you might think the Dallas-based, multinational company would be on the defensive. But with the help of a Washington law firm — Caplin & Drysdale, which includes a former IRS commissioner — Zale has literally put the government on the defensive.

By simply filing a Freedom of Information Act request asking the IRS to itemize 300,000 pages of documents and 360,000 computer cards related to the investigation of Zale and more than 1,000 subsidiaries, the company has turned the tables on the government.

IRS agents, who compulsively collect every scrap of paper they can find in a wide-ranging probe, are being asked to open their files to taxpayers under investigation in a growing number of cases.

Deputy IRS Commissioner William E. Williams says about half the Freedom of Information lawsuits against the agency seek records being used in current investigations.

"INVESTIGATORY records compiled for law-enforcement purposes" are generally exempt from disclosure if their release would interfere with law-enforcement activities.

Since Congress pared down the exemption in 1974, thousands of documents have been released to taxpayers. Indeed, Zale got so many that it brought its own copying machine and machine operator to the regional IRS office.

Judges, in reviewing denials of records, often demand an index of withheld documents. Preparing such an index can be a huge task. The descriptive index entry for an item may be longer than the document itself.

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Zale owns a network of 1,100 jewelry stores, including Bailey Banks & Biddle shops in the Washington area.

Each of Zale's 1,300 subsidiary corporations filed separate tax returns in 1970 to 1975, and the IRS says it is auditing all those returns.

"The Zale investigation has at all times been unique in terms of its complexity and magnitude," Justice Department lawyers said in resisting disclosure this month. "In fact," according to the government, "one special agent has retired due to the stress caused by his position as the lead special agent on the Zale case."

ZALE'S REQUEST, according to the government, would cover "virtually every document" gathered by IRS in its probe of the company.

Federal lawyers contend that Zale, in trying to force the government to "disgorge its entire . . . file," threatened "grave and unprecedented interference with the investigative efforts of a law-enforcement agency."

They say that forced disclosure would impede the government's ability to prosecute tax violations and other white-collar crimes.

Regardless of whether such damage occurs, lawyers at the Justice Department, IRS and other investigative agencies will probably ask Congress to revise the Freedom of Information Act this year.

Last year, in the department's annual FOI report to Congress, Deputy Attorney General Benjamin R. Civiletti called for "remedial action."

But many members of Congress and civil liberties advocates remain skeptical of the need.

THE ZALE CASE and several other big tax cases share several special features:

- Only one person or company, the taxpayer, can obtain the records requested. Disclosure to anyone else would be forbidden by the Privacy Act and the Internal Revenue Code.
- The records are so complicated, according to the government, that they are fully understood only by the agents and lawyers directly involved in the case. These people must be diverted from enforcement work to review the records for possible release.
- The statute of limitations covering some of the financial transactions will soon expire.

It is hard to evaluate these arguments because in the past, government agencies have exaggerated their need for secrecy and have withheld records merely because they might prove embarrassing.

But there are several new indications of the burden on the government in the biggest cases.

In perhaps the most famous case, involving a Chicago lawyer named Burton W. Kanter, the federal government leased additional office space in Florida so it could review records on Kanter gathered in the course of Project Haven. Project Haven is a controversial IRS investigation into the use of offshore trusts and banks in the Bahamas for the purpose of evading U.S. taxes.

THE JUDGE IN Kanter's case was skeptical of government secrecy claims because a federal court had already found certain Project Haven activities illegal. The judge ordered IRS to give him an index of all the documents in question, together with the supposed justification for withholding them.

The index, covering about 13,000 pages, was prepared by a team of 35 IRS agents working with 10 government attorneys for more than two months. The cost, including salaries of the agents but not the lawyers, exceeded \$202,000.

In a telephone interview, Kanter said: "Government officials don't do the job they're supposed to do under the act until they are pushed. Only as we litigate issues and as a court is about to force disclosure do they release materials."

Kanter is now fighting the State Department, in another FOI lawsuit, to obtain diplomatic cables describing official Bahamian protests about the investigative techniques of IRS agents operating in the Bahamas.

State Department officials contend disclosure would harm U.S. national security and embarrass the Bahamian government.

Meanwhile, Anheuser-Busch, the world's largest brewer, facing a grand jury investigation of its taxes, filed a request last year seeking the contents of its IRS investigative file.

THE IRS RELEASED 3,365 pages and withheld another 12,000 pages on the ground that disclosure would "interfere with enforcement proceedings."

U.S. District Judge George L. Hart Jr. upheld the government's position without requiring a detailed index of the documents withheld. Anheuser-Busch is now appealing that decision.

Anheuser-Busch, like the Zale Corp., is represented by Caplin & Drysdale. Ralph A. Muoio, a partner in the law firm, said IRS officials are overstating the difficulty of responding to Freedom of Information requests, but added: "It is a big job. I sympathize with them."

Muoio denied that taxpayers used the act to delay, disrupt or impede investigations.

In any event, he said: "We haven't gotten any real benefit out of the act. The government has taken a very tough line on what it will release under FOI."

Mark H. Lynch, a lawyer with the American Civil Liberties Union, said the IRS and other agencies could comply with the information act more

easily if they organized their files to identify what can be disclosed.

"I don't feel sorry for the government," Lynch said. "When the government is going after a person, he has a right to fight back, to get whatever the government has on him."

MANY LAW-ENFORCEMENT officials would like to bar all public access to open, active investigative files. But Congress has shown itself unwilling to accept that approach because it permits "commingling" of sensitive data with other information that should be disclosed.

The FOI law already protects "investigatory records compiled for law-enforcement purposes" when producing the records would "interfere with enforcement proceedings," reveal investigative techniques or disclose the identity of a confidential source.

Government officials were encouraged by a case last year in which the Supreme Court seemed to say that the

National Labor Relations Board did not have to index certain records or give a separate justification for withholding each document sought by Robbins Tire and Rubber Co.

The court accepted a broad statement that disclosure of witnesses' statements prior to a hearing would interfere with enforcement, because witnesses might be open to intimidation or other pressures.

JUDGE HART CITED that case in denying Anheuser-Busch's request for a detailed index of its IRS file. Some lawyers contend the Supreme Court ruling should be applied narrowly to cover only the NLRB, not other agencies.

In going to court to fight for disclosure of records, a taxpayer inevitably sacrifices some confidentiality. Thus, the government disclosed in the Zale case that it was considering prosecution of the company, two officers, one current employee and two former employees.