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SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

Commissioner Of Internal Revenue,

Petitioner,

V.

Samuel Shapiro, et ux,

Respondents.

No. 74-744

Washington, D. C.
November 5, 1975

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

..... :
COMMISSIONER OF INTERNAL REVENUE, :

Petitioner, :

v. :

SAMUEL SHAPIRO, et ux, :

Respondents. :

No. 74-744

Washington, D. C.,

Wednesday, November 5, 1975.

The above-entitled matter came on for argument at
2:05 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MYRON C. BAUM, ESQ., Deputy Assistant Attorney General,
Tax Division, Department of Justice, Washington,
D. C. 20530; on behalf of the Petitioner.

NATHAN LEWIN, ESQ., Miller, Cassidy, Larroca & Lewin,
2555 M Street, N. W., Suite 500, Washington, D. C.
20037; on behalf of the Respondents.

C O N T E N T S

ORAL ARGUMENT OF:PAGE

Myron C. Baum, Esq.,
for the Petitioner

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Nathan Lewin, Esq.,
for the Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-744, Commissioner of Internal Revenue against Shapiro.

Mr. Baum, I think you may proceed now.

ORAL ARGUMENT OF MYRON C. BAUM, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BAUM: Mr. Chief Justice, and may it please the Court:

This case arises on certiorari to the District of Columbia Circuit, and presents, once again, the problem which this Court has dealt with in its preceding two terms; namely, injunctions against the assessment and collection of taxes, and the prohibition against such injunctions which is contained in Section 7421 of the Internal Revenue Code.

This Court dealt with it two years ago in Bob Jones University and Americans United. It dealt with it several years earlier in Williams Pecking, and briefly again last term in American Friends Service Committee.

The Court of Appeals on the very same day on which this Court announced its opinion in Bob Jones University and Americans United, reversed a decision of the District Court for the District of Columbia, dismissing this complaint for injunction, and held that the case should be remanded for a hearing at which the Commissioner of Internal Revenue would be

required to make a factual submission as to the basis for the tax assessment here involved, and in which the respondent taxpayer would be permitted discovery.

The Commissioner sought reharing on the basis of this Court's opinion in Bob Jones University and Americans United, but the Court of Appeals refused to modify its decision and, accordingly, we sought and obtained certiorari.

The controversy arises in the following circumstances: Mr. Shapiro is a citizen of Israel, who came to the United States in 1970. At some time in that year, or shortly thereafter, he was indicted in Israel for securities fraud, and the Government of Israel requested the Government of the United States to permit his extradition.

The question of his extradition was litigated in the District Court for the Southern District of New York and in the Court of Appeals for the Second Circuit. Both Courts held that Mr. Shapiro was extraditable, and ordered his surrender.

He then filed a petition for certiorari with this Court. While that petition was pending, Mr. Shapiro negotiated an agreement with the State of Israel, under which he would withdraw his petition and would surrender for extradition if the State of Israel would allow him to remain here until his then unborn child was born, and would allow him to remain on bail until his trial in Israel.

The petition for certiorari in this Court from that

extradition was then withdrawn, and Mr. Shapiro was scheduled to surrender for extradition on December 9, 1973.

On December 6 of that year, three days earlier, the Commissioner, upon learning from the Immigration and Naturalization Service that this extradition was to take place, and pursuing an investigation which had begun in September of '73, issued a jeopardy assessment against Mr. Shapiro for income taxes amounting to approximately \$7,000 for the year 1970 and \$85,000 for the year 1971, and levied on some bank accounts maintained by Mr. Shapiro, which represented some but not all of his property.

This, of course, was a recognition of the fact that had Mr. Shapiro been allowed to depart, the bank accounts would have also departed, and there would have been no funds available to the United States to collect taxes which it believed to be due.

At this point I think it appropriate to point out the procedure for these assessments: Normally, in income tax cases, the Commissioner, if he determines a deficiency is due from a taxpayer, must, under the Code, issue a statutory notice of deficiency, which provides that within ninety days thereafter the taxpayer may file a petition for review in the Tax Court of the United States.

This is the procedure described in Section 6212 and 6213 of the Internal Revenue Code, which appear in the appendix

to our brief.

If he does not follow that procedure, the statute expressly provides that he may be enjoined. But Section 6213 contains an express exception, namely, for a jeopardy assessment under Section 6861.

That section provides that if the Commissioner believes that the assessment or collection of a deficiency may be in jeopardy, he shall, notwithstanding the provision of Section 6213, immediately assess such deficiency.

If he does this before a notice of deficiency has been issued, the statute further provides that he must issue a notice of deficiency within sixty days of that assessment.

Thus, in jeopardy assessments, the procedure is essentially reversed. The assessment comes first, and the notice of deficiency comes second.

QUESTION: Mr. Baum, --

MR. BAUM: Yes, Mr. Justice?

QUESTION: -- bring me up to date on the facts about Mr. Shapiro. Is he back in this country?

MR. BAUM: He is in Israel now, Your Honor.

QUESTION: Has he been tried over there?

MR. BAUM: He has not been tried as far as we are aware.

QUESTION: Is he free on bond over there?

MR. BAUM: He's free on bond.

This was represented in the district court by counsel for Mr. Shapiro.

Section 6861 also provides that notice and demand for payment shall be made by the Commissioner in the case of a jeopardy assessment without waiting the ten days which we have found to exist in other statutes.

The taxpayer has raised the point in brief, and he raised it below, that Mr. Shapiro never did receive notice. This is contradicted, however, by the affidavit of a Revenue Service Center official who was responsible for the mailing of the notice, and a copy of that affidavit is printed at pages 10a and 11a of Respondents' brief.

QUESTION: At what stage of the proceedings was that affidavit filed, Mr. Baum?

MR. BAUM: After the decision of the Court of Appeals, Mr. Justice Rehnquist.

QUESTION: This is one thing that kind of raises some problems for me about the case, is that: Are we entitled to consider, in reviewing the judgment of the Court of Appeals, proceedings that transpired after the judgment of the Court of Appeals in the District Court?

MR. BAUM: I'd like to say, in response to that, if Your Honor please, that the proceedings in the District Court were dismissed before any question was raised about the non-receipt of the notice. The non-receipt of notice came in the

subsequent proceedings, and it is placed in issue by counsel before the Court now.

QUESTION: So both the contention and the response occurred in the post-Court of Appeals hearing in the District Court?

MR. BAUM: As far as my best recollection is, Your Honor.

QUESTION: Isn't that as it should be litigated, and if this case goes back it would be a point that would be litigated, wouldn't it?

MR. BAUM: If that were all that were to be litigated, we would not be here, Mr. Justice Marshall.

QUESTION: That's not my question. It is a matter that should be litigated.

MR. BAUM: We think we have established it --

QUESTION: Whenever somebody says "yes" and somebody else says "no", that's litigation in my book.

MR. BAUM: Yes, Your Honor.

Under the Internal Revenue Code, however, --

QUESTION: And so if this case were to proceed without us ruling with you, that would be one of the points that would be litigated.

MR. BAUM: There are numerous decisions, Mr. Justice Marshall, which hold that in the case of Internal Revenue notices there is no statutory requirement that they be received;

it is sufficient if there is proof that they have been sent. This has happened any number of times in the Tax Court because of these statutory notices, and we submit that we have established in the usual fashion and in the fashion required by the Federal Rules that it was mailed in due course.

Indeed, a copy of the notice appears in taxpayer's brief, at the following pages: 12a and 13a. And taxpayer, however, says -- the form says "Taxpayer's Copy". It says "Taxpayer's Copy" because he has failed to take into account the computerization of the Revenue Service.

The Revenue Service file copy is a piece of magnetic tape, and the only way the Service can reproduce a document is to push the appropriate button, if that be the device, on the machine and it will printout on the form which has printed on it, "Taxpayer's Copy", because they do not make copies for themselves, they have the permanent magnetic tape.

In accordance with the prescribed procedure, the Commissioner issued a statutory notice of deficiency to this taxpayer within fifteen days -- not sixty -- but within fifteen days, on December 21, 1973. And shortly thereafter, on January 3, 1974, Mr. Shapiro filed his petition in the Tax Court of the United States. That petition is still pending, and is awaiting trial.

And that is a factor which distinguishes this case from your prior decisions where there was no Tax Court petition

pending.

In the meantime, however, he filed this action for an injunction on December 13th in the District Court for the District of Columbia, seeking to have the levies removed and also seeking to have his extradition stayed. The latter part has been disposed of in the Court of Appeals and is no longer before this Court. That is, the extradition.

And it was after that that he departed and returned to Israel.

After hearings before the District Court in December 1973, and after a copy of the notice of deficiency was filed with the Court, it dismissed the action for lack of jurisdiction on the authority of your decision in Williams Packing Co.

But the Court of Appeals reversed and held that that dismissal was incorrect, because the Court should have held a hearing at which the Commissioner would be required to come forward with a factual submission to determine whether there was a rational basis for the assessment.

It also held --

QUESTION: Do you know, Mr. Baum, whether the Court of Appeals had any precise civil procedure type of thing in mind? Would it have been enough if the government had filed an answer to the complaint?

MR. BAUM: I think Your Honor has asked me two questions, and I'd like to answer them in order: The Court of

Appeals did not indicate exactly what procedure, in fact, in the conclusion of its opinion, appearing on page 16a of our Petition for Certiorari, it says: the District Court is not required to explore the matter in precisely the same manner as in Lucia and Pizzarello; each case is different and should be considered on its particular facts.

Which, frankly, I must admit, leaves us very little guidance.

On the second point, it is exactly what happened in the District Court while we were considering and filing a petition for certiorari in this proceeding that illuminates it, because the District Court has imposed a much more onerous burden on us than possibly even the Court of Appeals contemplated. I don't know, because I --

QUESTION: May I ask, Mr. Baum, in that paragraph 5, doesn't that -- may I properly draw the inference from this that they are talking about a probable cause hearing?

MR. BAUM: I didn't hear Your Honor.

QUESTION: A probable cause hearing. That the Commissioner has to come up with some showing, from which an instance of probable cause to levy the tax may be inferred.

MR. BAUM: You could call it that, Your Honor, yes. But I don't know what a probable cause hearing is in a tax context.

QUESTION: Well, but we're in the context of the Rules

of Civil Procedure here, I take it. An action was filed seeking injunctive relief, and that would be governed, would it not, by the Rules of Civil Procedure?

MR. BAUM: And the Rules of Civil Procedure, if Your Honor please, require that the taxpayer, the plaintiff, must establish by some means that there has been some taint of illegality in this assessment. Instead, the whole burden has been placed upon the government to justify its action by the mere filing of an injunction complaint.

QUESTION: Well, but the Rules of Civil Procedure don't necessarily supplant whatever may have been said in Enochs.

Conceivably, Enochs may mean that the government has to file an answer in a case like this, but do you know of any provision in the Rules of Civil Procedure that talks about a probable cause hearing?

MR. BAUM: None at all, Your Honor.

The Court of Appeals also held that the taxpayer had met the other test of Williams Packing, namely, the equity jurisdiction test. We submit that the Court of Appeals was in error on both counts.

This Court said in Williams Packing and in Bob Jones University that: injunctions restraining the assessment and collection of taxes might not issue unless the taxpayer can prove that it is clear that under no circumstances would the

government prevail.

In my humble opinion that goes way beyond a probable cause requirement. It also, of course, reiterated the necessity for a requirement of equity jurisdiction.

And this is nothing but a recognition, as this Court is well aware, of the danger of a waive of injunction suits flooding the courts and delaying the collection of taxes.

QUESTION: Well, isn't Mr. Chapiro's contention here that all of a sudden this just came like a bolt out of the blue, and if the government didn't tell him why they were after him, he had no way of evaluating their claim, or arguing that it was baseless?

MR. BAUM: He says that, Your Honor, but the notice of deficiency, which was before the District Court and the Court of Appeals, states that for the year 1970 he had \$18,000 in unexplained bank deposits. Under numerous decisions, of which one might be O'Dwyer vs. Commissioner, that is sufficient to carry the Commissioner's burden of showing that there may be a tax liability, and the burden is then on the taxpayer to show that those, that \$18,000 in this case does not represent taxable income.

As to the year 1971, the notice of deficiency stated expressly that he had \$137,000-odd from narcotics transactions in taxable income. And a tax was imposed accordingly for the year 1971.

Now, I submit that is a -- certainly he was not completely uninformed as to the basis for the Commissioner's action; indeed, he was put on ample notice of the basis for it.

In fact, the Commissioner -- the Court of Appeals, in its opinion, says that the District Court should obtain some evidence to determine whether the tax was arbitrary or excessive.

In other words, the Commissioner is the one who is on trial, and all we had before the District Court was an affidavit accompanying a motion for a preliminary injunction, which said: "I had no taxable income for 1970, and my 1971 tax return was correct."

That is far from the showing that the Commissioner acted wholly irrationally, arbitrarily, or in any capricious manner.

The Court has not only ignored the fact of the two-fold test of Williams Packing Company, and the fact that a simple denial is not sufficient to carry the burden we imposed on the taxpayer. But it assumed that there was a lack of good faith. For lack of good faith and the necessity for speed here, which gave rise to the accusation of lack of good faith, was, of course, as I said earlier, the question of imminent departure.

And nothing, in any decision of this Court, supports the view that there should be a heavier burden on the Commission when the taxpayer brings an injunction suit than there should be if he brought a refund suit, or filed a petition in the Tax

Court.

QUESTION: Instead of responding as he did in conclusion terms, suppose he had submitted a certified copy of a final decree of his grandmother's estate, showing that he had -- that at the time of these deposits -- inherited precisely or substantially that amount; would you say that would have carried the taxpayer's burden?

MR. BAUM: I would think so, Your Honor, as to that branch of the case. Of course that would not affect the narcotics transactions there, which would --

QUESTION: Well, it wouldn't affect -- it wouldn't, with finality, determine all of the tax aspects either, would it?

MR. BAUM: No, it would not, Your Honor.

What is most serious to us about this case --

QUESTION: May I interrupt you once more?

MR. BAUM: Yes. Sorry.

QUESTION: What bearing would it have on the jeopardy assessment?

MR. BAUM: It would, I think, allow the Court perhaps some basis for coming in and saying, "Now, Mr. Commissioner, it is incumbent upon you to examine the -- to acquaint us with the facts underlying this case."

QUESTION: As a condition to the continued impoundment?

MR. BAUM: That's correct.

QUESTION: Where would this showing be made?

MR. BAUM: In the District Court.

QUESTION: In the District Court. So you don't -- you say that it's proper to file this suit and it's just a -- in face of the Anti-Injunction Act, and that one or the other of the parties has got to show something?

MR. BAUM: That's correct, Your Honor.

QUESTION: Unh-hunh.

MR. BAUM: That's absolutely correct.

QUESTION: Would some of the problem that is followed here have been saved if the government simply filed an answer to the complaint for an injunction, outlining in very rough form the basis for the imposition of the tax?

MR. BAUM: I doubt that it would, Mr. Justice Rehnquist, because some of the government's evidence was based upon confidential informants. That would not have been -- no details would have been disclosed --

QUESTION: Well, under the pleadings we have now, we you don't answer in great detail as to what witnesses will testify, do you? You just answer the same way that you allege in a complaint, you can be fairly cursory.

MR. BAUM: Well, I submit, that's what we did when we filed a notice of deficiency on the 21st of December 1973.

QUESTION: Yes, but procedurally in the District Court, in stead of answering, you filed a motion to dismiss.

MR. BAUM: Well, I don't think that changes it, Your Honor, that it had before it, on motion to dismiss, other materials, even though that was the procedural framework in which the issue arose.

Because essentially, if Your Honor please, what the Court has done is not only inverted the burden of proof, but it has changed the forum for the resolution of tax disputes. If this decision stands, any taxpayer can ignore his right to go to the Tax Court, can ignore the possibility of refund suits, and file an action for an injunction with a general denial that he owes any money.

And he is then in a position of letting the Commissioner come forward and produce the evidence which sustains the assessment, having the Court decide whether that evidence is sufficient, and possibly deciding the whole merits of the controversy in advance.

QUESTION: Indeed, he can force the Commissioner to come forward, by discovery, under the Court of Appeals ruling.

MR. BAUM: That's correct.

QUESTION: Long before he could in the Tax Court.

QUESTION: This is just a question of -- what provokes it is the fact that you've got his property.

MR. BAUM: Well, --

QUESTION: You have his property locked up and he can't get it.

MR. BAUM: He cannot get it, that is true, Your Honor.

QUESTION: And -- well, that makes quite a bit of difference.

I suppose the suit would be -- he would gladly dismiss the suit if you'd give him back his property. And he would go forward in the Tax Court.

And, as the Court of Appeals said, you ought to show something if you're going to hold his property.

MR. BAUM: But, Your Honor -- if Your Honor please, this has been in existence since 1924, and we have been using this statute, and the direct statutory purpose as contained in the statute is to shorten the time, and that's why the sixty-day for giving a statutory notice of deficiency, allowing him to go to the Tax Court -- we may not sell the property, we can only hold it. And having accelerated the whole statutory scheme, that is what Congress did, and which has been upheld many, many times.

There is no problem on that, and if he had made some showing, some substantial showing that there was a wholly arbitrary tax here, or something just based upon retribution as might be his claim, then I would understand the point. But I see nothing when a straightforward tax assessment is made, based upon alleged items of income, and where you are immediately at issue as to whether those items of income are true and correct or not, as we are in thousands of tax cases every year.

QUESTION: Well, at the time he filed his complaint in the District Court, am I right in understanding that all he knew was that he was scheduled to be deported, or, rather, extradited in a very short time, and that the United States Government had seized all of his assets in the United States, and he knew nothing else. Isn't that right?

And that was what his complaint said.

MR. BAUM: That is correct, except that --

QUESTION: Wasn't it then incumbent upon the government to file something as a pleading in that court, to allow the District Court to apply the very test that this Court has established in the Enochs case?

Otherwise, the Court would find it absolutely impossible to do what this Court has told it it has to do; that is, to apply a test.

MR. BAUM: But, then, in every jeopardy case, Your Honor, we would have been accused of seizing the man's property --

QUESTION: Yes.

MR. BAUM: -- and proceeding without any basis for him to challenge it --

QUESTION: Yes.

MR. BAUM: -- and he would then get an immediate trial --

QUESTION: No. You would have -- it would be incumbent on you to file a pleading in the court, which is --

that's what is incumbent upon any defendant in any court anywhere, when he's sued.

That's no discrimination against you at all.

MR. BAUM: Well, I think that what happened here discloses that that's not quite true, Your Honor. We filed an affidavit in the District Court. The District Court says "that's wholly insufficient, we want you to bring in your confidential informant" --

QUESTION: Well, if they win on that, but that isn't -- but you say that your motion to dismiss just said: Dismiss this case because the taxpayer hasn't carried his burden.

MR. BAUM: That's correct, Your Honor.

QUESTION: Now, how can the taxpayer carry any burden at all if he -- if all he knows is that you've seized his property? And he says, "I don't owe any tax, and I have no idea why the government thinks I owe some tax."

Now, maybe if the government comes in and says so, says something, maybe then he has some burden, I don't know, but --

MR. BAUM: Well, that, as I submit, is what we did, Mr. Justice White.

QUESTION: But it isn't. You filed a motion to dismiss, which says, in effect, that the complaint does not state a claim. If you'd answered, the test might well be that

unless the claimant can obtain a judgment, a motion for judgment on the pleadings, the thing should be dismissed. But you didn't even answer.

MR. BAUM: We filed a motion to dismiss for lack of jurisdiction, Your Honor, which was in accordance with this Court's holdings, and the rules provide that on a motion to dismiss the court may consider affidavits and other materials in deciding the motion.

QUESTION: Mr. Baum.

MR. BAUM: Yes, Mr. Justice?

QUESTION: I don't think you filed a definitive affidavit until after the decision by the CADC.

MR. BAUM: That's correct, Your Honor.

QUESTION: And that prompts me to ask a question I think was alluded to by one of the other Justices earlier: What is before us? We granted certiorari from the decision and judgment of the Court of Appeals. Your brief, and I think the brief of your opponent, tell us about what happened subsequently, and you've been speaking a good deal about what happened subsequently.

Is there anything before us beyond the decision of the Court of Appeals?

MR. BAUM: That is a very anomalous situation, Your Honor. We have lodged with this Court the proceedings subsequent to the Court of Appeals, because we were in the

position of the District Court refusing to await our filing of a petition for a writ of certiorari. The District Court ordered us to proceed, and we had to do something, and we were not willing to be in contempt of the District Court.

And so we are in the position of having been proceeding in two courts at once. I've never had that experience before.

QUESTION: Well, may I ask this: The Court of Appeals based its judgment on the two tests laid down in Enochs. One of them was irreparable injury, because the taxpayer was not able to obtain bond and would be imprisoned in Israel. The District Court proceeding that followed the decision of the Court of Appeals revealed that the taxpayer is out on bail, so now there's no irreparable injury.

Does that dispose of the case under Enochs?

MR. BAUM: It could, Your Honor, because, we submit that there is no longer any showing of irreparable injury.

QUESTION: Well, doesn't it under Enochs, and under the decision of the Court of Appeals?

So that brings me back to my question: What do we look at? What you say in your briefs, or what we granted certiorari to consider?

MR. BAUM: Well, of course, we would prefer that you look at what you granted certiorari to consider, because we think it's a misapplication of Your Honors' opinions of two

years ago.

QUESTION: But you say you weren't required, in order to get relief, to file what you filed in the District Court.

MR. BAUM: That's correct. The affidavit on the subsequent proceedings.

QUESTION: Yes.

MR. BAUM: That's correct. We were compelled to do that. We think that went far beyond the requirements of any of the cases.

In Williams Packing, as this Court knows, the taxpayer came in and said, "I don't owe the tax", and this Court said, "We're sorry, that does not get your an injunction; pursue your remedies."

And we don't have the problem here that troubled Mr. Justice Blackmun in Americans United, of no problem of a tax liability. We have a real tax liability which is before the Tax Court; and the Tax Court is in a position to decide it, as it does every day, and this Court would then be in a position to review it if it so desired at a later date.

But we are not in the position of sitting on the man's property for an indefinite period and keeping it.

QUESTION: But you're in a position of sitting on it until the Tax Court acts; and you say you don't have to prove anything until then.

MR. BAUM: Until the taxpayer has come forward with

some showing that this assessment is made out of whole cloth. That is, I submit, what the burden is in this case.

And I don't think the taxpayer, by any remote stretch of the imagination, by a mere general denial that he owes an tax, has made that showing.

QUESTION: If you had filed the affidavit initially, that was ultimately filed after the decision of the Court of Appeals, you probably wouldn't be here today, would you?

MR. BAUM: I doubt that, Your Honor, because the District Judge said the affidavit was wholly insufficient. Of course, he had the benefit of the Court of Appeals opinion.

QUESTION: Right. That was in light of that decision, I would assume.

QUESTION: Originally, the District Court dismissed.

MR. BAUM: The District Court originally dismissed, because of Williams Packing.

QUESTION: And granted your motion.

MR. BAUM: Yes, Your Honor, he did.

QUESTION: So, a fortiori, if you had filed something more than just your motion, it would have --

MR. BAUM: Well, he didn't think it made any difference at that point, and his mind has been changed, at least for the time being.

QUESTION: Right.

QUESTION: I suppose you feel he has too much

government -- the government is forcing him out of the country on the one hand, and then taking all his property away from him on the other.

MR. BAUM: Well, I hardly think it is fair to say the government is forcing him out of the country. It's his home government that was requesting his presence for an urgent appointment with a criminal court there.

QUESTION: Well, he's been extradited.

MR. BAUM: Lastly, if I may, if the Court please, I would like to point out that the Court of Appeals did rely on two decisions; namely, Pizzarello and Lucia. Pizzarello in the Second Circuit; and Lucia in the Fifth Circuit.

Now, both of those, I think, illustrate the point that possibly you, Mr. Justice Stewart, and Mr. Justice White were making. These are the extremes. In Pizzarello, on the basis of three days' transactions, we projected a wagering tax for a five-year period in the face of an indictment for two months.

In Lucia, we did it for over four years on the basis of one day's transaction.

I might add, in Pizzarello there was the additional factor that the evidence was illegally -- was obtained by an illegal search and seizure.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Lewin, maybe it will save you one interruption if I put a question to you right now.

I've been waiting to get your reaction to it. Somewhat the point that Justice Powell was pursuing.

On the last -- I read the last paragraph of the Court of Appeals opinion, at 17A of the cert petition, as indicating that the irreparable injury which seems to be the fulcrum was that if he didn't get this money, he wouldn't be able to put up bond when he was extradited to Israel, and that it was the incarceration of Shapiro. The opinion says:

"... that after extradition Shapiro will be incarcerated, an incarceration that will cause irreparable injury for which he has no remedy at law."

And so the Court of Appeals then decided it.

Now, that was a premise that has some flaws in it, was it not?

ORAL ARGUMENT OF NATHAN LEWIN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. LEWIN: Well, Mr. Chief Justice, I think that as matters developed, subsequent to Mr. Shapiro's return to Israel, it is true that that factor was dropped out of the case. He is now on bail.

QUESTION: Well, isn't that the fulcrum of this opinion?

MR. LEWIN: At the time the Court of Appeals reviewed the case, that was the basis that we were relying on to establish irreparable injury.

However, we think that if we were back in the District Court today, we could demonstrate irreparable injury from the fact that I think Mr. Justice White pointed out; which is that all this man's assets in the United States are presently being held by the Internal Revenue Service. Which means that he is not able to pay counsel to litigate the tax claim, that he suffers the same kind of irreparable injury that the Courts of Appeals have held, for example, in the Willits case, which we cite in our brief; in the Sherman case, the Third Circuit and the Fifth Circuit have both held that jeopardy assessments which essentially forfeit a man's entire assets deprive him of the possibility of living during that period of time, do constitute irreparable injury.

QUESTION: What evidence is there in this record that these constitute his entire assets, since he has now apparently been able to make bail in Israel?

MR. LEWIN: Well, the representation we made to the District Court, Mr. Chief Justice, was that he made bail because a relative came forward at the last moment and posted an apartment as security, a relative who had no legal obligation to Mr. Shapiro, but simply out of a family feeling, rather than seeing him in jail for an extended period.

I might point out, in that regard, Mr. Baum has said that he has an urgent appointment for criminal prosecution in Israel. In fact, he's not even been put to trial by this date

in Israel. He's out on bail this entire period of time.

And if, indeed, I might say in that regard, if, indeed, the United States thought that Mr. Shapiro, or had some evidence that he was engaged in the kind of conduct that they alleged at the last minute, at the eleventh hour in the civil proceeding, we submit they could very easily have asked the Israeli authorities to defer any extradition so that they could institute criminal narcotics proceedings against him.

That was not done, and I think that the fact that it's not done is a factor that this Court ought to consider in determining the question of good or bad faith, or whether there is at least enough of a colorable -- enough ground for a question in good faith to have a District Court look into this issue.

Now, Mr. --

QUESTION: Tell me, Mr. Lewin, everything you said indicates not that you're going to argue an affirmance, but that we ought to vacate and send this back to the District Court for a redetermination of the irreparable injury component of your argument?

MR. LEWIN: No, Your Honor. I think we are arguing an affirmance, because the Court -- what I think the government overlooks --

QUESTION: Well, the way you've been arguing, I rather thought you --

MR. LEWIN: No, the Court of Appeals has remanded for further consideration. And that's one of the things -- for further proceeding.

Now, if subsequent developments in the course of litigation are such that the further proceedings warrant either an amendment to the complaint, to allege a different form of irreparable injury, we think we're entitled to do that. We certainly think we're entitled to a remand. And that's what is before the Court at the present time.

The government is asking for an affirmance, for, essentially, a reversal of the Court of Appeals and an affirmance of the dismissal.

We say we're entitled to further proceedings in the District Court, on various issues. And the thing -- I think that what the government overlooks is that there are three different issues in this case available, or which should be available to us in the District Court.

One is the procedural issue, which I think I almost understood Mr. Baum to concede is an appropriate issue, if raised by the pleadings, and if properly presented to the District Court.

Now, we said in the complaint, and it's very clear in the complaint, that there was no notice or demand before the seizure of these assets on December 6. That appears at paragraph 18, which is page 11 of the Appendix.

Now, Mr. Baum says an affidavit subsequently submitted to the District Court says that this notice was sent out; and, in fact, he says, there's a copy of it that appears in our brief at pages 12a to 13a.

We pointed out in that hearing in the District Court that that affidavit was the taxpayer's copy. To which Mr. Baum responds, as the trial counsel did in the District Court, well, that just was simply produced from the computer records.

Well, the interesting thing, which I don't think comes out quite clearly in the photostat in the brief, is that the copy has a jagged edge, at least the copy that we received. Which certainly makes it look as if it was torn off some other copies, and these forms, as I've seen them as a taxpayer, have several copies you can tear off the top; the taxpayer tears off the top, keeps it, sends back the second copy.

It looks to me, if we were to have a hearing, that we might very well develop that the Internal Revenue Service has in its records the physical copy that should have been sent to Mr. Shapiro, and never was.

Now, if, in fact, that's true, then there was no proper jeopardy assessment under Section 6861, and the introductory language to the Anti-Injunction Act, which says "except for section 6213(a) there may not be an injunction" would apply. Because the exception would apply. 6213(a) says that the only time that you may -- you can fail to follow the procedure in

6213(a) is with a proper jeopardy assessment.

QUESTION: Well, rather than pursuing a kind of "13 at dinner" theme, we really have to review what the Court of Appeals did, don't we, that there may be issues that it didn't reach, but I think we wouldn't reach them, either.

MR. LEWIN: Well, I think, Your Honor, to the extent that the complaint alleges those -- raises those issues, and they are not answered by the government's pleadings or, indeed, we submit, by any subsequent submission -- we're not disputing the procedural question of whether the court may look to, maybe, the subsequent hearing.

The government has lodged a hearing. We certainly don't want ~~empiric~~ victory in this Court. We're not interested in coming here and taking the Court's time to get a rule that says: Well, if the government files what it filed in that subsequent hearing, the case is over.

We think that's not true. In fact, I think what the facts develop, really, is that the basis for the government's claim that the taxpayer was on notice was a notice of deficiency served on him at 12:20 p.m. on the date the complaint was dismissed. The judge said: I will reconvene court at 3:00 p.m. on Friday afternoon, December 21.

At 12:20 p.m., we received, as counsel, copies of this notice of deficiency which, for the first time, said: This man is, in the government's view, a dealer in narcotics.

The government, rather extraordinarily says, in light of that, with Mr. Shapiro being in New York, being of the Orthodox Jewish faith, unable to come to Washington to appear at a hearing in response to that, his counsel came into court, and said: "Mr. Shapiro was called on the phone, and denies this."

The government says in its brief: The only thing that the respondent did, the only thing that the respondent did was have one of his counsel tell the District Court that respondent had advised another of his counsel that the Commissioner's determination of the income from narcotics dealing was false.

Well, that's all he could do in the two hours and forty minutes that he had before the District Judge turned around and said: "The case is dismissed."

Thereafter, Mr. Shapiro filed a verified petition in the Tax Court in which he denied being a narcotics dealer; thereafter, at the hearing which Mr. Baum refers to, he filed an extended petition in the District Court which said, "I am not a narcotics dealer."

Indeed, I think, Mr. Chief Justice, you asked what would happen if the taxpayer came back with an affidavit or a document that established where he had received the funds. That's exactly what Mr. Shapiro did in the hearing in the District Court, the record of which has been lodged with this

Court.

We filed an affidavit from a resident of Switzerland, who had -- who described in detail that she had held cash for Mr. Shapiro while he was in Switzerland, and that she sent it over to the United States.

All that is in the record in the District Court. It's referred to in that transcript that's been lodged with the Court.

QUESTION: That doesn't remove it automatically from the category of taxable income, does it?

MR. LEWIN: Well, I think if he had it in Switzerland before he came here, I think it does, Mr. Chief Justice.

QUESTION: Automatically?

MR. LEWIN: Well, he hasn't made it --

QUESTION: Did she say how long she held it and what she was holding it for?

MR. LEWIN: Well, if she had it in 1970, before he arrived in the United States, and she had it at that time, and he then came to the United States and she sent it to him while he was --

QUESTION: Aren't those the kind of issues you try out in a lawsuit on tax liability and not the way you're trying to try them out now?

MR. LEWIN: No, Your Honor. Our view is that if we're entitled to something other than merely arbitrary action on the

part of government, there has to be some minimal showing before the government can seize a man's entire assets. Mr. Justice Brennan spoke of a probable cause hearing.

The Fourth Amendment says you can't seize a man's papers or effects without probable cause. When you've got criminal allegations against him. This --

QUESTION: What about a general creditor? What if he had a general creditor of the same amounts that are involved here, who used the typical attachment processes that apply to a departing debtor; would your situation be much different?

MR. LEWIN: Well, I think this Court's ruling, whether it's Fuentes and Chevin, or substantial other cases, have said that there has to be a meaningful hearing attached to that. And only in extraordinary circumstances may the hearing follow the seizure.

Now, we are not challenging the fact that the Internal Revenue Service has authority, in appropriate circumstances, to take the extraordinary step of jeopardy assessments.

QUESTION: Mr. Lewin, did you raise any constitutional issue like this in the Court of Appeals?

MR. LEWIN: Yes, we did. We said --

QUESTION: You did.

MR. LEWIN: Our basic argument in the Court of Appeals, Mr. Justice Rehnquist, and one that we argued there and I think we argued in the District Court, was that -- was a variety of

constitutional arguments. One was I guess what Mr. Justice Blackmun referred to, the government on the one hand excluding a man from the country and, on the other hand, seizing all of his assets.

But if what you mean by these constitutional arguments is the fact that there should be some minimal showing on the part of the government, I think we did raise that in the Court of Appeals.

QUESTION: Well, the government excluding him from the country at the same time they're seizing his assets, was the United States excluding him from the country?

MR. LEWIN: No. But pursuant to the --

QUESTION: Wasn't Israel plucking him?

MR. LEWIN: Well, what the United States certainly was doing, and we -- our -- let me correct that if I might.

QUESTION: The United States was fulfilling a treaty obligation, was it not?

MR. LEWIN: But the result of the treaty obligation on the part of the United States was to keep him from being able to litigate the tax claim. True, it was fulfilling a treaty obligation. But there are times, it seems to us, when the government maybe has to make a hard choice. And it does so, I suppose, in all extradition cases. If it fulfills a treaty obligation, it may end up, in some circumstances, in a position where it's more difficult for it to collect the tax

liability.

And we did raise in the Court of Appeals, and, although that's not the -- we think the judgment of the Court of Appeals can be sustained on the very narrow grounds that the Court of Appeals took. The Court of Appeals did not reach our broad constitutional argument, and ruled for us. They simply said: There's enough here for a remand to the District Court.

But we did argue to the Court of Appeals, and we think -- we continue to think that it's right, that if the government put the man in a position where he cannot litigate the tax claim, particularly when that claim is based, as it is here, on an allegation that he committed criminal conduct, which is really very hard to fight in absentia, they may not, at the same time, seek to forfeit all of his assets on that tax claim.

QUESTION: Well, even if he won all this money at the races, instead of by criminal conduct, it would still be subject to tax, wouldn't it?

MR. LEWIN: It would. But we think that the difficulty with the government's theory, and the government's approach in this case, is that if the government is able to use an allegation of criminal violation as a basis for a jeopardy assessment and then cut off all litigation of the basis for that kind of a claim by citing the Anti-Injunction Act, it opens up the door for the Internal Revenue Service to become the prosecutor of a-l kinds of criminal offenses, because, clearly,

most criminal offenses in the United States are committed for private gain, and, if so, the fruit of that criminal offense is taxable. I don't think there can be any question. And if --

QUESTION: Did Mr. Shapiro file any affidavit that corresponds to and dovetails with the affidavit of the lady in Switzerland who said that she had held this cash for him?

MR. LEWIN: Yes, he did. Yes, he did.

QUESTION: His own affidavit?

MR. LEWIN: His own affidavit on --

QUESTION: Where do we find that?

MR. LEWIN: Well, I'm sorry, it's in the record of the District Court. That affidavit was filed --

QUESTION: Is it in the record before us here?

MR. LEWIN: Ah -- no. There is an earlier affidavit. There is an earlier affidavit, which was filed at a time when there were no allegations of criminality that were made.

You see, that difficulty of that -- that appears at page 20 --

QUESTION: Well, it's not in this Appendix?

MR. LEWIN: It is.

QUESTION: Oh.

MR. LEWIN: There is an affidavit, pages 20 to 21 of the Appendix. And it does say in paragraph 4: "Before arriving in the United States I had made successful investments in Europe and had funds at that time, part of which I brought with me and

the other portions of which were brought to me after I arrived in the United States. I can establish this fact by documentation and by the testimony of witnesses, and would be prepared to do so in a bona fide inquiry into my tax obligations."

Now, that -- of course that didn't refer to narcotics allegations, because there were no narcotics allegations made at that point. Mr. Shapiro was not alleged to be a narcotics dealer at that point. It was only at the eleventh hour, before the District Court was about to rule, that the -- that that allegation was made. And it was in response to that kind of allegation that the subsequent affidavit was filed in the later hearing.

Now, I think I pointed out that as to procedure -- I think that's one issue that's open in the District Court; the second issue which we believe is open in the District Court is simply the question of good faith, and I don't -- and I think that this Court's decisions in Enochs and in Bob Jones make it clear that that is a legitimate issue that can be raised, even under the Anti-Injunction Act.

In Enochs, this Court said -- page 370 U.S. -- page 7 of 370 U.S.: "To require more than good faith on the part of the government would unduly interfere with" the objective of protecting the collector from suit.

So, implicit in that was that good faith was an element of what the Collector of Internal Revenue had to

establish. The same thing was true of the language in Bob Jones. I think it's page 740, the Court said: "There is no evidence that that position" -- the position of the Internal Revenue Service -- "does not represent a good-faith effort to enforce the technical requirements of the tax laws."

Again, there has to be good faith on the part of the Commissioner.

Now, we are not in a position where we're simply a taxpayer who has gone through a tax audit, the usual procedure with the Internal Revenue Service, and then comes in at the last minute says, "Well, you're proceeding in bad faith."

There are substantial indicia, simply from the allegations in the complaint, that this jeopardy assessment was not a good-faith collection of revenue measure.

The waiting until the last minute, I think the government tries to --

QUESTION: You say not in good faith, you mean that the government, if all the facts were brought out, really didn't even have a colorable claim of tax liability?

MR. LEWIN: No. What I -- what I think --

QUESTION: When you say "no" --

MR. LEWIN: What I'm referring to, Mr. Justice Rehnquist, is that the Internal Revenue Service was attempting to use an assessment as a basis for prosecuting or harassing what the government believed to be someone who violated a

criminal law.

QUESTION: Well, but that doesn't really answer the question of whether the government had at least a colorable claim of tax liability.

MR. LEWIN: Well, I think it -- the government's good-faith effort has to be to collect revenue. That's what it has to be.

QUESTION: Well, if it had a colorable claim for revenue, that's the end of the question, isn't it?

MR. LEWIN: No -- with all deference, I think not so, if the government's whole claim is based on an allegation of criminality which should be pursued by other agencies of government. Otherwise, every --

QUESTION: Well, you're saying, then, that they have levied against Al Capone for income tax violation -- actually he was guilty of an awful lot of other things worse than income tax violation; Al could have come in and gotten an injunction?

MR. LEWIN: No, I think that -- against Al Capone, the government could not have tried to use a jeopardy assessment as a substitute for a criminal prosecution. And I think that's what is being done here.

QUESTION: Well, you mean that if there is criminal liability, the government must prosecute criminally, even though, if there's tax liability conjointly, it cannot -- it can't pursue the tax liability?

MR. LEWIN: I think it may pursue the tax liability, and I think it may pursue it jointly. But here it's in the peculiar position of having a man who they know is going to be extradited, Mr. -- the government says, "Well, we just found that out."

I think its own answers to the interrogatories show that they knew it back in October of 1973, two months before they levies the jeopardy assessment. They waited until --

QUESTION: Well, how does that vary what I take you concede to be the general rule, that the government can proceed both criminally and to collect taxes at the same time? The fact that he's just about to be extradited.

MR. LEWIN: Because I think the government knew that he would have no possible way of defending himself against what I believe would have been insubstantial allegations, or what he believed to be insubstantial allegations of criminality. If the government proceeds against someone before he's about to be extradited, and seizes his assets, and, indeed, the inferences here are that the government proceed in a way in which it supposed that he might not even learn about it until after he was out of the country.

QUESTION: But the charge was -- the basis of the assessment was tax liability, not criminality.

MR. LEWIN: But the bottom rung, the facts out of which the a-legend tax liability arose was criminal, alleged criminal

acts.

QUESTION: Well, Mr. Lewin, you are defending the Court of Appeals judgment, aren't you?

MR. LEWIN: Yes, I am.

QUESTION: Well, I didn't know the Court of Appeals decided in your favor on this basis.

MR. LEWIN: No, what the Court of Appeals --

QUESTION: Well, you're asking us to do something to go way beyond the Court of Appeals, and you're arguing things that weren't resolved there and aren't before us now, as far as I can see.

MR. LEWIN: I didn't mean to do that, Mr. Justice White. I --

QUESTION: I don't know why you don't just defend the Court of Appeals judgment, if that's what you want to do.

MR. LEWIN: I think what the Court of Appeals judgment did is it gave us a day in court, and I think the only things I'm responding to --

QUESTION: Well, is that what you want or not?

MR. LEWIN: That's what I want. And that's the only thing I'm trying to do here.

QUESTION: Because you've got a constitutional argument?

MR. LEWIN: Pardon?

QUESTION: You want it because you've got a

constitutional argument or not?

MR. LEWIN: No, I think we have a statutory argument, and a constitutional --

QUESTION: Well, do you have a constitutional argument?

MR. LEWIN: Yes, we have a constitutional argument, as well.

QUESTION: Well, you ought to make the argument, before it's too late.

MR. LEWIN: Well, if -- if what Your Honor is referring to is that if the Internal Revenue Service acted on the basis of what might be arbitrary and excessive procedures, then we're entitled to proceed in the District Court under the procedures that Lucia and Pizzarello set out; then I'd like to proceed directly to that point.

Those are two cases which the Court of Appeals applied, one of which, I might say, was decided by a unanimous en banc Fifth Circuit, that's fourteen judges of the Fifth Circuit. There was a separate concurring and dissenting opinion which, in fact, would have gone further than the majority opinion in Lucia.

And what the Court of Appeals said in Lucia was that if the government's jeopardy assessment is alleged to be arbitrary and excessive, then the government must at least come forward with something other than mere protestations of

good faith. And the Court of Appeals indicated in Lucia that it was not sufficient, if the government simply said, "Well, we made a projection out of this man's wagering proceeds that he could have made so-and-so much money over the course of the year."

We think our case -- and the same thing is true in Pizzarello. Both of which involve admitted gamblers, who were -- whose assets, or who were the subject of a seizure, as to which the proceeds of their gambling for a definite period of time was known: for one day or for three days. And the government made a projection from that.

In this case, we think it follows, a fortiori, from Lucia and Pizzarello. Because in this case Mr. Shapiro denied, under oath, that he had ever been engaged in illegal activity. One doesn't even reach the question of projection.

In fact, if one looks at what the government relied on in the later hearing before the District Court, they did rely on a projection precisely like that that was involved in Lucia and Pizzarello, and which the Courts of Appeals in those cases held would be inadequate.

In this case, the government is asking the projection to be applied to the kind of conduct, which I would think this Court could almost take judicial notice, would not be as regular and repeated as it would be in the case of one who is running a bookmaking establishment, who has regular daily

customers.

At most, what the affidavit which appears in our brief, and which was filed by the government in that hearing, shows was that on several isolated occasions they believe that money that Mr. Shapiro received were proceeds of hashish sale.

So we have here the denial of the illegal activity, and, in addition to that, the projection. We submit that both those things, together, certainly warranted the Court of Appeals in saying that we were entitled to a day in court in which what the government used as a basis for its claim would come forward in court, what we felt -- what our client said in response to that would come forward in the court, and the court would then make a finding.

It's true the Court of Appeals left vague what the contours of that finding would be. And the judge is given -- the trial judge is given substantial discretion to proceed under such standards as he might think appropriate to this particular case.

But we don't think that that in any way undexmines the bottom line of the Court of Appeals decision, which is, really, that a complaint of this kind which alleges procedural deficiencies, alleges bad faith on the part of the government, raising constitutional questions and alleges that the basis for the jeopardy assessment was arbitrary, excessive, and beyond the constitutional power; therefore, the Internal Revenue

Service warrants a full hearing in the District Court.

Thank you.

QUESTION: Pursuing Mr. Powell -- and maybe others asked your predecessor: Just what we have here to review in this case, do we -- we granted certiorari to the judgment of the Court of Appeals remanding to the District Court, and should we assume that that's all we have and all we know and wholly disregard what has subsequently taken place in the District Court? Or should we -- or do we have something more?

MR. LEWIN: Well, certainly on behalf of the respondent, I would consent, if the government consents, to the Court considering what happened in the District Court subsequent to that time.

Simply because, from our client's point of view, we think it's important to get the matter resolved.

Now, we think the entire record that's before the District Court should be before this Court. I know the transcript is here. I must admit I'm not sure whether those two affidavits have been filed, but I will check that with the Clerk and file them.

But if the government has filed, lodged these other documents, and we both discussed them in the briefs, we certainly would urge the Court to consider what happened subsequent to that time.

QUESTION: Well, the question -- you would be agree-

able to approaching the case by asking if the government had filed immediately in answer to the complaint what it has now filed in the District Court, whether or not, then, it would be justified in holding your client's property pending complete hearing in the Tax Court?

MR. LEWIN: Yes. And, Mr. Justice White, if we had filed in response to that what we filed in the District Court in response to that.

QUESTION: Yes, but all to the end, I gather, we ought look at all this, I gather is your summation, only to see whether the remand by the Court of Appeals to the District Court should be sustained or reversed?

MR. LEWIN: Right. And I should point out, in that regard, that what the District Court said on the basis of those facts is that there should be discovery. So that our view is that there should be further proceedings.

We are --

QUESTION: I think your answer to Mr. Justice White and to me are inconsistent.

QUESTION: Yes.

MR. LEWIN: Well, I'm sorry in that regard. I would -- in other words, the District Court has said -- the District Court has now said there will be further proceedings, and has ordered us to proceed with discovery.

QUESTION: But I would take it from your answer to me

that if we look at the record and if we were willing to undertake it, and we would say, Well, the government has filed all it would ever need to file to satisfy any kind of an Enochs burden, therefore, if we decided that, we would say the District Court was right in dismissing the case.

QUESTION: Yes.

QUESTION: That would be your -- that's what your answer means to me.

QUESTION: That's right.

MR. LEWIN: If the Court were to come to that conclusion. But we think --

QUESTION: Well, I know, we may not come to that conclusion, but, as a matter of fact, if you say we ought to -- arguably, if you -- we should never undertake that arguably, we should say we remand to the Court of Appeals to make this judgment on the basis of what's happened in the District Court.

MR. LEWIN: Except that there's been no subsequent appealable order, I suppose.

QUESTION: That's right.

MR. LEWIN: The Court of Appeals might consider it, but the Court of Appeals would be considering it without an appealable order.

QUESTION: Well, it would be as much there as it is here.

MR. LEWIN: Well, I suppose that's true.

[Laughter.]

QUESTION: It's not either place, really.

MR. LEWIN: But our feeling is that on the basis of the record as it appears, there is reason for further proceedings in the District Court, and that's why the Court of Appeals judgment remanding it was correct, that there should be further proceedings in the District Court.

QUESTION: And then everything that's happened since, you say, only supports that conclusion of the Court of Appeals, is that it?

MR. LEWIN: That's right. That's our position.

It supports the correctness of that conclusion.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:05 o'clock, p.m., the case in the above-entitled matter was submitted.]

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