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Recent Developments: Criminal Law—Search and Seizure—Information from Unnamed Informant Held to Be Reliable without Any Demonstration of the Informant's Inherent Credibility. *Thompson v. State*, 16 Md. App. 560, 298 A.2d 458 (1973)

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The *Harris* decision that the defendant, who held the boat for two boating seasons without seriously attempting to dispose of it, did not act with commercial reasonableness appears to be equitable and in accord with the decisions on point.^{3 5} Although it is somewhat difficult to apply the standards of § 9-507(3) since the defendant took no affirmative actions, it is not difficult using the standards of *Old Colony* to reach the same conclusion as was reached in *Harris*. Considering the short depreciation schedule of a boat, the defendant neither acted "in good faith" nor with an effort to avoid a loss by holding the plaintiff's boat in drydock for two years without seriously attempting to dispose of it.

By the *Harris* decision Maryland has adopted the sound majority view that commercial reasonableness must reach every aspect of the sale. This view appears to be in harmony with the intent of the draftsmen and the best interests of parties engaged in a commercial undertaking.

Jon W. Brassel

CRIMINAL LAW—SEARCH AND SEIZURE—INFORMATION FROM UNNAMED INFORMANT HELD TO BE RELIABLE WITHOUT ANY DEMONSTRATION OF THE INFORMANT'S INHERENT CREDIBILITY. *THOMPSON V. STATE*, 16 Md. App. 560, 298 A.2d 458 (1973).

In *Thompson v. State*¹ the Maryland Court of Special Appeals affirmed the conviction of the defendant for possession of heroin. Based upon information obtained from an unnamed informant (which had been given to the informant by a street seller of narcotics when he was attempting to consummate a prearranged "buy"),² the police ar-

35. See *California Airmotive Corp. v. Jones*, 415 F.2d 554 (6th Cir. 1969) (secured party sold repossessed collateral for \$70,000 lower than the purchase price less than one year after contract); *Mercantile Fin. Corp. v. Miller*, 292 F. Supp. 797 (E.D. Pa. 1968) (mere price discrepancy does not establish that a sale of collateral was not commercially reasonable); *Frontier Inv. Corp. v. Belleville Nat'l. Sav. Bank*, 119 Ill. App. 2d 2, 254 N.E.2d 295 (1969) (judicial approval of sale is conclusive of its commercial reasonableness); *Family Fin. Corp. v. Scott*, 24 Pa. D. & C.2d 587 (1961) (where there is a wide discrepancy between any standard of value recognized in the trade and the sale price, there appear to be equitable grounds for opening the deficiency judgment).

1. 16 Md. App. 560, 298 A.2d 458 (1973).

2. The street seller of narcotics, when finding himself with an insufficient supply of heroin for sale, told his prospective purchaser (the primary informant) that heroin would be available for purchase after a one o'clock drop by "Guy." The primary informant was able to specify that the reference to "Guy" was a reference to the defendant.

When a primary informant is a mere conduit for hearsay information from a secondary source, the information evaluation process of *Aguilar v. Texas*, 378 U.S. 108 (1964), must begin at the secondary level. *Dawson v. State*, 11 Md. App. 694, 701 n.3, 276 A.2d 680, 683 n.3 (1971), cert. denied, 263 Md. 711 (1971).

rested the defendant in his automobile and then conducted a search of that vehicle. The search produced the inculpatory evidence. Both parties to the action below agreed that the warrantless search of the automobile was based on the "automobile exception" to the warrant requirement.³ Under this exception, the constitutionality of the search was bottomed on both the existence of exigent circumstances and probable cause to make a valid arrest.⁴ The sole issue before the court, therefore, was whether the secondary informant (the street seller) and his information met the standards for evaluating probable cause in hearsay information, as stated by *Aguilar v. Texas*.⁵

In *Aguilar* the magistrate was faced with the same evaluative process⁶ as were the police officers in *Thompson*: to determine if the information received was sufficiently reliable to furnish probable cause. The standards the *Aguilar* Court used in judging the sufficiency of probable cause derived from the hearsay information were: "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'"⁷

The "credible or his information reliable" test was used in *Thompson* to evaluate the hearsay information supplied by the unnamed secondary informant. However, the court, in dicta, noted a new approach in the use of this test:

The "veracity" prong of *Aguilar* is . . . significantly phrased in the disjunctive. Even knowing nothing about the inherent credibility of a source of information, we may still ask, "Was the information furnished under circumstances giving reasonable assurances of trustworthiness?" If so, the information is "reliable," notwithstanding the ignorance as to its source's credibility.⁸

3. 16 Md. App. at 564, 298 A.2d at 460. The parties also agreed that the credibility of the primary informant was not in issue. *Id.* For a discussion of the "automobile exception," see 2 BALT. L. REV. 338 (1972).

4. *Carroll v. United States*, 267 U.S. 132 (1925).

5. 378 U.S. 108 (1964).

6. In *Aguilar* the affidavit stated that police officers had "received reliable information and do believe [narcotics] are being kept at the above described premises." *Id.* at 109.

7. *Id.* at 114. These two standards have been respectively referred to as the "basis of knowledge" and the "veracity" prongs of *Aguilar*. In Maryland the basis of knowledge prong has been construed to require that an officer pass on to the trial judge "some of the underlying circumstances from which the informant concluded that the evidence was where he claimed it would be." *Soles v. State*, 16 Md. App. 656, 662-63, 299 A.2d 502, 506-07 (1973). The veracity prong is split into two parts. The first part measures whether there is any information on which to posit the informant's inherent credibility. The second or alternative part of the veracity prong (which was relied on by the *Thompson* court) is a requirement that in the absence of the informer's inherent credibility, his information be reliable. See *Dawson v. State*, 11 Md. App. 694, 276 A.2d 680 (1971).

8. 16 Md. App. at 566, 298 A.2d at 461. The facts of *Thompson* appear to support the defendant's conviction under the holdings of *Aguilar* and *Spinelli v. United States*, 393 U.S. 410 (1969). This language set forth by the *Thompson* court to rationalize its holding does not appear to be consistent with the guidelines set by *Aguilar* and *Spinelli*.

The *Thompson* court decided that because the secondary informant was a street seller of narcotics, he was a merchant and was passing on information (to the primary informant) that was "replete with assurances of trustworthiness."⁹ By this language the Court of Special Appeals appeared to conclude that the street seller, in his attempt to assure the return of his prospective purchaser, was giving (to that customer) reliable information. The court reasoned that the vendor-vendee relationship was sufficient to demonstrate the reliability of the information without a need to demonstrate the credibility of the secondary source.¹⁰ This interpretation by the *Thompson* court does not appear to be consistent with the constitutional requirements enunciated in *Aquilar*, *Spinelli v. United States*,¹¹ and other cases of the Supreme Court dealing with hearsay information.¹²

In *Spinelli*, the Court explicated the *Aquilar* guidelines in regard to the "or his information reliable" (second) aspect of the veracity prong.¹³ An FBI investigation was conducted that confirmed an unnamed informant's tip as being factually correct, but the Court held that such factual verification was, in that case, subject to an ambivalent interpretation and could not be used to satisfy the *Aquilar* requirements. The *Spinelli* Court reasoned that *Aquilar* had phrased the veracity prong in the disjunctive so as to give the officer who was unable to supply the magistrate with information about the inherent credibility of his informant an opportunity to demonstrate reliability in another manner (police verification of an informant's information).¹⁴

Spinelli further noted that absent detailed information concerning the informant's credibility (trustworthiness), more than simply a "totality of circumstances" approach must be taken by a magistrate issuing a warrant.¹⁵ In the same vein, the police officer in *Thompson* conducted a personal verification of the primary informant's tip; however, the officer in *Thompson* was not an issuing magistrate, but a police officer observing what he believed to be criminal activity.¹⁶ Such an officer would arguably have a practical advantage over a magistrate in that he is not confined to information contained in an affidavit, but that officer still cannot adopt a "totality of circumstances" approach in making his own determination of probable cause. Even a warrantless search has been held to be subject to at least the same standards as a search with a

9. 16 Md. App. at 568, 298 A.2d at 462.

10. *Id.* at 567, 298 A.2d at 462.

11. 393 U.S. 410 (1969).

12. *See, e.g.*, *United States v. Harris*, 403 U.S. 573 (1971); *McCray v. Illinois*, 386 U.S. 300 (1967); *Draper v. United States*, 358 U.S. 307 (1959).

13. 393 U.S. at 412-13. *Spinelli* also has been used to supply an alternative method for satisfaction of the basis of knowledge prong. Independent police investigations can be used to satisfy a magistrate that the informant properly arrived at his conclusion and that his tip was factually correct. *See Soles v. State*, 16 Md. App. 656, 299 A.2d 502 (1973). In the context of the textual discussion above, the examination of *Spinelli* has been confined solely to its effect upon the second aspect of the veracity prong.

14. *Id.* at 415-17.

15. *Id.*

16. Brief for State at 4-5, *Thompson v. State*, 16 Md. App. 560, 298 A.2d 458 (1973).

warrant in the case of determining probable cause based on hearsay information.¹⁷

Another method used to satisfy the second aspect of the *Aquilar* veracity prong was demonstrated by the Supreme Court in *Draper v. United States*.¹⁸ In this pre-*Aquilar* decision, the *Draper* court was presented with a comprehensive tip as to the activities and characteristics of the defendant. The issuing magistrate, however, was not given information as to how the informant came by his information or why he should be trusted. Because the officer in *Draper* was able to verify a substantial portion of the informant's extremely comprehensive tip, the warrant was upheld, as the officer "had reasonable grounds to believe the remaining unverified bit [of the information] was likewise true."¹⁹ Such a comprehensive tip does not appear to have been before the court in *Thompson*; if a tip similar to the one in *Draper* had been presented, it would have contributed greatly towards satisfying the second aspect of the veracity prong in that it would have lent reliability to the informant's information.

A recent decision dealing with hearsay information as a basis for a warrant is *United States v. Harris*,²⁰ where the underlying circumstances upon which the informant based his conclusion were demonstrated, but the informant's credibility was in dispute. In *Harris* the informant had supplied the police with information that the defendant was a trafficker in non-tax-paid distilled spirits. The warrant affidavit recited that the informant had personally purchased illicit whiskey from the defendant, and that the informant had personal knowledge that the defendant kept the whiskey in his residence. However, the affidavit did not supply any details about the informant's credibility, it merely stated that he was a "prudent person."²¹

The plurality opinion of the *Harris* Court held that the information was reliable because the informer had declared against his penal interest and had made these declarations in fear of his life.²² The Court reasoned that, absent information as to the inherent credibility of the informant, the special circumstances of this case indicated informational reliability. However, these special circumstances distinguish the case from *Thompson*, where the secondary informant was unaware that he was dealing with a person who was cooperating with the police. As noted above, the *Thompson* court relied on no more than the vendor-

17. See *McCray v. Illinois*, 386 U.S. 300 (1967); *Draper v. United States*, 358 U.S. 307 (1959).

18. 358 U.S. 307 (1959). *Draper*, like *Spinelli* has also been used to supply an alternative method for satisfaction of the basis of knowledge prong. Self-verifying information can be used to satisfy the magistrate that the informant properly arrived at his conclusion and that the tip was factually correct. See *Buckner v. State*, 11 Md. App. 55, 272 A.2d 828 (1971), cert. denied, 261 Md. 723 (1971). In the context of the textual discussion above, the examination of *Draper* has been confined solely to its effect upon the second aspect of the veracity prong.

19. 358 U.S. at 313.

20. 403 U.S. 573 (1971).

21. *Id.* at 575.

22. *Id.* at 583-84.

vendee relationship to posit the secondary informant's informational reliability and this relationship was not such as to be analogous to the *Harris* factual situation for finding probable cause.

Past Supreme Court decisions support the *Thompson* statement that the *Aquilar* veracity prong is phrased in the disjunctive; however, unlike the *Thompson* dicta,²³ the Supreme Court has applied the second aspect of the veracity prong only under the happening of special circumstances, such as the decisions of *Draper* (where the Court found informational reliability from self-verifying information), *Spinelli* (where the Court found informational reliability was demonstrated by an independent police investigation, although in *Spinelli* the investigation was not sufficient to satisfy the Court) and *Harris* (where the Court found informational reliability from the nature of the informant's confession to a crime).

The departure of *Thompson* from the rationale of the Supreme Court occurred when the court concluded: "The circumstances in which the seller passed on the information to a customer and confidant are replete . . . with assurances of trustworthiness."²⁴ As set forth above, this rationale of the *Thompson* dicta²⁵ is based on a reasoning that the relative positions of the primary and secondary informants led to another special circumstance which allowed an exception to the traditional *Aquilar* test. However, this position of *Thompson*, as yet not before the Supreme Court, would seem to extend the parameters of *Aquilar* to a position of questionable solidity.

The Maryland interpretation of the *Aquilar* standard for measuring hearsay information was delineated in *Dawson v. State*.²⁶ In *Dawson* the court sustained the defendants' conviction for unlawfully maintaining premises for the purpose of selling lottery tickets and for gambling on a horse race. Inculpatory evidence was found during a search pursuant to a warrant, which was based upon confidential hearsay information given to a police officer. In addition to this information, the police officer affiant observed one of the defendants engaged in suspicious activity, which was not in itself conclusive of bookmaking activity.

Dawson pointed out that based on an interpretation of *Aquilar* and *Spinelli* "probable cause may be based upon a combination of direct observation and hearsay information."²⁷ When evaluating hearsay information buttressed by independent observation, the *Dawson* court set forth four possible conclusions:

- (1) That the direct observation is adequate unto itself to establish probable cause

23. 16 Md. App. at 566-67, 298 A.2d at 461.

24. *Id.* at 568, 298 A.2d at 462.

25. *Id.* at 566-67, 298 A.2d at 461.

26. 11 Md. App. 694, 276 A.2d 680 (1971).

27. *Id.* at 697, 276 A.2d at 681.

- (2) That the hearsay information is adequate unto itself to establish probable cause
- (3) That neither the direct observation nor the hearsay information, standing alone, is adequate to establish probable cause but that the two combined do add up to the establishment of such probable cause
- (4) That even the sum total of the direct observation plus the hearsay information does not establish probable cause²⁸

Although *Dawson* recognized that both the credibility of a person and the reliability of his information must be judged by the *Aquilar* standards,²⁹ the court used the concurring opinion of Justice White in *Spinelli* as authority for the conclusion that:

To conclude that trustworthiness is probably present [the veracity prong], the magistrate must be convinced either 1) that the source himself is inherently honest and credible or 2) in the absence of such proof of the character of the man, that the information is furnished by that source under circumstances redolent with assurances of trustworthiness [or his information reliable].³⁰

Dawson thus provided the foundation for the *Thompson* court to conclude that because the circumstances of the buy were "replete . . . with assurances of trustworthiness"³¹ the information was reliable. *Dawson* further noted that "the necessary trustworthiness may [be] established extrinsically by . . . independent verification" but, like the *Thompson* court, the *Dawson* court failed to point out that independent verification was the "or his information reliable" aspect of the veracity prong, not "circumstances redolent with assurances of trustworthiness."

In *Moore v. State*³² a search was based on a combination of hearsay information and direct observations by a police officer. The court found that the inherent credibility of the informants was not demonstrated and, using the standard of *Dawson*, that there was no indication that the information had been furnished "under circumstances reasonably insuring trustworthiness." However, the court noted that the search for the veracity prong need not stop at that point and found that the police officer's observations were sufficient to corroborate a substantial part of the informant's story to satisfy the *Draper* test; thus there was an adequate showing of informational reliability.³³

The court here used *Draper* to bolster informational reliability but, as in *Dawson*, the *Moore* court subscribed incorrectly to the theory that

28. *Id.* at 702, 276 A.2d at 684.

29. *Id.* at 699, 276 A.2d at 682.

30. *Id.* at 699-700, 276 A.2d at 682.

31. 16 Md. App. at 568, 298 A.2d at 462.

32. 13 Md. App. 711, 284 A.2d 614 (1971).

33. *Id.* at 719-20, 284 A.2d at 618-19.

the "or his information reliable" aspect of the veracity prong could be satisfied "by circumstances reasonably insuring trustworthiness." As in *Dawson, Moore* correctly related the *Spinelli* and *Draper* tests to the second aspect of the veracity prong, but both Maryland cases used an intermediate step prior to the use of *Spinelli* and *Draper* that was not part of the Supreme Court guidelines.

As the opinion in *Thompson* indicates, the court interpreted the information of the secondary informant as if that information had originated from one not within the criminal milieu. The court reasoned that because the secondary informant (the street seller) was not "wittingly" working with the police, he could be trusted.³⁴ The court concluded that the criminal-informant was trustworthy by predicting what it believed would be the usual or commercial relations to one selling narcotics.

Maryland cases dealing with informants not from within the criminal milieu have held that those informants need not be proven credible because their credibility is posited from their position in society.³⁵ One such case is *Lomax v. State*,³⁶ where the court decided that the supervisor of an apartment complex was "presumptively truthful" when he relayed information to the police based upon the complaints of several tenants about the narcotics activities of another tenant. Another such case in accord with *Lomax* is the Maryland case of *Kraft v. State*,³⁷ where the court noted that:

The credibility of an unnamed informant is at best, suspect. Where . . . the informers are not shown to be reliable, and there are no legally competent facts, circumstances or observations to add to their information, we cannot say that a prudent and cautious man would be justified in finding probable cause to believe that an offense was being committed . . .³⁸

The very logic of cases such as *Lomax* and *Kraft*—that a citizen should have a form of inherent credibility—would seem to argue against extending such a quality to an individual unquestionably from the criminal milieu, the street seller of narcotics in *Thompson*.

The Maryland cases considered thus far have dealt with a judgment of probable cause by the issuing magistrate who must rely in part on hearsay information from unnamed informants. The *Thompson* court applied the tests to be used by such a magistrate to a situation where there was independent action by a police officer. It has been held that

34. 16 Md. App. at 568, 298 A.2d at 462.

35. See, e.g., *Lomax v. State*, 16 Md. App. 502, 298 A.2d 454 (1972); *Evans v. State*, 11 Md. App. 451, 274 A.2d 653 (1971), cert. denied, 262 Md. 746 (1971); *Knight v. State*, 7 Md. App. 282, 254 A.2d 379 (1969).

36. 16 Md. App. at 502, 298 A.2d at 454 (1972).

37. 16 Md. App. 347, 297 A.2d 328 (1972), rev'd on other grounds, ___ Md. ___, 307 A.2d 683 (1973).

38. *Id.* at 352, 297 A.2d at 331.

warrantless searches are subject to the *Aquilar* guidelines³⁹ and that these searches require more persuasive evidence to justify them than would be needed to justify the issuance of a warrant.⁴⁰

The Maryland case of *Hundley v. State*⁴¹ held that when the state has the burden of proving a warrantless search, the trial court must be informed as to why the officer determined that the informant's information was reliable.⁴² This has been further interpreted by the Maryland courts to mean that the officer must supply information as to why he concluded that the "informant was credible or his information reliable."⁴³

In *Thompson* the action of the officer fulfilled the *Spinelli* requirements because by personal observation the officer was able to conclude that the informant's tip was accurate and reliable and thus gave a sufficient basis for probable cause. The officer did not conclude that the information was given under reasonable assurances of trustworthiness or that it was replete with assurances of trustworthiness; rather, he used the requirements of *Spinelli* to show informational reliability. The trial court (and the Court of Special Appeals) was thus presented with a case similar to *Hundley*.⁴⁴ This distinction between *Thompson* and the accepted method by which a police officer is to conduct a warrantless arrest and rationalize it to the court appears to add weight to the argument against the adoption of the *Thompson* rationale by future Maryland courts.

Other jurisdictions that have reviewed the *Aquilar* standards have also had to decide what the Supreme Court intended by the wording of the second part of the veracity prong.⁴⁵ In *Commonwealth v. Eazer*⁴⁶ the Superior Court of Pennsylvania was presented with a situation where a police officer (dressed in plain clothes) went to a newsstand and overheard a phone conversation that appeared to involve the placing of bets. The officer confronted the caller and was told that the bets were being given to one "Joe" and that the officer was welcome to place bets at that time everyday. The officer then proceeded to place a bet with the informant, and he observed other bets being placed through the informant to the defendant. The Pennsylvania court, in upholding the warrant, noted that notwithstanding the absence of any information

39. See generally *McCray v. Illinois*, 386 U.S. 300 (1967); *Beck v. Ohio*, 379 U.S. 89 (1964).

40. See, e.g., *Aguilar v. Texas*, 378 U.S. 108 (1964); *Hignut v. State*, 17 Md. App. 399, 303 A.2d 173 (1973).

41. 3 Md. App. 402, 239 A.2d 593 (1967), cert. denied, 251 Md. 750 (1968).

42. *Id.* at 405, 239 A.2d at 595. Accord, *Bolesta v. State*, 9 Md. App. 408, 264 A.2d 878 (1970); *Watkins v. State*, 7 Md. App. 151, 253 A.2d 925 (1969), cert. denied, 256 Md. 749 (1969); *Mullaney v. State*, 5 Md. App. 248, 246 A.2d 291 (1967), cert. denied, 252 Md. 732 (1969).

43. 9 Md. App. at 412, 264 A.2d at 880.

44. Accord, *Bolesta v. State*, 9 Md. App. 408, 264 A.2d 878 (1970); *Watkins v. State*, 7 Md. App. 151, 253 A.2d 925 (1969); *Mullaney v. State*, 5 Md. App. 248, 246 A.2d 291 (1967).

45. See, e.g., *Commonwealth v. Eazer*, 223 Pa. Super. 501, 302 A.2d 354 (1973); *State v. Collins*, 112 N.H. 449, 298 A.2d 742 (1972); *Commonwealth v. Stevens*, ___ Mass. ___, 283 N.E.2d 673 (1973).

46. 223 Pa. Super. 501, 302 A.2d 354 (1973).

concerning the informant's inherent credibility, the police officer's actions here corroborated the informant's tip and satisfied the "or his information reliable" aspect of *Aquilar*.⁴⁷

In *State v. Collins*,⁴⁸ a New Hampshire decision, police received an anonymous telephone tip that stated, with intricate detail, the activities and appearance of the defendant, a narcotics seller. The police through their investigation found that the defendant had been participating in suspicious activities. The court held that even absent information concerning the inherent credibility of the unnamed informant, the independent corroborative investigation combined with the detail of the tip "furnished a basis for a determination as to the . . . reliability of [the] information."⁴⁹ For its support of the interpretation of the *Aquilar* guidelines, the New Hampshire court relied on *Spinelli* and *Draper*.⁵⁰

The decisions from these two states, along with others,⁵¹ indicate that the *Aquilar* guidelines have not been interpreted by other jurisdictions to include "replete with assurances of trustworthiness" where there is no information given as to the inherent credibility of the informant. Decisions such as *Eazer* demonstrate that most state courts are content to view the veracity prong in a manner consistent with the guidelines set by *Aquilar* and *Spinelli*.

As noted above, the *Aquilar* veracity prong has not been extended to the limits envisaged by the *Thompson* court in its dicta.⁵² The second aspect of that prong has been used by the Supreme Court only in cases similar to the *Spinelli*, *Draper*, and *Harris* decisions. What becomes questionable from a reading of *Thompson* is the way in which that court, when presented with a *Spinelli* corroboration to certify informational reliability, chose to ignore that certification and to extend the limits of the veracity prong beyond those delineated by the Supreme Court.

The *Thompson* extension is a new twist to using the Supreme Court guidelines and appears to be an extension inconsistent with the constitutional intent found in *Aquilar* and *Spinelli*. While the second aspect of the veracity prong has been available for use since 1964, it has only been rarely extended to incorporate something different than the pre-*Aquilar*, *Draper* decision; only with *Spinelli* and *Harris* has the court extended the second part of *Aquilar*'s veracity prong.

State's attorneys should be reticent in using the *Thompson* dicta⁵³ in future cases dealing with the judgment of information gleaned from unnamed informants to establish probable cause. This caution would

47. *Id.* at 504, 302 A.2d at 355-56.

48. 112 N.H. 449, 298 A.2d 742 (1972).

49. *Id.* at 452, 298 A.2d at 745.

50. *Id.* at 452, 298 A.2d at 744-45.

51. *Cf.* *State v. Lindquist*, ___ Minn. ___, 205 N.W.2d 333 (1973); *see, e.g., In Re One Peterbilt Tractor*, 84 N.M. 652, 506 P.2d 1199 (1973); *People v. Parker*, 42 Ill. 2d 42, 245 N.E.2d 487 (1968), *as modified on denial of rehearing* (1969).

52. 16 Md. App. at 566-67, 298 A.2d at 461.

53. *Id.*

appear to be particularly applicable in cases where no effort has been made by police officers to secure a warrant or to independently corroborate the information.

In *Thompson* the facts fit the mold of *Spinelli*; therefore, the holding appears to be well founded. However, the *Thompson* variation, while minor, is still one that might lead to a major deprivation of a defendant's fourth amendment rights. Since the reliability of an unnamed criminal informant is at best suspect, if his information is to be used, it should be subjected to the rigid tests dictated by *Aquilar* and *Spinelli*.

Steven Aaron Allen

FEDERAL TAXATION—TAXPAYER HELD TO HAVE BENEFICIAL INTEREST AND TO QUALIFY FOR DEPRECIATION DEDUCTION WHERE HE MADE LITTLE INVESTMENT AND INCURRED NO LIABILITY AS MAJORITY SHAREHOLDER OF A CORPORATION AND TRANSFEREE SUBSEQUENT TO PURCHASE—LEASE BACK AND MORTGAGE AGREEMENTS. *BOLGER V. COMMISSIONER*, 59 T.C. 760 (1973).

May a corporation be created to buy industrial property, lease the property back to the seller, mortgage the property using the lease as security and then convey the property to the incorporator thus providing a liability free depreciation deduction to that taxpayer?

The Tax Court answered yes in *Bolger v. Commissioner*.¹ There the court approved a scheme which allowed the taxpayer and his associates to hold commercial property with most of the advantages and few of the headaches. The court considered two basic issues: (1) whether the financing corporation is a separate viable entity or merely a conduit for the property owner; and (2) if the corporate entity is recognized, whether the taxpayer acquires a depreciable interest from it. An affirmative answer was given to both by application of the Internal Revenue Code of 1954 (the "Code"), § 167, allowing depreciation for property used in trade or business to the taxpayer, and § 1011, adjusting the basis by including an unpaid mortgage balance. The Tax Court held that despite the circuitous land transactions divesting the corporation of its sole assets, it engaged in sufficient business activity to be recognized as a viable entity.² The taxpayer was entitled to a depreciable interest in the property because he and the other transferees had acquired legal title and the beneficial ownership by virtue of the transfer. The outstanding debt obligation of the mortgage was recognized by the court as

1. 59 T.C. 760 (1973).

2. *Id.* at 766.