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NOTES

DISCOVERY IN THE IRS SUMMONS ENFORCEMENT PROCEEDING: LESS CERTAIN THAN DEATH AND TAXES*

INTRODUCTION

The Internal Revenue Service, with its broad investigatory powers,[1] is undoubtedly one of the most awesome of federal administrative agencies in the view of the American public.[2] This feeling apparently stems from the Service's ubiquitous and almost mystical qualities[3] and from the shroud of secrecy in which it frequently operates.[4] The Service's investigative power has often been characterized by the courts as "inquisitorial power, analogous to that of the grand jury."[5] Understandably, the ordinary taxpayer may feel

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1. *See* Note, *Constraints on the Administrative Summons Power of the Internal Revenue Service*, 63 IOWA L. REV. 526 (1977); *see also* Balter, *The Role of the Advisor in a Tax Investigation With Fraud Overtones: Analysis of the "Cooperation" Problem*, 27 U. FLA. L. REV. 914 (1975); Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966).

2. Members of the American public are universally affected by IRS operations since everyone is a potential target of investigation. Miller, *Administrative Agency Intelligence Gathering: An Appraisal of the Investigative Powers of the Internal Revenue Service*, 6 B.C. INDUS. & COM. L. REV. 657, 664 (1965). Furthermore, information gathered by the IRS is often of use to criminal investigatory agencies and may even be employed against political enemies or allegedly undesirable members of society. *Id.*

A well known example of using IRS information to fight organized crime is the tax evasion prosecution of Al Capone, *see* Capone v. United States, 56 F.2d 927, 3 U.S. Tax Cas. ¶885 (7th Cir.), *cert. denied*, 286 U.S. 553 (1932); Capone v. United States, 51 F.2d 609, 2 U.S. Tax Cas. ¶786 (7th Cir.), *cert. denied* 284 U.S. 669 (1931) (cited in Miller, *supra*, at 664 n.26).

For other instances where the summons was issued to determine tax liability of a taxpayer allegedly involved in criminal activity, *see* United States v. Moore, 485 F.2d 1165, 1973-2 U.S. Tax Cas. ¶9748 (5th Cir. 1973) (taxpayer on list of suspected narcotics law violators); United States v. Troupe, 438 F.2d 117, 1971-1 U.S. Tax Cas. ¶9222 (8th Cir. 1971) (taxpayer on list of alleged underworld members); Venn v. United States, 400 F.2d 207, 1968-2 U.S. Tax Cas. ¶9518 (5th Cir. 1968) (third party summonee was defendant in criminal antitrust prosecution); United States v. Richards, 431 F. Supp. 249, 1977-1 U.S. Tax Cas. ¶9362 (E.D. Va. 1977) (corporate taxpayer allegedly involved with slush funds, kickbacks, and illegal payments).

3. *See* Miller, *supra* note 2, at 664-67.

4. The IRS is extremely hesitant to allow access to its documents and to provide information, as evidenced by its frequent non-compliance with discovery orders. *See, e.g.*, United States v. Wright Motor Co., Inc., 536 F.2d 1090, 1976-2 U.S. Tax Cas. ¶9605 (5th Cir. 1976); United States v. Salter, 432 F.2d 697, 1970-2 U.S. Tax Cas. ¶9648 (1st Cir. 1970); United States v. Duke, 379 F. Supp. 545, 1974-1 U.S. Tax Cas. ¶9475 (N.D. Ill. 1974). See notes 163-174 *infra* and accompanying text.

5. United States v. Matras, 487 F.2d 1271, 1274, 1973-2 U.S. Tax. Cas. ¶9801 at 83,593 (8th Cir. 1973); Falsone v. United States, 205 F.2d 734, 737, 1953-2 U.S. Tax Cas. ¶9467 at 48,213 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953); *see* Comment, *Income Taxation—Section 7602 Civil Summons—Special Agent's Admission that Civil Search Warrant Not Probative*

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intimidated by the efficient technical machinery with which the IRS gathers, sorts, and computes data determining tax liability and occasionally indicating the need for criminal investigation.[6]

One important power[7] of the IRS is its authority under section 7602 of the Internal Revenue Code to summon a taxpayer or third party to produce books, papers, records, or other relevant data and to testify under oath concerning matters which may be relevant or material to the inquiry at hand.[8] Although the IRS is authorized to issue such summons,[9] it lacks enforcement power.[10] This power is vested instead in the federal district courts.[11] Moreover, the Supreme Court has determined that the taxpayer or summoned

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of Bad Faith, 54 TEX. L. REV. 1147, 1150 (1976) (suggesting that court's frequent use of discretion to truncate taxpayer's discovery contributes to inquisitorial nature of IRS powers).

6. *See* Liebowitz, *Use of Taxpayer Identifying Numbers by Individuals, Business and the Government*, 41 TAXES 31 (1963); Smith, *Automatic Data Processing in the Internal Revenue Service*, 41 TAXES 26 (1963); Surrey, *Automatic Data Processing and Tax Administration: The Potentialities of ADP*, 17 TAX L. REV. 165 (1962).

7. In recent years procedural matters have increased in importance in tax law as evidenced by the Tax Reform Act of 1976, Pub. L. No. 94-455, §§1201-1212, 90 Stat. 1522 (1976) which contained an entire title on administrative procedure. See notes 87-104 *infra* and accompanying text.

The summons is one of the most important of these procedural devices and the one most often used by the IRS to examine books, records, and other taxpayer data. *The IRS Summons: Vital Enforcement Machinery or a Threat to Constitutional Rights?* [1978] 9 STAND. FED. TAX REP. (CCH) ¶8325 [hereinafter cited as *IRS Summons*]. In recent years there has been a "veritable barrage" of cases and major revision of the law regarding the summons. *Id.*

8. I.R.C. §7602 reads: "EXAMINATION OF BOOKS AND WITNESSES. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized — (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry; (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry, and (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

9. I.R.C. §7608(b) authorizes any criminal investigator of the Intelligence Division or Internal Security Division who is charged with the enforcement of any of the criminal provisions related to internal revenue to serve subpoenas and summonses.

10. Frequently, the summonee voluntarily complies. For a discussion of whether to cooperate with the special agent, see Balter, *supra* note 1, at 916-17; Balter, *Should Your Client "Cooperate" When Charged With Tax Fraud?*, 29 TAXES 290 (1951).

11. I.R.C. §7604(a): "JURISDICTION OF DISTRICT COURT. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

party must receive an adversary hearing[12] during which he may challenge the summons on "any appropriate ground."[13] Because the enforcement proceedings are governed by the Federal Rules of Civil Procedure,[14] the discovery provisions provided therein may be made available to the challenging taxpayer or third party. Discovery is discretionary with the trial court,[15] however, and the courts generally disallow or severely limit discovery.[16]

The Supreme Court has recently redefined and effectively narrowed one of the major grounds employed by the taxpayer or third party to challenge the summons in *United States v. LaSalle National Bank*,[17] which set out revised guidelines for summons enforcement. This note will examine the grounds on which a taxpayer or third party may challenge the summons and the availability and scope of discovery to the challenging party. Emphasis will be placed on the implications of the *LaSalle* decision on these issues. Following an analysis of prior case law concerning discovery, the note will suggest possible guidelines for determining the scope of discovery which should be permitted by balancing the taxpayer's[18] right to a meaningful adversary hearing against the government's interest in expediting the procedure.

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12. *See* Donaldson v. United States, 400 U.S. 517, 525, 1971-1 U.S. Tax Cas. ¶9173 at 85,761 (1971); United States v. Powell, 379 U.S. 48, 58, 1964-2 U.S. Tax Cas. ¶9858 at 94,233 (1964); Reisman v. Caplin, 375 U.S. 440, 446, 1964-1 U.S. Tax Cas. ¶9202 at 91,450 (1964). Much disagreement exists as to what constitutes the *Reisman-Powell* mandated adversary hearing. Some courts decide whether to allow discovery based upon whether it seems necessary for an adequate adversary hearing. *See, e.g.*, United States v. Ruggeiro, 300 F. Supp. 968, 1969-2 U.S. Tax Cas. ¶9623 (C.D. Cal. 1969) (appropriate process of I.R.C. §7604(a) met when taxpayer afforded an "adversary" hearing. *Powell* falls short of requiring a panoply of discovery and pretrial incident to the normal civil action).

Whether the adversary hearing need be evidentiary is debated. *See, e.g.*, United States v. McCarthy, 514 F.2d 368, 1975-1 U.S. Tax Cas. ¶9402 (3d Cir. 1975); United States v. Salter, 432 F.2d 697, 1970-2 U.S. Tax Cas. ¶9648 (1st Cir. 1970).

13. Donaldson v. United States, 400 U.S. 517, 527, 1971-1 U.S. Tax Cas. ¶9173 at 85,761 (1971); United States v. Powell, 379 U.S. 48, 58, 1964-2 U.S. Tax Cas. ¶9858 at 94,233 (1964) (citing Reisman v. Caplin, 375 U.S. 440, 449, 1964-1 U.S. Tax Cas. ¶9202 at 91, 451 (1964)).

14. *See* FED. R. CIV. P. 81(a)(3); United States v. Powell, 379 U.S. 48, 58 n.18, 1964-2 U.S. Tax Cas. ¶9858 at 94,233 n.18 (1964) (citing Martin v. Chandis Sec. Co. 128 F.2d 731, 734, 1942-2 U.S. Tax Cas. ¶9521 at 10,213 (9th Cir. 1942)).

15. *See* Donaldson v. United States, 400 U.S. 517, 528-29, 1971-1 U.S. Tax Cas. ¶9173 at 85,762 (1971); United States v. Bell, 448 F.2d 40, 42, 1971-2 U.S. Tax Cas. ¶9649 at 87,553 (9th Cir. 1971); United States v. Ahmanson, 415 F.2d 785, 787, 1969-2 U.S. Tax. Cas. ¶9572 at 85,521 (9th Cir. 1969).

16. *See, e.g.*, United States v. Wright Motor Co., Inc., 536 F.2d 1090, 1976-2 U.S. Tax Cas. ¶9605 (5th Cir. 1976); United States v. Interstate Tool & Eng'r Corp., 526 F.2d 59, 1975-2 U.S. Tax Cas. ¶9870 (7th Cir. 1975); United States v. Roundtree, 420 F.2d 845, 1969-2 U.S. Tax Cas. ¶9733 (5th Cir. 1969). *See also* cases cited, note 15 *supra*.

17. 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978).

18. A summons may be issued to the taxpayer under investigation or to a third party. The summoned party may always challenge enforcement in the district court and frequently the taxpayer under investigation may intervene. The term "taxpayer" is frequently used in this Note because he would usually be the challenging party. However, the same rights and privileges would apply to a third party summonee.

PURPOSES FOR WHICH AN IRS SUMMONS MAY BE ISSUED

Despite its civil nature, the summons[19] is issued frequently to obtain information which may relate to the taxpayer's criminal liability.[20] This is because an IRS investigation generally serves a dual purpose – the determination of civil liability and the investigation of potential criminal liability.[21] The IRS has stressed,[22] and the courts have agreed,[23] that it is virtually impossible to separate these two functions because an investigation into the possibility of criminal tax fraud necessarily includes a determination of civil tax liability.[24] The Service is required by statute[25] to investigate the possibility of tax fraud and to refer appropriate cases to the Department of Justice for criminal prosecution.[26] To determine whether such a referral is justified, the IRS must first investigate tax liability.[27] It is for this dual purpose that the summons is issued when fraud is suspected.[28] A situation in which a civil purpose did not co-exist with a criminal tax fraud investigation would be very unusual.[29]

When fraud is suspected, a special agent is assigned to work with the revenue agent[30] in the investigation.[31] The dual purpose then exists until

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19. *See* United States v. O'Connor, 118 F. Supp. 248, 1953-2 U.S. Tax Cas. ¶9591 (D. Mass. 1953); Duke, *supra* note 1, at 42; Note *supra* note 1 at 539. "The danger clearly exists then of abuse of an investigative tool which by its language and interpretation should be considered primarily civil in nature, but which is in fact being used for criminal investigation without the traditional safeguards of probable cause or informed consent." *Id.*

20. The summons is generally issued only in connection with a full scale investigation. Brief for Respondents at 28 n.11, Donaldson v. United States, 400 U.S. 517, 1971-1 U.S. Tax Cas. ¶9173 (1971).

21. United States v. LaSalle Nat'l Bank, 98 S. Ct. at 2363, 1978-2 U.S. Tax Cas. at 84,581; Couch v. United States, 409 U.S. 322, 326, 1973-1 U.S. Tax Cas. ¶9159 at 80,187-88 (1973). *See generally* Duke, *supra* note 1.

22. *See* Brief for Respondents at 8-9, Donaldson v. United States, 400 U.S. 517, 1971-1 U.S. Tax Cas. ¶9173 (1971).

23. *See* United States v. LaSalle Nat'l Bank, 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978).

24. *Id.* at 2363, 1978-2 U.S. Tax Cas. at 84,580-81.

25. I.R.C. §7601(a) requires the Secretary to "inquire after and concerning all persons . . . who may be liable to pay internal revenue tax." I.R.C. §§7206-7207 subject to taxpayer who submits a fraudulent tax return to criminal penalties; thus a referral to the Justice Department becomes necessary.

26. The Intelligence Division "enforces the Criminal Statutes applicable to income . . . [and other] tax laws . . . by developing information concerning alleged criminal violations thereof. . . ." Brief for Petitioners at 17, United States v. LaSalle Nat'l Bank, 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978) (quoting Internal Revenue Service Organization and Functions §1118.6, 39 Fed. Reg. 11,607 (1974)).

27. *See* United States v. LaSalle Nat'l Bank, 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978).

28. *See id.* at 2363, 1978-2 U.S. Tax Cas. at 84,580-81.

29. *Id.* at 2366, 1978-2 U.S. Tax Cas. at 84,583. "For a fraud investigation to be solely criminal in nature would require an extraordinary departure from the normally inseparable goals of examining whether the basis exists for criminal charges and for the assessment of civil penalties." *Id.*

30. Representatives of the IRS Intelligence Division are known as special agents. Representatives of the Audit Division are revenue agents. Collection Division representatives

either the special agent closes the case or the matter is forwarded for prosecution.[32] The IRS generally suspends its civil investigation during the pendancy of the criminal prosecution.[33]

Upon receiving a tax summons,[34] the summoned party is legally required to appear at the designated time and place[35] but may refuse to comply if this refusal is in good faith.[36] Generally, a good faith refusal is recognized when the summoned party intends to challenge enforcement of the summons for lack of good faith or proper purpose on the part of the IRS.[37]

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are called revenue officers. Galen, *Discovery and Privilege in Tax Cases; What to do When the Special Agent Arrives*, 28 U.S. CAL. TAX INST. 833, 836 (1976).

A revenue officer explained that he represents the civil enforcement arm while the revenue agent represents the investigative arm. Interview with L. D. Mathis, Revenue Officer, in Gainesville, Fla. (Oct. 23, 1978).

31. *See* Brief for the Petitioners at 16-20, United States v. LaSalle Nat'l Bank, 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978).

The IRS Audit Technique Handbook for Internal Revenue Agents, §10(91) provides that if the revenue agent discovers indications of fraud during his audit examination, he should suspend his activities at the earliest opportunity without disclosing the reason for the suspension to the taxpayer, his representative, or employees. He must then refer the case to the Intelligence Division. "At the earliest opportunity" is defined to mean "at the earliest point after discovering firm indications of fraud." *Id.*

In a recent case, United States v. Toussaint, No. H-78-86, (S.D. Tex. Sept. 14, 1978), evidence of admissions made by taxpayer Toussaint, himself an IRS revenue agent, to the revenue agent investigating his 1976 returns, was suppressed because of a violation of this rule.

Toussaint had claimed a $190,000 tax deduction for a loss resulting from the alleged theft of a Picasso painting from his home. The painting was unappraised and uninsured. Toussaint claimed his grandfather had given him the painting. However, his grandfather had left no estate at his death and filed no gift tax on the painting. The district court found that the revenue agent had a firm indication of fraud on his first interview with Toussaint although he had five more interviews plus collateral contacts with police, art appraisers and Toussaint's mother over a six month period before referring the case. The court felt that if a special agent had been assigned immediately as required by IRS regulations, the taxpayer probably would not have been so cooperative in giving information. Therefore, the agent deceived Toussaint into believing the investigation was routine and no criminal charges were contemplated. This overzealousness of the revenue agent resulted in suppression of the evidence he had gained after the first interview and until he finally properly referred the case to a special agent. *Id.*

32. Authority to prosecute for tax evasion is reserved to the Department of Justice by 28 U.S.C. §547(1) (1976).

33. Galen, *supra* note 30, at 838. Galen suggests that the rationale behind such suspension is to avoid having the civil case precede the criminal case, thus educating the taxpayer as to the issues in the criminal prosecution. *Id.* at 838-39.

34. Although the revenue agent and special agent work together, the special agent assumes the primary responsibility for the investigation and takes control. United States v. LaSalle Nat'l Bank, 98 S. Ct. at 2359 n.1, 1978-2 U.S. Tax Cas. at 84,576 n.1 (1978).

Generally, special agents carry summonses and can issue one on the spot. Thus, summonses are sometimes referred to as "pocket summonses." Note, *Taxation: IRS Use of John Doe Administrative Summonses*, 30 OKLA. L. REV. 465, 469 (1977).

35. I.R.C. §7605(a).

36. Courts have generally held that the summoned party cannot be held in contempt so long as the refusal is in good faith. *See, e.g.*, United States v. Roundtree, 420 F.2d 845, 1969-2 U.S. Tax Cas. ¶9733 (5th Cir. 1969).

37. *Id.* at 853, U.S. Tax Cas. ¶9733 at 86,069.

Proper Purpose

The Supreme Court has developed criteria[38] for ascertaining whether a summons has been issued in good faith and pursuant to a proper purpose.[39] In *United States v. Powell*,[40] the Court first enumerated the requirements for proper summons issuance.[41] The Service must show that: (1) the investigation is being conducted pursuant to a legitimate purpose, (2) the inquiry may be relevant to that purpose, (3) the information sought is not already in the Commissioner's possession, and (4) the administrative steps established for the issuance of the summons have been followed.[42] The *Powell* Court held that as long as a proper purpose is shown, the Commissioner need not show probable cause to suspect fraud unless the taxpayer has introduced substantial evidence indicating that enforcement would result in an abuse of the court's process.[43] Consequently, a court may inquire into improper governmental purpose to prevent such an abuse.[44] The Court, however, placed both the burden of establishing that the IRS failed to meet the necessary criteria for proper purpose and the burden of proving improper purpose on the taxpayer.[45]

The *Powell* majority did not create new law but instead attempted to clarify some of the prior confusion surrounding summons enforcement. As early as 1869, a summons was enforced when issued in good faith and in compliance with instructions from the Commissioner.[46] The statutory pro-

38. The Court developed guidelines for summons enforcement in response to varying judicial interpretations. *See, e.g.*, Lash v. Nighosian, 273 F.2d 185, 1960-1 U.S. Tax Cas. ¶9104 (1st Cir. 1959), *cert. denied*, 362 U.S. 904 (1960) (as long as IRS has proper purpose, other purposes don't vitiate its authority); Boren v. Tucker, 239 F.2d 767, 1957-1 U.S. Tax Cas. ¶9246 (9th Cir. 1956) (sufficient showing of possibility of fraud to require production of corporate records); *In re* Myers, 202 F. Supp. 212, 1962-1 U.S. Tax Cas. ¶9328 (E.D. Pa. 1962) (summons issued several days before criminal prosecution set for trial was not enforced as clearly issued to aid in Government's prosecution); United States v. O'Connor, 118 F. Supp. 248, 1953-2 U.S. Tax Cas. ¶9591 (D. Mass. 1953) (court refused to enforce summons where taxpayer already indicted as against public policy and a perversion of statutory power).

39. The Supreme Court has progressively attempted to define and clarify these requirements in the following four major decisions: United States v. LaSalle Nat'l Bank, 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978); Donaldson v. United States, 400 U.S. 517, 1971-1 U.S. Tax Cas. ¶9173 (1971); United States v. Powell, 379 U.S. 48, 1964-2 U.S. Tax Cas. ¶9858 (1964); Reisman v. Caplin, 375 U.S. 440, 1964-1 U.S. Tax Cas. ¶9202 (1964).

40. 379 U.S. 48, 1964-2 U.S. Tax Cas. ¶9858 (1964).

41. The *LaSalle* Court included the *Powell* requirements in its updated enforcement requirements. United States v. LaSalle Nat'l Bank, 98 S. Ct. at 2368, 1978-2 U.S. Tax Cas. at 84,584.

42. 379 U.S. at 57-58, 1964-2 U.S. Tax Cas. at 94,233.

43. *Id.* at 51, 1964-2 U.S. Tax Cas. at 94,230. The Court states that the substantial question indicating such abuse must be "predicated on more than the fact of re-examination and the running of the statute of limitations on ordinary tax liability." *Id.*

44. *Id.* at 58, 1964-2 U.S. Tax Cas. at 94,233.

45. *Id.* at 58, 1964-2 U.S. Tax Cas. at 94,233 (cited with approval in Donaldson v. United States, 400 U.S. 517, 527, 1971-1 U.S. Tax Cas. ¶9173 at 85,762 (1971)).

46. *See, e.g.*, Stanwood v. Green, 22 F. Cas. 1077, 1079 (N.D. Miss. 1870); *In re* Meador, 16 F. Cas. 1294, 1296 (N.D. Ga. 1869).

visions authorizing the issuance of the summons, then contained in section 14 of the 1864 Act,[47] have remained a part of the Internal Revenue Code and have been consistently enforced.

Improper Purpose

The ground on which the majority of taxpayers challenge summons enforcement was not discussed by the *Powell* majority.[48] Although the summons may be issued for the dual purpose of investigating civil and criminal liability, it may not be used solely to obtain evidence for a criminal prosecution.[49] Thus, sole criminal purpose is a recognized defense against summons enforcement.[50] Understandably, the interpretation of "solely for use in a criminal prosecution" or "sole criminal purpose" has been the subject of much litigation.[51] The Supreme Court has recently re-examined and narrowed the scope of this defense in the *LaSalle*[52] decision, the implications of which will be analyzed in detail later in this note.

47. Revenue Act of 1864, ch. 173, §14, 13 Stat. 226 (1864) reads in part: "And if any person, on being notified or required as aforesaid, shall refuse or neglect to give such list or return within the time required as aforesaid, or if any person shall not deliver a monthly or other list or return without notice at the time required by law, or if any person shall deliver or disclose to any assessor or assistant assessor any list, statement, or return, which, in the opinion of the assessor, is false or fraudulent, or contains any understatement or undervaluation, it shall be lawful for the assessor to summon such person, his agent, or other person having possession, custody, or care of books of account containing entries relating to the trade or business of such person, or any other persons as he may deem proper, to appear before such assessor and produce such book, at a time and place therein named, and to give testimony or answer interrogatories under oath or affirmation respecting any objects liable to duty or tax as aforesaid, or the lists, statements, or returns thereof, or any trade, business, or profession liable to any tax or license as aforesaid."

48. Although *Powell* did not expressly mention the defense of sole criminal purpose, it could be implied since a sole criminal purpose evidences a lack of I.R.S. good faith.

49. *See* Reisman v. Caplin, 375 U.S. 440, 449, 1964-1 U.S. Tax Cas. ¶9302 at 91,451 (1964). *Reisman* has been cited in numerous subsequent cases for this proposition. *See, e.g.*, note 59 *infra* and accompanying text.

50. "[T]he witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the [defenses] that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution. . . ." Reisman v. Caplin, 375 U.S. 440, 449, 1964-1 U.S. Tax Cas. ¶9302 at 91,451 (1964).

51. *See, e.g.*, United States v. Hodge & Zweig, 548 F.2d 1347, 1977-1 U.S. Tax Cas. ¶9263 (9th Cir. 1977) (upheld enforcement even though special agent and district director recommended prosecution because recommendation to Justice Department had not yet occurred); United States v. Zack, 521 F.2d 1366, 1975-2 U.S. Tax Cas. ¶9626 (9th Cir. 1975) (denied enforcement, affirming that sole purpose of summons was to supplement previous criminal search warrant and therefore, solely to prepare criminal case against taxpayer); United States v. Weingarden, 473 F.2d 454, 1973-1 U.S. Tax Cas. ¶9210 (6th Cir. 1973) (standard used was whether sole purpose of issuance was to obtain evidence for a criminal prosecution); United States v. Wall Corp., 475 F.2d 893, 1973-1 U.S. Tax Cas. ¶9122 (D.C. Cir. 1972) (if agent had already formed a "firm purpose" to recommend criminal prosecution summons would be issued in bad faith); United States v. Troupe, 438 F.2d 117, 1971-1 U.S. Tax Cas. ¶9222 (8th Cir. 1971) (summons can only be successfully challenged when criminal prosecution has been recommended and is pending at time of issuance).

52. 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978). See text accompanying notes 73-86 *infra*.

The *Powell* majority did, however, anticipate the questions which would arise in defining improper purpose. The Court suggested that an improper purpose would exist if the summons were issued to harass the taxpayer, to pressure him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the investigation.[53] Thus, according to the *Powell* majority's rationale the key element for a showing of improper purpose appeared to be a lack of good faith.

Criminal Purpose Doctrine. Although it was well established that the summons would not be enforced if issued solely to gather criminal evidence,[54] disagreement long characterized court decisions dealing with two previously unsettled issues.[55] The first problem evolved when the IRS had both a proper purpose, that of determining civil tax liability, and an allegedly improper purpose, that of gathering evidence of a criminal nature.[56] Assuming that the court found enforcement proper when a dual purpose existed, a second problem arose in recognizing the point where the criminal purpose became so dominant that use of the summons became unjustified.[57]

An important case purporting to clarify both issues was *Donaldson v. United States*.[58] Unfortunately, the Supreme Court compounded the existing confusion by setting out two distinguishable rulings that resulted in an unclear opinion. First, the majority agreed that the summons should not be enforced when the material sought was for "the improper purpose of obtaining evidence for use in a criminal prosecution."[59] The Court held, however, that

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53. 379 U.S. at 58, 1964-2 U.S. Tax Cas. at 94,233 (1964).

54. *See* Reisman v. Caplin, 375 U.S. 440, 1964-1 U.S. Tax Cas. ¶9202 (1964); Boren v. Tucker, 239 F.2d 767, 1957-1 U.S. Tax Cas. ¶9246 (9th Cir. 1956).

55. These two issues were finally resolved in United States v. LaSalle Nat'l Bank, 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978). See text accompanying notes 73-86 *infra*.

56. Courts most often held that if a valid civil purpose existed, the coexistence of a criminal purpose was irrelevant so long as no referral to the Justice Department had been made. *See, e.g.*, United States v. Ruggeiro, 425 F.2d 1069, 1970-1 U.S. Tax Cas. ¶9381 (9th Cir. 1970); United States v. Michigan Bell Telephone Co., 415 F.2d 1284, 1969-2 U.S. Tax Cas. ¶9625 (1969); United States v. DeGrosa, 405 F.2d 926, 1969-1 U.S. Tax Cas. ¶9154 (3d Cir.), *cert. denied*, 394 U.S. 973 (1969).

57. Courts varied between two extremes. For example, in United States v. Wall Corp., 475 F.2d 893, 1973-1 U.S. Tax Cas. ¶9122 (D.C. Cir. 1972), the court adopted the "firm purpose" test. When the agent had formed a firm purpose in his mind to recommend prosecution, the summons was no longer enforceable. At the other extreme were the courts which held that the summons was unenforceable until a formal referral to the Justice Department had been made.

58. 400 U.S. 517, 1971-1 U.S. Tax Cas. ¶9173 (1971). In the *Donaldson* case, a summons was issued to taxpayer Donaldson's former employers, Joseph J. Mercurio and Acme Circus Operating Co., Inc., later Clyde Beatty-Cole Bros. Circus. Donaldson sought to intervene in the proceeding, but intervention was denied. The district court ordered enforcement of the summons. The Fifth Circuit affirmed, United States v. Mercurio, 418 F.2d 1213, 1969-2 U.S. Tax Cas. ¶9701 (5th Cir. 1969), holding that Donaldson could not intervene because he had no "proprietary interest" in the materials sought.

59. 400 U.S. at 532, 1971-1 U.S. Tax Cas. at 85,764 (quoting Reisman v. Caplin, 375 U.S. 440, 449, 1964-1 U.S. Tax Cas. ¶9302 at 91,451 (1964)).

an IRS summons was enforceable if "issued in good faith and prior to a recommendation for criminal prosecution."[60]

The circuits split in their interpretation of *Donaldson*, some courts stressing the first rule and others following the ultimate holding.[61] The division among the circuits hinged on whether the issuance of a summons when the special agent's primary or sole purpose was to unearth criminal evidence showed a per se lack of good faith,[62] or whether the good faith requirement was met if there was also a valid civil purpose satisfying the *Powell* criteria and the summons was issued prior to a recommendation for criminal prosecution.[63] Again, because of the hybrid nature of the tax investigation, the answer actually turned on the good faith of the IRS. To further complicate matters, circuits adhering to the latter view differed as to when a recommendation for prosecution occurred — when the special agent recommended criminal prosecution to his immediate superior[64] or when the IRS referred the case to the Department of Justice.[65] This confusion continued to trouble the courts until the Supreme Court resolved it in the *LaSalle* opinion.

Other Improper Purposes. Although the criminal purpose defense is alleged most often, various other defenses are also available to one contesting the enforcement of a summons. The *Powell* Court expressly recognized only two specific improper purposes, to harass the taxpayer and to pressure him to settle a collateral dispute.[66] However, by adding "or any other purpose reflecting on the good faith of the investigation,"[67] the Court left open the possibility of other improper purposes.

60. 400 U.S. at 536, 1971-1 U.S. Tax Cas. at 85,765.

61. See cases cited note 51 *supra* for examples of the split.

62. *See, e.g.*, United States v. Friedman, 532 F.2d 928, 1976-1 U.S. Tax Cas. ¶9328 (3d Cir. 1976); United States v. Zack, 521 F.2d 1366, 1975-2 U.S. Tax Cas. ¶9626 (9th Cir. 1975); United States v. Lafko, 520 F.2d 622, 1965-2 U.S. Tax Cas. ¶9642 (3d Cir. 1975).

63. *See, e.g.*, United States v. Morgan Guar. Trust Co., 572 F.2d 36, 1978-1 U.S. Tax Cas. ¶9235 (2d Cir. 1978); United States v. Hankins, 565 F.2d 1344, 1978-1 U.S. Tax Cas. ¶9184 (5th Cir. 1978); United States v. Billingsly, 469 F.2d 1208, 1973-1 U.S. Tax Cas. ¶9117 (10th Cir. 1972).

64. *See, e.g.*, United States v. Wright Motor Co., Inc., 536 F.2d 1090, 1976-2 U.S. Tax Cas. ¶9605 (5th Cir. 1976); United States v. Friedman, 532 F.2d 928, 1976-1 U.S. Tax Cas. ¶9328 (3d Cir. 1976); United States v. National State Bank, 454 F.2d 1249, 1972-1 U.S. Tax Cas. ¶9168 (7th Cir. 1972).

65. *See, e.g.*, United States v. Buck, 479 F.2d 1327, 1973-1 U.S. Tax Cas. ¶9188 (5th Cir. 1973); United States v. Artman, 435 F.2d 1375, 1971-1 U.S. Tax Cas. ¶9119 (6th Cir. 1970); *In re* Magnus, Mabee & Reynard, 311 F.2d 12, 1963-1 U.S. Tax Cas. ¶9114 (2d Cir.) *cert. denied*, 370 U.S. 918 (1962).

Generally, the IRS does not issue a summons after a formal recommendation to the Justice Department has been made. However, one frequently cited case in which this did occur was United States v. O'Connor, 118 F. Supp. 248, 1953-2 U.S. Tax Cas. ¶9591 (D. Mass. 1953). The taxpayer had already been indicted, and the special agent had completed his investigation and report. The Department of Justice had indirectly "suggested" that the summons be issued by the special agent to aid the Government in preparing the pending criminal case. The special agent admitted that at least one purpose of the summons was to aid the Justice Department. The *O'Connor* court refused to enforce the summons. *Id.*

66. 379 U.S. at 58, 1964-2 U.S. Tax Cas. at 94,233.

67. *Id.* Although this seems to leave the door open to other types of improper purpose,

Governmental harassment has been alleged frequently[68] and probably will appear even more often now that the criminal purpose doctrine has been so severely narrowed by the recent *LaSalle* decision. The mere allegation that the IRS has no *proper* purpose would itself reflect upon the government's good faith and would, therefore, be a valid defense to enforcement. Indeed, a number of parties have alleged that the material sought is irrelevant, cumulative, or already in the possession of the Commissioner.[69] Some commentators have suggested that in specific instances involving summons issuance, the IRS was engaging in a "fishing expedition." "Fishing expeditions" have generally been held to be improper[70] although they have been found to be a proper use of the summons where the IRS had a valid reason to suspect unpaid taxes.[71] The courts generally use a case-by-case approach, enforcing the

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taxpayers continue to use the ones specified plus criminal purpose, probably because most any other purpose would be encompassed by these broad categories.

68. *See, e.g.*, United States v. Fensterwald, 553 F.2d 231, 1977-1 U.S. Tax Cas. ¶9266 (D.C. Cir. 1977) (see text accompanying notes 143-147 *infra*); United States v. Church of Scientology, 520 F.2d 818, 1975-2 U.S. Tax Cas. ¶9584 (9th Cir. 1975) (see text accompanying notes 131-134 *infra*); United States v. Benford, 406 F.2d 1192, 1969-1 U.S. Tax Cas. ¶9217 (7th Cir. 1969) (taxpayer who was in custody under sentence for other conviction alleged harassment as well as sole criminal purpose and pressure to settle a collateral dispute).

69. In United States v. Coopers & Lybrand, 550 F.2d 615, 1977-1 U.S. Tax Cas. ¶9216 (10th Cir. 1977), the Court affirmed the lower court's finding that the information requested by the summons—the firm's audit program and tax pool analysis—were not relevant to the investigation. Therefore, the summons did not meet this element of the *Powell* criteria and was unenforceable.

70. *See, e.g.*, United States v. Humble Oil & Refining Co., 518 F.2d 747, 1975-2 U.S. Tax Cas. ¶9705 (5th Cir. 1975). See note 71 *infra*.

71. This characterization has been applied to the "John Doe" summons where the IRS issues a third party summons to obtain information which might disclose tax liability or fraud but where the IRS does not know the name of the taxpayer. A well known example is United States v. Bisceglia, 420 U.S. 141, 1975-1 U.S. Tax Cas. ¶9247 (1975) in which a Kentucky bank received deposits containing four hundred decrepit $100 bills. The IRS issued the summons to Mr. Bisceglia, an officer of the bank, to obtain records in order to identify the depositor to ascertain whether an unpaid tax liability might exist. The Court enforced the summons concluding that since IRS agents are authorized to "proceed from time to time through each Internal Revenue district and inquire after and concerning all persons therein who may be liable to pay any Internal Revenue tax," I.R.C. §7601, the Service may summon records without identifying the unknown taxpayer. *Id.* at 149-50, 1975-1 U.S. Tax Cas. at 86,458. *But see*, United States v. Humble Oil & Refining Co., 448 F.2d 953, 1974-1 U.S. Tax Cas. ¶9186, (5th Cir. 1974), *vacated* 421 U.S. 943, 1975-1 U.S. Tax Cas. ¶9426, *aff'd*, 518 F.2d 747, 1975-1, U.S. Tax Cas. ¶9705 (5th Cir. 1975), in which the Fifth Circuit, reconsidering the case in accordance with a Supreme Court order for reconsideration in light of *Bisceglia*, continued to deny enforcement of a summons seeking the identities of lessors of mineral rights to which expired leases had been returned without the oil company having extracted any minerals. The purpose of this information was to determine whether the lessors had restored in their tax returns the depletion allowance which they had claimed during the life of the lease. The Fifth Circuit distinguished *Bisceglia* because the IRS had a valid reason to suspect unpaid taxes in *Bisceglia* and no such ground in *Humble Oil*, 518 F.2d at 747, 1975-2 U.S. Tax Cas. at 88,144; *see generally* Mastry, *Bisceglia & Humble Oil: A New Era in Internal Revenue Service Summonses*, 50 FLA. B.J. 311 (1976).

The Tax Reform Act of 1976 added a new section effective February 28, 1977, regarding the John Doe Summons. It requires that the summons relate to the investigation of a particular party or ascertainable group or class of persons, that the IRS have a reasonable

summons when sufficiently related to specific tax liability but not when the purpose is general research.[72]

United States v. LaSalle National Bank

The 1978 Supreme Court opinion in *United States v. LaSalle National Bank*[73] effectuated the almost complete demise of the criminal purpose doctrine. Without directly challenging the premise that the summons may not be used solely to collect evidence for criminal prosecution, the *LaSalle* majority so severely narrowed the doctrine that only a shell remains. The Court stressed the dual civil and criminal nature of an Internal Revenue investigation and indicated that it must be reflected in any limitation on the good faith use of the summons.[74] The Court concluded that a summons, even if issued *primarily* to investigate criminal liability, is valid as long as a civil purpose is also present.[75]

As to the question of when the summons would be improper, the Court decided that after referral of the case to the Department of Justice, the summons could no longer be enforced.[76] The majority reasoned that although a civil purpose might conceivably continue to exist even after referral, prohibition was necessary as a "prophylactic restraint."[77] In effect, the majority

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basis for believing tax liability is involved, and that the information sought is not readily available from other sources. I.R.C. §7609(f).

72. *See* Note, *IRS Access to Bank Records; Proposed Modifications in Administrative Subpoena Procedure*, 28 HASTINGS L.J. 247, 278 (1976).

73. 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978). The Court called this opinion a "supplement" to their *Donaldson* opinion (discussed in text accompanying notes 58-60 *supra*). *Id.* at 2359, 1978-2 U.S. Tax Cas. at 84,576.

In *LaSalle*, the majority reversed the Seventh Circuit decision, concluding that the lower court had misinterpreted *Donaldson*. *Id.* at 2365 n.15, 1978-2 U.S. Tax Cas. at 84,582 n.15. The Seventh Circuit had affirmed the district court's finding that the summons was unenforceable because the special agent was subjectively pursuing a "purely criminal" investigation. 554 F.2d 302, 1977-1 U.S. Tax. Cas. ¶9344 (5th Cir. 1977).

Although the agent testified that he was also pursuing a civil aspect, the district court apparently did not believe him, stating that "it had heard nothing in Agent Oliver's testimony to suggest that the thought of a civil investigation ever crossed his mind." *Id.* at 303, 1977-1 U.S. Tax Cas. at 86,775.

Additionally, the special agent who was investigating the taxpayer, John Gattuso, was doing so without the customary assistance of a revenue agent from the audit division. When asked about this he indicated that there was no revenue agent "because the investigation was for criminal violations." The agent had requested the assignment "to investigate the possibility of any criminal violations . . ." because of information he had received from a confidential informant and from an unrelated investigation. As a result of this unrelated investigation, the special agent had received information from the F.B.I. 98 S. Ct. at 2359, 1978-2 U.S. Tax Cas. at 84,576.

74. 98 S. Ct. at 2363-65, 1978-2 U.S. Tax Cas. at 84,580-82. "In short, Congress has not categorized tax fraud investigations into civil and criminal components. Any limitation on the good faith use of an Internal Revenue summons must reflect this statutory premise." *Id.* at 2365, 1978-2 U.S. Tax Cas. at 84,582.

75. *Id.* at 2367, 1978 U.S. Tax Cas. at 84,584.

76. *Id.* at 2365, 1978 U.S. Tax Cas. at 84,582.

77. *Id.* The Court noted that even this recommendation to the Justice Department, the civil and criminal elements do not diverge completely and the interest of the IRS in

vested virtually unlimited summons power in the IRS prior to the actual referral to the Justice Department.

More significantly, the *LaSalle* majority elucidated that the existence of a sole criminal purpose is not dependent upon the special agent's personal intent but instead must be determined by examining the Service's institutional intent.[78] The Court pointed out that while the special agent's sole interest might be to investigate criminal liability, the IRS has an institutional responsibility to collect taxes and impose civil penalties.[79] Furthermore, the Service may at any time terminate the criminal investigation altogether and impose civil penalties.[80] The four dissenters[81] warned that determinations of the "institutional good faith" of the Internal Revenue Service would prove to be elusive, burdensome, and unworkable, producing "little but endless discovery proceedings and ultimate frustration of the fair administration of the Internal Revenue Code."[82]

Although the *LaSalle* Court dealt a heavy blow to the taxpayer's chances of proving sole criminal purpose,[83] the majority refused to abandon completely this aspect of the good faith duty of the IRS.[84] The Court noted that sole criminal purpose still might preclude a finding of good faith if the IRS unnecessarily delayed referral to the Justice Department in order to unearth additional evidence for the subsequent criminal prosecution of the taxpayer.[85] Therefore, the Court left open a small loophole for the taxpayer

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unpaid taxes does not stop. However, the majority felt that at the point of referral, both the likelihood of broadening criminal discovery and of infringing upon the role of the grand jury would increase. *Id.*

78. *Id.* at 2366, 1978-2 U.S. Tax Cas. at 84,583.

79. The findings of the special agent are reviewed by his immediate supervisor, the district chief of the Intelligence Division, and the Office of Regional Counsel. *Id.* (citing 26 C.F.R. §601.107(c) (1977)); Internal Revenue Service Organization and Functions §1116(3), 39 Fed. Reg. 10602 (1974); Internal Revenue Manual, ch. 9600, ¶¶9624, 9631.2, 9631.4 (1977).

The case may then be reviewed at a national level, and at various points during these reviews the taxpayer may request a conference with Intelligence officials. *Id.* As an additional protection, the taxpayer may obtain a conference upon request or whenever the Division Chief determines a conference to be in the Government's best interest (citing 26 C.F.R. §601.107(b)(2) (1977); Internal Revenue Manual, ch. 9300, ¶9356.1 (1977)). *Id.* at 2367, 1978-2 U.S. Tax Cas. at 84,583.

80. *Id.* The IRS can impose a civil penalty of 50% of the underpayment. I.R.C. §6653(b). This is considered a part of the taxpayer's liability. I.R.C. §6659(a).

81. The Court split five to four; the dissent was written by Justice Stewart and joined by Chief Justice Burger and Justices Rehnquist and Stevens.

82. 98 S. Ct. at 2369, 1978-2 U.S. Tax Cas. at 84,585 (Stewart, J. dissenting). The dissent would have gone even further than the majority by enforcing all summonses issued before recommendation to the Justice Department even if there was no civil purpose. The dissent finds no statutory limitation to civil liability. *Id.*

83. The *LaSalle* Court reiterated that the taxpayer bears the burden of proving lack of valid civil purpose by the IRS (see text accompanying note 44 *supra*). The majority acknowledged that the burden is a heavy one. 98 S. Ct. at 2367, 1978-2 U.S. Tax Cas. at 84,584.

84. *Id.* The majority notes that the dissent would completely eliminate this aspect of the good faith inquiry and suggests that the dissent's error is a fundamental misunderstanding of the authority of the IRS. *Id.* at 2367 n.18, 1978-2 U.S. Tax Cas. at 84,584 n.18.

85. *Id.* at 2367-68, 1978-2 U.S. Tax Cas. at 84,584. This hypothetical situation seems

who apparently would need to show that the IRS has concluded the civil liability investigation and is merely delaying referral to collect further incriminating evidence.

In summation, the Court set out updated requirements for enforcement of the summons: (1) the summons must be issued before the IRS recommends criminal prosecution to the Justice Department, (2) the Service must at all times use the summons authority in good faith pursuant to a congressionally authorized purpose, thus meeting the *Powell* criteria, and (3) the Service must not abandon the pursuit of a civil tax determination or collection in an institutional sense.[86]

INTERVENTION

When the IRS summons is issued to a taxpayer under investigation, he may challenge its enforcement by appearing but refusing to comply, thus forcing the IRS to file a petition in the federal district court for judicial enforcement. In court, the taxpayer may attempt to show that the IRS has no proper purpose for issuance.[87] Frequently, however, the summons is not issued

to be somewhat analogous to the delay by the revenue agent in referring the case to a special agent involved in United States v. Toussaint, No. H-78-86 (S.D. Tex. Sept. 14, 1978), discussed note 30 *supra*.

86. *Id.* at 2368, 1978-2 U.S. Tax Cas. at 84,584. The Court notes that these requirements are not intended to be exclusive and that future cases "may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." *Id.* at 2368 n.20, 1978-2 U.S. Tax Cas. at 84,584 n.20.

87. A taxpayer who has received a summons relating to his own tax liability can challenge enforcement on grounds which are not available to a third party. Fourth and fifth amendment rights have been the subject of much debate in the courts and by numerous commentators. *See, e.g.*, United States v. Miller, 425 U.S. 435, 1976-1 U.S. Tax Cas. ¶9380 (1976) (fourth amendment does not prohibit obtaining information revealed to third party such as bank and conveyed to governmental agency such as IRS); Fisher v. United States, 425 U.S. 391, 1976-1 U.S. Tax Cas. ¶9353 (1976) (requiring taxpayer's attorney to produce documents does not violate taxpayer's fifth amendment right against self-incrimination because taxpayer is not compelled to produce such records himself); Couch v. United States, 409 U.S. 322, 1973-1 U.S. Tax Cas. ¶9159 (1973) (fifth amendment rights do not adhere to records belonging to accountant even when accountant has turned over records to taxpayer's attorney); United States v. Theodore, 479 F.2d 749, 1973-1 U.S. Tax Cas. ¶9477 (4th Cir. 1973) (fourth amendment prohibition against unreasonable searches and seizures does not require that administrative summonses meet a "probable cause" standard); United States v. Held, 435 F.2d 1361, 1971-1 U.S. Tax Cas. ¶9329 (6th Cir.), *cert. denied*, 401 U.S. 1010 (1970) (taxpayer's fifth amendment privilege not violated where summons required taxpayer to appear and answer all questions relevant to inquiry to which he raised no valid claim of self-incrimination); McGarry's Inc. v. Rose, 344 F.2d 416, 1965-1 U.S. Tax Cas. ¶9391 (1st Cir. 1965) (government can summon information previously obtained in an illegal search and seizure and returned to taxpayer, if it had knowledge of existence of the information independent of the illegal search and seizure); Comment, *Constitutional Law — Taxpayer's Fifth Amendment Privilege Against Self-Incrimination — Fisher v. United States*, 18 B.C. INDUS. & COM. L. REV. 998 (1977).

As shown by the above cases, fourth and fifth amendment privileges have been severely narrowed. The taxpayer's fifth amendment right against self-incrimination applies only when the records actually belong to him (*see, e.g.*, United States v. Widelski, 452 F.2d 1, 1972-1 U.S. Tax Cas. ¶9134 (1971)) and may be lost by turning the records over to a third party as shown by *Couch* and *Fisher*.

to the taxpayer but to a third party such as the taxpayer's accountant, attorney, bank, employer, or a credit agency or corporation. The third party usually has no interest in challenging enforcement of the summons and would voluntarily comply without the taxpayer's objection.[88] The taxpayer under investigation may have a substantial interest in challenging enforcement, in which case he may request that the summoned party refuse compliance,[89] thus forcing the Service to litigate. The taxpayer must then file a motion to intervene in the enforcement proceeding.[90] The intervention issue has produced much disagreement among the circuits.[91] In response, the Supreme Court held in *Donaldson*[92] that the taxpayer could not intervene unless he had a proprietary interest in the books or records summoned.[93]

Recently enacted section 7609 of the Internal Revenue Code[94] gives the taxpayer a statutory right to intervene in the enforcement proceedings for the sole reason that his tax liability is under investigation. Section 7609(a)(1) requires that the IRS give notice[95] to the taxpayer whose liability is involved

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Furthermore, partnership records are not protected by the fifth amendment. United States v. Greenleaf, 546 F.2d 123, 1977-1 U.S. Tax Cas. ¶9168 (5th Cir. 1977) (a partnership has no fifth amendment rights). A corporation also has no fifth amendment rights. Essgee of China v. United States, 262 U.S. 151 (1923); Hale v. Henkel, 201 U.S. 43 (1906).

Even when the taxpayer is the sole owner of the corporation, he cannot assert his personal privilege against self-incrimination as a defense to production of corporate records. United States v. Bell, 448 F.2d 40, 1971-2 U.S. Tax Cas. ¶9649 (9th Cir. 1971).

88. *See, e.g.*, Donaldson v. United States, 400 U.S. 517, 1971-1 U.S. Tax Cas. ¶9173 (1971).

89. The third party summonee may notify the taxpayer when he receives a summons. However, this is not required and the summonee could comply without the taxpayer ever knowing.

90. FED. R. CIV. P. 24(a)(2).

91. According to Reisman v. Caplin, 375 U.S. 440, 449, 1964-1 U.S. Tax Cas. ¶9302 at 91,451 (1964), third parties may intervene to protect their interests, if the taxpayer is not a party, he too may intervene (citing Corbin Deposit Bank v. United States, 244 F.2d 177, 1975-1 U.S. Tax Cas. ¶9673 (6th Cir. 1957) and *In re* Albert Lindley Lee Memorial Hosp., 209 F.2d 122, 1954-1 U.S. Tax Cas. ¶49,013 (2d Cir. 1953)).

Unfortunately, *Reisman* did not define the "interests" which the taxpayer must assert to enable his intervention. Some courts interpreted these interests very broadly; *see, e.g.*, United States v. Benford, 406 F.2d 1192, 1969-1 U.S. Tax Cas. ¶9217 (7th Cir. 1969) (taxpayer may intervene as a matter of right when his tax liability is the subject of the investigation); United States v. Bank of Commerce, 405 F.2d 931, 1969-1 U.S. Tax Cas. ¶9156 (3d Cir. 1969) (taxpayer intervention upheld because he alleged that summons was issued based upon information acquired in illegal search); Justice v. United States, 365 F.2d 312, 1966-2 U.S. Tax Cas. ¶9609 (6th Cir. 1966), *aff'd*, 390 U.S. 199 (1968) (taxpayer intervention permitted to raise constitutional objections).

Other courts held that the taxpayer must assert a proprietary interest in the summoned records. *See, e.g.*, O'Donnell v. Sullivan, 364 F.2d 43, 1966-2 U.S. Tax Cas. ¶9529 (1st Cir.), *cert. denied*, 385 U.S. 969 (1966); *In re* Cole, 342 F.2d 5, 1965-1 U.S. Tax Cas. ¶9271 (2d Cir.), *cert. denied*, 381 U.S. 950 (1965).

92. 400 U.S. 517, 1971-1 U.S. Tax Cas. ¶9173 (1971).

93. *Id.* at 531, 1971-1 U.S. Tax Cas. at 85,763-64.

94. I.R.C. §7609 was enacted as a part of the Tax Reform Act of 1976, Pub. L. No. 94-455, tit. XII, §1205, 90 Stat. 1699, and became effective Feb. 28, 1977.

95. I.R.C. §7609(a): "NOTICE — (1) IN GENERAL — IF — (A) any summons described in subsection (c) is served on any person who is a third party recordkeeper, and (b) the summons requires the production of any portion of records made or kept of the business

when a summons is issued to a "third party recordkeeper,"[96] the Code definition of which enumerates specific parties and institutions that would normally keep records of a taxpayer's financial transactions. The taxpayer may then instruct the summoned third party recordkeeper not to comply pending enforcement proceedings.[97] Any taxpayer who has the right to notification has a further statutory right to intervene in the proceedings.[98]

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transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain directions for staying compliance with the summons under subsection (b)(2). . . ."

96. A third party recordkeeper is defined in I.R.C. §7609(a)(3), for the purposes of that subsection, as: "(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A)); (B) any consumer reporting agency (as defined under section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))); (C) any person extending credit through the use of credit cards or similar devices; (D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4))); (E) any attorney; and (F) any accountant."

97. I.R.C. §7609(b)(2): "RIGHT TO STAY COMPLIANCE — Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) [see note 95 *supra*] shall have the right to stay compliance with the summons. . . ." Such notice must be given to the summonee in writing within 14 days. *Id.*

In a recent decision, United States v. Bank of Monte Vista, No. 78-W-458 (D. Colo. June 15, 1978), Chief Judge Winner expressed his concerns regarding problems arising under the new provisions. In the case at bar, he noted the Bank of Monte Vista "got hauled into court because they have obeyed the law." *Id.* He continued that, even worse, the government had tendered an order requiring them to appear in person because the most inconvenient method of meeting the statute was the most convenient for the IRS. *Id.*

The taxpayer involved had requested the bank not to comply, per I.R.C. §1609(b)(2)(a) and accordingly, the bank refused to comply; in fact, did not show up at the appointed place at all. The place where the bank officer was to appear was in Pueblo which was 280 miles round trip from Monte Vista when there was an IRS office only 17 miles away. The judge also suggested that the IRS agent could have gone to the bank.

The judge continued that he and the other Colorado judges would refuse to "knuckle under" to the procedures advocated by the IRS and United States attorney. Accordingly, he refused to sign the show cause order or to order the bank official to "show up" in Pueblo. Instead, he insisted on an order that merely required the bank to notify the court within twenty days if it were going to refuse to comply per request of the taxpayer. *Id.*

As noted in United States v. Morgan Guar. Trust Co., 572 F.2d 36, 38 n.2, 1978-1 U.S. Tax Cas. ¶9235 at 83,424 n.2 (2d Cir. 1978), the quid pro quo for the right granted in I.R.C. §7609(b) is I.R.C. §7609(e), which provides: "Suspension of statute of limitations. — If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending."

98. I.R.C. §7609(b)(1) provides: "INTERVENTION — Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a)

By providing more effective due process rights to the taxpayer, section 7609 makes the *Powell* mandated adversary hearing[99] somewhat less illusory.[100] Although section 7609(b)(1) might appear to give automatic intervention rights to all taxpayers, intervention has been denied when the third party falls outside of the definition of a third party recordkeeper.[101] For example, if the taxpayer under investigation is a corporate officer or director, the IRS might summon corporate records which do not record the taxpayer's personal financial transactions, but may still bear upon his tax liability. In this case the corporation is not a third party recordkeeper under the Code definition.[102] It seems questionable as to whether Congress intended to make this distinction among summoned third parties.[103] Nonetheless, because this distinction sometimes precludes intervention as of right, further litigation will undoubtedly ensue when the summonee is not a "third party recordkeeper." At any rate, the right to intervene is now recognized for most taxpayers who will fall within the provisions of section 7609(b)(1).[104]

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shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604."

It might be noted that a taxpayer must make a timely application to intervene or waive his right to do so. In United States v. Portage Nat'l Bank, No. C78-567 (N.D. Ohio June 13, 1978), the taxpayer waited 26 days before attempting to intervene. The judge stated that adopting either I.R.C. §7609(b)(2), affording taxpayer 14 days to stay the examination, or FED. R. CIV. P. 12(a) which allows 20 days to respond to a summons, taxpayer failed to pursue his right to intervene in a timely manner and therefore, waived it.

99. This is sometimes referred to as the *Reisman-Powell* mandated adversary hearing. Both *Reisman* and *Powell* were decided by the United States Supreme Court in 1964. *Reisman* stated that "[a]ny enforcement action under this section would be an adversary proceeding affording a judicial determination of the challenges to the summons. . . ." 375 U.S. at 446, 1964-1 U.S. Tax Cas. at 91,450. *Powell*, which followed *Reisman* in sequence, stated that its holding requiring the IRS to meet the four criteria for proper purpose (see text accompanying note 42 *supra*) in lieu of showing probable cause "does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered" (footnote omitted). 379 U.S. at 58, 1964-2 U.S. Tax Cas. at 94,233.

100. Obviously, it is quite difficult for a taxpayer to contest enforcement of a summons when he cannot intervene; he can hardly expect the third party summonee to challenge it for him. The idea of an "adversary" hearing with no one contesting the enforcement of the summons seems incongruous, thus rendering the adversariness of the hearing illusary.

101. *See, e.g.*, United States v. Gartland, Inc., No. Y-78-747 (D. Md. July 7, 1978). See note 102 *infra*.

102. *See, e.g.*, United States v. Gartland, Inc., No. Y-78-747 (D. Md. July 7, 1978). In *Gartland*, the court did not allow the taxpayer to intervene where the summons required a corporation to produce all records pertaining to transactions with taxpayer. The court reasoned that because the records sought pertained to the corporation's own transactions, the corporation was not a third party recordkeeper to the taxpayer. For definition of third party recordkeeper, see note 96 *supra*. The court continued that taxpayer could not intervene under the Federal Rules of Civil Procedure because he had no proprietary interest in the records (citing Donaldson v. United States, 400 U.S. 517, 1971-1 U.S. Tax Cas. ¶9173 (1971)). See text accompanying note 93 *supra*.

103. It seems more logical that Congress intended that all taxpayers under investigation be given the right to intervene since a third party's records which reflect upon the taxpayer's liability may be used by the IRS for the same purpose as records of the taxpayer's own transactions. *See generally* H.R. 10612, 94th Cong., 2d Sess., *reprinted in* [1976] 4 U.S. CODE CONG. & AD. NEWS 3202-06.

104. See note 98 *supra*.

DISCOVERY AND ITS APPLICATION TO THE SUMMONS ENFORCEMENT PROCEEDINGS

To prove allegations of improper purpose, or lack of proper purpose, a party may need to use the discovery provisions of the Federal Rules of Civil Procedure.[105] Although the federal discovery rules became effective in 1938 and were first held to be applicable to enforcement proceedings in 1942,[106] the recent interest in their use seems to have been triggered by a *Powell* footnote which restated that the Federal Rules of Civil Procedure are applicable to the summons enforcement proceeding.[107] Unfortunately, *Powell* presented no standards for determining when discovery should be permitted or the extent to which it should be allowed. After *Powell*, courts attempted to apply the federal rules in a way that would allow the taxpayer sufficient discovery to comply with due process without unnecessarily restricting the IRS in the performance of its duties. Rule 81(a)(3)[108] authorizes the application of Rule 26 to enforcement proceedings. In providing for discovery, Rule 26[109] gives the court discretion to deny discovery or limit its scope for adequate cause. Accordingly, the appellate courts have generally allowed the trial court judge wide discretion regarding the granting and limiting of discovery.[110] Virtually

105. *See* FED. R. CIV. P. 81(a)(3) & 26. See notes 108-109 *infra* and accompanying text.

106. *See* Martin v. Chandis Sec. Co., 128 F.2d 731, 1942-2 U.S. Tax Cas. §9521 (9th Cir. 1942); Comment, *Pretrial Discovery of Internal Revenue Service Investigative Files*, 6 SUFFOLK L. REV. 230, 232 n.23 (1972).

107. Comment, *supra* note 106. For the *Powell* footnote referred to in text, *see* 379 U.S. at 58, 59 n.18, 1964-2 U.S. Tax Cas. at 94,233 n.18.

Another explanation for the recent interest in discovery might be *Powell's* reiteration of the *Reisman* dicta stating that the taxpayer could challenge the enforcement "on any appropriate ground." United States v. Powell, 379 U.S. at 58, 1964-2 U.S. Tax Cas. at 94,233 (citing Reisman v. Caplin, 379 U.S. at 449, 1964-1 U.S. Tax Cas. at 91,451).

108. FED. R. CIV. P. 81(a)(3) states in part: "These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings."

109. FED. R. CIV. P. 26 provides: "(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examination; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited. . . .

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to the deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time and place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters. . . ."

110. *See* Note, *Criminal Tax Fraud Investigations: Limitations on the Scope of the Section 7602 Summons*, 25 U. FLA. L. REV. 114, 117 (1972).

every circuit has recognized at least some limited right to discovery, although the method and scope permitted has varied greatly.[111]

Deposition

In *United States v. Roundtree*[112] the taxpayer alleged that the summons was issued solely for the purposes of gathering evidence for criminal prosecution and harassing the taxpayer. The Fifth Circuit recognized the taxpayer's right to limited pre-hearing discovery, permitting him to depose the special agent to determine the purpose of the challenged summons.[113] The court reasoned that the *Powell*-mandated adversary hearing required that Roundtree be permitted to investigate the government's purpose "where such purpose had been put in issue and may effect the legality of the summons."[114] The majority cautioned, however, that if conducted unreasonably, the depositions could be curtailed by the district court.[115]

More recently, in *United States v. Wright Motor Co., Inc.*,[116] the Fifth Circuit affirmed the district court's dismissal of the Government's petition because the special agent refused to answer the taxpayer's questions on deposition.[117] Because *Donaldson* required issuance of the summons in good faith

111. *See, e.g.*, United States v. Morgan Guar. Trust Co., 572 F.2d 36, 1971-1 U.S. Tax Cas. ¶9235 (2d Cir. 1978) (taxpayer must make a substantial preliminary showing before even limited discovery is ordered); United States v. Roundtree, 420 F.2d 845, 1969-2 U.S. Tax Cas. ¶9733 (5th Cir. 1969) (permitted taxpayer to depose special agent to determine IRS purposes); United States v. Benford, 406 F.2d 1192, 1969-1 U.S. Tax Cas. ¶9217 (7th Cir. 1969) (respondent allowed pre-trial discovery although court could bar or limit scope and time for taking depositions); United States v. Ahmanson, 415 F.2d 785, 1969-2 U.S. Tax Cas. ¶9572 (9th Cir. 1969) (allowed broad discovery which lasted over two years).

112. 420 F.2d 845, 1969-2 U.S. Tax Cas. ¶9733 (5th Cir. 1969).

113. *Id.* at 852, 1969-2 U.S. Tax Cas. at 86,068. The majority affirmed the district court's denial of Roundtree's requests for interrogatories and his request to inspect the IRS's files relevant to himself and to his wife, ruling that the requests were irrelevant and overbroad. *Id.* at 847-48, 852, 1969-2 U.S. Tax Cas. at 86,065, 86,068.

114. *Id.* at 852, 1969-2 U.S. Tax Cas. at 86,068 (footnote omitted).

115. *Id.* Such curtailment is authorized by FED. R. CIV. P. 30(d): "Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, the court . . . may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition . . . ."

Discovery cannot be used to harass the IRS, cause delay, or to obtained privileged information. United States v. Nunnally, 278 F. Supp. 843, 1968-1 U.S. Tax Cas. ¶9320 (W.D. Tenn. 1968).

116. 536 F.2d 1090, 1976-2 U.S. Tax Cas. ¶9605 (5th Cir. 1976).

117. *Id.* at 1095, 1976-2 U.S. Tax Cas. at 84,928. Upon the agent's refusal to answer certain questions regarding the purpose of the summons (per instructions from the Commission), the court dismissed the case under FED. R. CIV. P. 37(b)(2) which states, in part: "If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matter regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

and before recommendation for criminal prosecution, the court reasoned that the taxpayer must be afforded some opportunity to prove his allegations.[118]

Deposition is the method of discovery most often granted in the summons enforcement proceeding.[119] A deposition is not unduly time consuming and can effectively reveal the special agent's true motives for requesting the summoned material or testimony. Pursuant to the *LaSalle* enforcement requirements, however, courts must consider the IRS's institutional motives which undoubtedly are more difficult to ascertain.[120] The special agent may have insufficient information to discern the interests of the entire institution. The *LaSalle* Court did recognize that examination of the agent's motives may still be necessary to evaluate the *Powell* good faith factors,[121] even though his personal motive is not dispositive. However, the taxpayer may now need to depose other IRS officials to identify institutional purpose.[122] Taking a large number of depositions might become unduly time consuming, thus interfering with the contemplated expediency of the summary proceeding.[123] Possibly, as suggested by the dissent, the *LaSalle* majority has inadvertently complicated the enforcement procedure, a circumstance which may produce an unmanageable situation.[124]

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . ."

118. 536 F.2d at 1095, 1976-2 U.S. Tax Cas. at 84,928 (citing United States v. Church of Scientology of Cal., 520 F.2d 818, 1975-2 U.S. Tax Cas. ¶9584 (9th Cir. 1975)). The taxpayer, Mr. Wright, alleged that the summons was issued for the purpose of securing evidence for use in his criminal prosecution. 536 F.2d at 1092, 1976-2 U.S. Tax Cas. at 84,925.

119. Besides *Roundtree* (see text accompanying notes 112-115 *supra*) and *Wright Motor Co.* (see text accompanying notes 116-118 *supra*), *see, e.g.*, United States v. Monsey, 429 F.2d 1348, 1970-2 U.S. Tax Cas. ¶9578 (7th Cir. 1970); United States v. Benford, 406 F.2d 1192, 1969-1 U.S. Tax Cas. ¶9217 (7th Cir. 1969); United States v. Lomar Discount Ltd., 61 F.R.D. 420, 1974-2 U.S. Tax Cas. ¶9820 (N.D. Ill. 1973); United States v. Kessler, 364 F. Supp. 66, 1973-2 U.S. Tax Cas. ¶9781 (S.D. Ohio 1973); United States v. Nunnally, 278 F. Supp. 843, 1968-1 U.S. Tax Cas. ¶9320 (W.D. Tenn. 1968); United States v. Moriarty, 278 F. Supp. 187, 1968-1 U.S. Tax Cas. ¶9137 (E.D. Wis. 1967); Kennedy v. Rubin, 254 F. Supp. 190, 1966-2 U.S. Tax Cas. ¶9603 (N.D. Ill. 1966).

120. *See* United States v. LaSalle Nat'l Bank, 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978). For discussion of *LaSalle*, see notes 73-87 *supra*.

121. *Id.* at 2367 n.17, 1978-2 U.S. Tax Cas. at 84,584 n.17.

122. The *LaSalle* Court does not suggest this and probably did not intend to imply a need for numerous depositions resulting in delay. However, it follows from the holding, which requires a determination of institutional purpose, that this might be necessary to ascertain this purpose.

123. The court in United States v. Salter, 432 F.2d 697, 1970-2 U.S. Tax Cas. ¶9648 (1st Cir. 1970) states that "[b]road discovery can be expected to cause extensive delays and to jeopardize the integrity and effectiveness of the entire investigation." *Id.* at 701, 1970-2 U.S. Tax Cas. at 84,644. The court also cites two cases in which discovery "dragged on" for two years or more in which time the defense never proved satisfactory to the court. The court notes further that "[n]o case has been cited in which discovery has been used successfully to prove an 'improper purpose' defense." *Id.* at 701 n.6, 1970-2 U.S. Tax Cas. at 84,644 n.6.

124. See text accompanying note 85 *supra*. Determining the specific purpose of a single

An alternative to the deposition is the questioning and cross-examination of the special agent during the adversary hearing. This procedure is generally more expedient, and arguably an adequate substitute.[125] However, this alternative suffers from the same infirmities inherent in the deposition. It is probative only of the motives and information within the knowledge of one individual and therefore is of questionable value after *LaSalle*.[126] Several circuits have approved and adopted such a procedure. As proposed by the First Circuit in *United States v. Salter*,[127] the procedure would involve a limited evidentiary hearing including examination of the special agent concerning the purpose of the summons. If after his testimony and, when necessary, questioning by the judge himself, the court still had substantial question as to whether an improper purpose might exist, discovery could then be ordered.[128] The Third Circuit[129] recommended a nearly identical four point procedure whereby the IRS would specifically allege compliance with each of the *Powell* requirements, the summonee or taxpayer would respond by showing cause why the order should not be enforced, and at the hearing each party would be prepared to prove its allegations and rebut the opponent's case. Finally, if the court then concluded that it could not fairly decide the case on the record, it could order discovery or further proceedings.[130]

individual is a relatively simple matter in comparison with the determination of the purposes of an entire institution such as the IRS, which is composed of many levels and divisions. Various individuals within the IRS might differ in their interpretations of the purpose of the investigation and of the specific summons within the investigation. Ascertaining who within the agency would have the necessary information and the authority to speak in behalf of the institution might also prove problematic. The taxpayer might experience difficulty ascertaining the proper individuals to request depositions from and the trial court judge might experience similar difficulty deciding how many and which depositions to authorize.

125. A number of cases have held that the trial court's denial of discovery was not an abuse of discretion when the special agent was present at hearing and subject to direct and cross-examination. *See, e.g.*, United States v. Interstate Tool & Eng'r Corp., 526 F.2d 59, 1975-2 U.S. Tax Cas. ¶9870 (7th Cir. 1975); United States v. Turner, 480 F.2d 272, 1973-2 U.S. Tax Cas. ¶9489 (7th Cir. 1973); United States v. Bowman, 435 F.2d 467, 1971-1 U.S. Tax Cas. ¶9121 (3d Cir. 1970); United States v. Erdner, 422 F.2d 835, 1970-1 U.S. Tax Cas. ¶9256 (3d Cir. 1970). *See also* Note, *supra* note 1, at 539.

126. Under *LaSalle*, the motive of the special agent is not dispositive, 98 S. Ct. at 2366, 1978-2 U.S. Tax Cas. at 84,583. It follows that the deposition of only that agent would not be too valuable to the taxpayer.

127. 432 F.2d 697, 1970-2 U.S. Tax Cas. ¶9648 (1st Cir. 1970).

128. *Id.* at 700, 1970-2 U.S. Tax Cas. at 84,643. In United States v. National State Bank, 454 F.2d 1249, 1972-1 U.S. Tax Cas. ¶9168 (7th Cir. 1972), the Seventh Circuit cited *Salter* in denying discovery, noting that the taxpayers "did not avail themselves of the opportunity to elicit direct testimony, or testimony in cross-examination . . . to give substance to the allegations in their answer." *Id.* at 1252, 1972-1 U.S. Tax Cas. at 83,690.

129. *See* United States v. McCarthy, 514 F.2d 368, 1975-1 U.S. Tax Cas. ¶9402 (3d Cir. 1975).

130. *Id.* at 372-73, 1975-1 U.S. Tax Cas. at 87,027. The proposal provided that:

1) The Secretary would file a complaint which would specifically allege compliance with each of the *Powell* requirements. The affidavit would support these allegations.

2) The summoned party would be served with an order fixing a deadline for responsive pleading with affidavit and any motions and directing the summonee to show cause why the order should not be enforced.

In *United States v. Church of Scientology of California*,[131] the Ninth Circuit endorsed the First and Third Circuits' approach. In that case, the Church of Scientology challenged the enforcement of an IRS summons by claiming that the summons was issued to harass the Church, to put pressure on the Church to settle a collateral dispute over its claimed tax exemptions, and to eliminate Scientology organizations.[132] The appellate court upheld the lower court's denial of discovery on the basis that it would impede the summary procedure.[133] The court did, however, reverse and remand the case for an evidentiary hearing to give the taxpayer an opportunity to show improper purpose, thus following the procedure outlined by the First and Third Circuits.[134]

Admittedly, this procedure offers the advantage of expediency[135] and, if adopted by other circuits, would furnish uniformity in contrast to the present panoply of discovery approaches.[136] Considering the barrage of enforcement

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3) At the hearing, the Secretary should be prepared to prove that the summons complies with *Powell* and to rebut any proper defenses asserted by the summonee. The summonee should be prepared to produce any rebuttal evidence of the Government's case and to assume the burden as to affirmative issues which he might raise to support his claim that enforcement of the summons would constitute an abuse of the court's process.

4) If the court concluded from the summary proceeding that it could not fairly decide the case on the record, it would be free to direct further proceedings including discovery. *Id.*

131. 520 F.2d 818, 1975-2 U.S. Tax Cas. ¶9584 (9th Cir. 1975).

132. *Id.* at 820-21, 1975-2 U.S. Tax Cas. at 87,732. The Church of Scientology cited several other cases in which the IRS had investigated other Scientology churches. *See, e.g.*, Handeland v. Commissioner, 519 F.2d 327, 1975-2 U.S. Tax Cas. ¶9586 (9th Cir. 1975); Church of Scientology of Hawaii v. United States, 485 F.2d 313, 1973-2 U.S. Tax. Cas. ¶9659 (9th Cir. 1973); Foundling Church of Scientology v. United States, 412 F.2d 1197, 1969-2 U.S. Tax Cas. ¶9538 (Ct. Cl.), *cert. denied*, 397 U.S. 1009 (1969).

133. 520 F.2d at 824, 1975-2 U.S. Tax Cas. at 87,735.

134. *Id.* at 825, 1975-2 U.S. Tax Cas. at 87,735. In a recent opinion, United States v. Boone, Nos. C-78-151-G, C-78-152-G (M.D.N.C., filed July 6, 1978), the district court endorsed this procedure set out by the First and Third Circuits.

In *Boone*, the IRS sought a protective order against taxpayer's interrogatories, request for production of government documents and notice to take depositions of numerous officials. The trial court noted that the case was a "prime example" of how summons enforcement proceedings could be abused if discovery were permitted as a matter of course. The court quashed the discovery requests, finding them "largely irrelevant, oppressive, and burdensome" (citing FED. R. CIV. P. 26(c)), and ordered that no further discovery be made without further court order. The court also noted in a footnote that taxpayer's concern that the summons was being used to obtain evidence for use in a criminal proceeding had been deflated by the Supreme Court in United States v. LaSalle Nat'l Bank, 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978). *Id.*

135. The IRS's primary argument against discovery is that it causes extensive delay, thus handicapping the Service, restricting its effectiveness and thwarting its purpose. United States v. Salter, 432 F.2d at 701, 1970-2 U.S. Tax Cas. at 84,664.

136. The trial courts, perhaps even more than appellate courts, differ as to the scope of discovery granted the taxpayer, generally making the decision on a case by case basis. *Compare* United States v. Kessler, 338 F. Supp. 420, 1972-2 U.S. Tax Cas. ¶9661 (S.D. Ohio 1972), *rev'd*, 474 F.2d 995, 1973-1 U.S. Tax Cas. ¶9262 (6th Cir. 1973) (trial court authorized depositions but before second deposition held, enforced summons; Sixth Circuit reversed, stating that, in interests of fairness, a court may not change its mind without warning and

proceedings currently pervading the courts,[137] a judicial guideline for permitting or denying discovery would seem appropriate. However, expediency must be balanced against constitutionally protected rights such as the rights to privacy and due process.[138] The procedure adopted by the First, Third and Ninth Circuits may not provide the taxpayer sufficient opportunity to discover the true motives of the IRS. To meet adversary hearing requirements, the envisioned procedure must enable the taxpayer to obtain enough evidence to be granted further discovery when his defense is or may be valid.[139] Courts frequently deny pre-hearing discovery because it might impede the proceeding's summary nature.[140] However, the hearing is meaningless when one party has no means of obtaining necessary evidence.[141]

Unlike the in-court examination, pre-hearing discovery allows the taxpayer time to evaluate information obtained to further prepare his defense. The proposed in-court procedure might produce unfair surprise for both parties resulting in a distorted picture of the actual situation and culminating in either a denial of further needed discovery or a granting of unnecessary discovery.[142] Perhaps limited pre-trial discovery combined with the in-court examination would produce a fairer determination of the issues.

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terminate litigation) *and* United States v. Amonson, 415 F.2d 785, 1969-2 U.S. Tax Cas. ¶9572 (9th Cir. 1969) (allowed broad discovery lasting over two years) *with* United States v. Schmidt, 360 F. Supp. 339, 1973-2 U.S. Tax Cas. ¶9588 (M.D. Pa. 1973) (discovery denied because too broad and because unnecessary to afford taxpayers a meaningful hearing) *and* United States v. Schoendorf, 307 F. Supp. 1034, 1970-1 U.S. Tax Cas. ¶9178 (E.D. Wis. 1970) (allowed deposition of special agent but denied further discovery).

Therefore, the taxpayer has no way of knowing what to expect in the way of discovery during the early stages of pre-hearing preparation.

137. *See IRS Summons, supra* note 7.

138. Obviously, an expedient hearing is of no value if, due to the rush to resolve the matter, the hearing loses it adversary nature. It then no longer meets the *Reisman-Powell* requirement (see note 99 *supra*) and thus lacks due process.

139. This would seem to be the ultimate goal of an adversary hearing. *See generally* Miller, *supra* note 2.

140. *See, e.g.*, United States v. Morgan Guar. Trust, 572 F.2d 36, 1978-1 U.S. Tax Cas. ¶9235 (2d Cir. 1978); United States v. National State Bank, 454 F.2d 1249, 1972-1 U.S. Tax Cas. ¶9168 (7th Cir. 1972); United States v. Newman, 441 F.2d 165, 1971-1 U.S. Tax Cas. ¶9329 (5th Cir. 1971).

141. Although a taxpayer may sincerely believe that the IRS has a bad faith purpose for issuing the summons, without evidence he has no hope of successfully contesting enforcement. In many instances, this evidence is not available without discovery, which renders the taxpayer helpless as far as presenting any defense. Thus, what is intended to be an "adversary" hearing is, instead, a one-sided and *very* summary procedure.

142. When the special agent is examined in court without any advance deposition, neither party knows what to expect. Therefore, spur of the moment responses may produce a distorted picture. For example, the agent may hesitate to answer questions out of concern as to what he is at liberty to disclose. This could cause the judge to incorrectly suspect that the agent is hiding an improper purpose. The agent would probably not be aware of all of the case law regarding proper and improper purposes and might, therefore, be wary of saying the wrong thing.

On the other hand, the taxpayer's attorney, who may be surprised by the agent's testimony or who may disbelieve him, may not be able to frame the proper questions to elicit the hoped for responses. Impulsive questions could render the cross-examination disorganized and confusing and might frustrate the judge, who is trying to get a true picture

Interrogatories

A recent example of the use of the interrogatory in the enforcement proceeding is *United States v. Fensterwald.*[143] Attorney Bernard Fensterwald, Jr. represented a defendant who, in the early stages of the Watergate investigation, supplied information which may have embarrassed high ranking executive officers.[144] He had also served as Chief Counsel to the Senate Committee which investigated and produced evidence of alleged illegal activities of the Internal Revenue Service.[145] Fensterwald claimed that the special audit of his tax return was connected with his former activities and was intended to harass him. Apparently, the District of Columbia Circuit concluded that Fensterwald had reason to suspect harassment, holding that he clearly had "taken himself out of the category of an ordinary taxpayer challenging the good faith of the Internal Revenue Service in conducting a special audit."[146] The court thus determined that the taxpayer should have been permitted limited discovery to determine how his tax return was selected for special audit. The case was remanded for discovery, preferably specific interrogatories addressed to IRS officials.[147]

This was an exceptional case, however, for interrogatories are authorized far less often than depositions in enforcement proceedings.[148] Like a deposition, an interrogatory must be relevant to the hearing's purpose and may not be used for broad discovery of the Government's case.[149] However, taxpayers may have preferred the deposition because responses to interrogatories are often less spontaneous and candid than those on deposition.[150] In addition,

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of the situation. The entire situation might merely compound the problem of determining whether discovery is needed.

143. 553 F.2d 231, 1977-1 U.S. Tax Cas. ¶9266 (D.C. Cir. 1977).

144. *See IRS Summons, supra* note 7, at 8329. Attorney Fensterwald represented James McCord, one of the original seven Watergate conspirators. This was at the time when McCord revealed information to Judge Sirica contributing to judicial, congressional, and public knowledge of the Watergate conspiracy. Fensterwald also represented James Earl Ray and other well known persons in controversial cases. 553 F.2d at 232, 1977-1 U.S. Tax Cas. at 86,535.

145. 553 F.2d at 232, 1977-1 U.S. Tax Cas. at 86,535. Fensterwald noted that the tax returns of Senator Long of Missouri, Chairman of the Senate Committee, somehow reached the hands of a national publication and were published, destroying Long's political career. *Id.*

146. *Id.* Harassment by the IRS was also alleged in United States v. Hayes, 408 F.2d 932, 1969-1 U.S. Tax Cas. ¶9231 (7th Cir. 1969), in which an allegedly non-profit foundation had been the subject of discussion of a House Subcommittee Investigation. Foundation trustee Hayes was permitted to depose the IRS agent, but the court determined that the IRS's purpose was to discover abuse of tax-exempt status, which necessitated a determination of tax liability and was, therefore, proper. 553 F.2d at 232, 1977-1 U.S. Tax Cas. at 86,535.

147. 553 F.2d at 232, 1977-1 U.S. Tax Cas. at 86,536.

148. *See, e.g.*, United States v. Roundtree, 420 F.2d 845, 1969-2 U.S. Tax Cas. ¶9733 (5th Cir. 1969).

149. *See, e.g.*, United States v. Howard, 360 F.2d 373, 1966-1 U.S. Tax Cas. ¶9390 (3d Cir. 1969) (discovery denied because interrogatories too broad and, allegedly, harassed IRS). *See also Duke, supra* note 1, at 60.

150. Interrogatories have been requested and granted in some instances. *See* United States v. Nunnally, 278 F. Supp. 843, 1968-1 U.S. Tax Cas. ¶9320 (W.D. Tenn. 1968). Inter-

interrogatories take longer to prepare and to answer, thus making courts more hesitant to authorize them. Nevertheless, the interrogatory could be useful in determining the institutional purpose of the IRS as mandated by the *LaSalle* majority. An interrogatory could produce a substantial amount of information from a high official with authority to answer for the IRS as an institution, thus avoiding the necessity of arranging times and places for depositions. This is a significant advantage when officials are located in more distant areas of the country. Furthermore, officials might need to inquire in several divisions of the Service to determine the purpose of the entire agency, necessarily requiring more time but probably leading to more accurate information. The interrogatory therefore could be an extremely practical tool for ascertaining institutional purpose if complete and candid responses were forthcoming from IRS representatives.

Production of Government Documents

A discovery device which is often requested[151] but only occasionally granted[152] is the production and examination of government documents. Courts are hesitant to grant this type of discovery absent a strong showing of necessity.[153] A frequent impediment to gaining access to documents is the official information privilege,[154] which the IRS may claim in order to prevent

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rogatories were permitted to determine IRS's purpose in denying tax-exempt status in Center on Corporate Responsibility v. Schultz, 368 F. Supp. 863, 1974-1 U.S. Tax Cas. ¶9118 (D.D.C. 1973) (see notes 164-174 *infra*). *But see* United States v. Roundtree, 420 F.2d 845, 1969-2 U.S. Tax Cas. ¶9733 (5th Cir. 1969) (denying motion requesting interrogatories; see note 113 *supra*).

Exhaustive discovery is possible with an interrogatory, unlike the deposition where the official could only provide information available at the time. The pre-hearing deposition may involve some of the same problems as the in court examination. See note 142 *supra*. However, the taxpayer will have time to evaluate the information to prepare for further questioning at the hearing. The agent can prepare his own testimony more adequately by becoming aware at disposition of what information he should acquire before the hearing.

151. *See, e.g.*, United States v. Fensterwald, 553 F.2d 231, 1977-1 U.S. Tax Cas. ¶9266 (D.C. Cir. 1977); United States v. Roundtree, 420 F.2d 845, 1969-2 U.S. Tax Cas. ¶9733 (5th Cir. 1969); United States v. Howard, 360 F.2d 373, 1966-1 U.S. Tax Cas. ¶9390 (3d Cir. 1966).

152. *See* United States v. Interstate Tool & Eng'r Corp., 526 F.2d 59, 1975-2 U.S. Tax Cas. ¶9870 (7th Cir. 1975) (granted inspection of some documents); United States v. Monsey, 429 F.2d 1348, 1970-2 U.S. Tax Cas. ¶9578 (7th Cir. 1970) (district court granted such discovery but issue became moot before appeal); United States v. Duke, 379 F. Supp. 545, 1974-1 U.S. Tax Cas. ¶9475 (N.D. Ill. 1974) (*in camera* inspection granted). Two other cases which did not involve the summons, but in which discovery of IRS documents was granted, are Tax Reform Research Group v. IRS, 419 F. Supp. 415, 1976-2 U.S. Tax Cas. ¶9558 (D.D.C. 1976) (public interest group concerned with tax reform gained access to documents, the existence of which was revealed by testimony of John Dean before Senate Select Committee on Presidential Campaign Activities, under the Freedom of Information Act) and Center on Corporate Responsibility, Inc. v. Shultz, 368 F. Supp. 863, 1974-1 U.S. Tax Cas. ¶9118 (D.D.C. 1973) (see notes 164-174 *infra* and accompanying text).

153. *See* Hickman v. Taylor, 329 U.S. 495 (1947).

154. Although there are some statutory governmental privileges and such governmental privileges as state secret, military, or informers' privilege, there is also a non-

disclosure of memoranda, writings and official documents. In considering whether this privilege exists, the court must balance the government's interest in protecting the policy-making process of the IRS against the taxpayer's need for the documents to prove his allegations.[155] The IRS insists that its policy-making process depends upon a free exchange of participants' views, which is not feasible without protection of its records.[156]

An apparent trend toward increased disclosure of documents is evidenced by the passage of and the 1974 amendments to the Freedom of Information Act (FOIA).[157] Although this act has been used successfully to obtain disclosure of IRS documents and publications,[158] courts have generally held that the FOIA is not intended to accelerate or circumvent normal discovery procedures in pending investigations.[159] One could argue, however, that if documents would be available under the FOIA, denial of access to the identical information for discovery would be senseless.[160]

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statutory official information privilege which protects suggestions, advice, recommendations and opinions, but not factual and investigatory reports, data, and surveys. United States v. Leggett & Platt, Inc., 542 F.2d 655, 658 nn.3 & 4 (6th Cir. 1976) (antitrust action in which government asserted official information privilege to prevent discovery). *See also* Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142 (1976).

155. *Cf.* United States v. Leggett & Platt, Inc., 542 F.2d 655, 658 (6th Cir. 1976) (in antitrust action, court "properly applied a balancing test in determining whether LP [Leggett & Platt] could pierce the qualified governmental official information privilege." [footnote omitted]. *See also*, Tax Reform Research Group v. IRS, 419 F. Supp. 415, 423, 1976-2 U.S. Tax Cas. ¶9558 at 84,773 (D.D.C. 1976); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 945-46 (Ct. Cl. 1958) (discussing purpose of privileges).

In *Tax Reform Research Group* the court discussed the possibility of the invasion of that personal privacy of a taxpayer which has traditionally been protected by the IRS. 419 F. Supp. at 418, 1976-2 U.S. Tax Cas. at 84,770. In the summons enforcement proceedings, however, the taxpayer presumably would waive this privilege, because it is to his advantage to have IRS records of his tax transactions produced in court.

156. *See* Rosenbloom, *More IRS Information May Become Public Due to Amended Freedom of Information Act*, 45 J. TAX. 258, 261 (1976).

157. 5 U.S.C. §552 (1977). *See generally* Rosenbloom, *supra* note 156; Note, *The Federal "Government in the Sunshine Act": A Public Access Compromise*, 29 U. FLA. L. REV. 881 (1977).

158. *See, e.g.*, Tax Reform Research Group v. IRS, 419 F. Supp. 415, 1976-2 U.S. Tax Cas. ¶9558 (D.D.C. 1976). FOIA litigation has also resulted in the publication of most of the IRS manual. Rosenbloom, *supra* note 156, at 258. A letter from the IRS Commissioner to Senator Edward M. Kennedy included a list of 44 cases which had been initiated against the IRS under FOIA as of October 21, 1975. *Id.* at 262.

159. *See, e.g.*, United States v. Murdock, 548 F.2d 599 1977-1 U.S. Tax Cas. ¶9,289 (5th Cir. 1977) (where tax protestor convicted for willful failure to file income tax returns alleged discriminatory prosecution under FOIA, court held that FOIA and Privacy Act of 1974 did not enlarge scope of discovery available to defendant under FED. R. CRIM. P. 16); Williams v. IRS, 345 F. Supp. 591, 1972-1 U.S. Tax Cas. ¶9406 (D. Del. 1972), *aff'd*, 479 F.2d 317, 1973-1 U.S. Tax Cas. ¶9476 (3d Cir.), *cert. denied*, 414 U.S. 1024 (1973) (work papers and data prepared or used by agent in the tax investigation of plaintiff exempt from disclosure under 5 U.S.C. §552(b)(7)).

160. Rosenbloom, *supra* note 156, at 262. The counterpart to this argument is that the FOIA anticipates special administrative proceedings prior to litigation, and this process should not be circumvented. *Id.*

Another recent phenomenon symptomatic of the trend toward increased disclosure is the unique situation presented by the allegations of White House influence on IRS policy and practice. The resulting revelations and implications triggered more liberal access to traditionally protected government documents.[161] Admittedly, the strong public interest in a thorough airing of these serious abuses called for much broader discovery than that necessary for the average taxpayer challenging summons enforcement.[162] Nevertheless, this trend toward governmental disclosure could make the production and examination of government documents a more viable discovery method.

Even when disclosure of documents is ordered, the IRS may not be entirely cooperative in complying.[163] Although the IRS has not faced a broad discovery order involving the production of documents in a summons enforcement proceeding, its lack of cooperation is illustrated by *Center on Corporate Responsibility, Inc. v. Shultz*.[164] Plaintiff, a charitable and educational organization,[165] requested tax-exempt status.[166] Although the IRS indicated to plaintiff that it would qualify, an adverse ruling was ultimately issued.[167] Plaintiff alleged that the ruling was a direct result of political influence on the Service.[168] Pursuant to a letter sent to the court by plaintiff's counsel citing various indicia of White House influence, the court granted the plaintiff dis-

161. *See, e.g.*, Center on Corporate Responsibility, Inc. v. Shultz, 368 F. Supp. 863, 1974-1 U.S. Tax Cas. ¶9118 (D.D.C. 1973) (see text accompanying notes 164-174 *infra*).

162. *See, e.g.*, United States v. Fensterwald, 553 F.2d 231, 1977-1 U.S. Tax Cas. ¶9266 (D.C. Cir. 1977) (see text accompanying notes 143-147 *supra*); Teague v. Alexander, 1978-1 U.S. Tax Cas. ¶9363 (D. Colo. 1978) (Indochina Solidarity Committee alleged harassment by Activist Organizations Committee of IRS). *Cf.* Tax Reform Research Group v. IRS, 419 F. Supp. 415, 1976-2 U.S. Tax Cas. ¶9558 (D.D.C. 1976) (public interest group requesting IRS documents under FOIA for purposes of tax reform).

163. *See, e.g.*, United States v. Salter, 432 F.2d 697, 1970-2 U.S. Tax. Cas. ¶9648 (1st Cir. 1970) (respondent granted discovery of IRS documents by trial court but IRS refused to comply; trial court dismissed government's action but the First Circuit reversed); United States v. Duke, 379 F. Supp. 545, 1974-1 U.S. Tax Cas. ¶9475 (N.D. Ill. 1974) (although government refused to submit to pre-trial discovery, it did produce its file later for *in camera* inspection); Center of Corporate Responsibility, Inc. v. Shultz, 368 F. Supp. 863, 1974-1 U.S. Tax Cas. ¶9118 (D.D.C. 1973) (see notes 164-174 *infra* and accompanying text); United States v. Kessler, 364 F. Supp. 66, 1973-2 U.S. Tax Cas. ¶9781 (S.D. Ohio 1973) (government refused to comply with court order to produce work papers *in camera*).

164. 368 F. Supp. 863, 1974-1 U.S. Tax Cas. ¶9118 (D.D.C. 1973).

165. The purpose of plaintiff organization, incorporated under the laws of the District of Columbia, was to: "engage in and conduct educational and charitable activities on a non-profit basis to improve and better the conditions of American life and institutions by promoting the development of increased responsibility and awareness on the part of corporate entities and decision-makers to use the corporate institution and power to better the social welfare, particularly in the areas of minority group problems and employment discrimination, pollution, and utilization and conservation of national resources — economic, human, natural and otherwise." *Id.* at 866, 1974-1 U.S. Tax Cas. at 83,047.

166. To qualify for tax exempt status, the plaintiff ceased participation in proxy contest activities upon the advice of the IRS. *Id.*

167. The adverse ruling was issued by the IRS only after plaintiff brought suit in federal district court to enjoin defendants from refusing to rule on plaintiff's tax exempt status. *Id.* at 867, 1974-1 U.S. Tax Cas. at 83,048.

168. *Id.* at 866, 1974-1 U.S. Tax Cas. at 84,047.

covery, including depositions, interrogatories, the production of unprivileged IRS documents and files, and all relevant documents, memoranda and other writings in the possession of the White House.[169] Although plaintiff accomplished sufficient discovery to indicate such influence,[170] the IRS did not cooperate fully, thus hindering discovery.[171] Citing the Government's delaying tactics and refusal to comply adequately with discovery orders, the court eventually imposed the Rule 37(b)(2) sanction[172] pursuant to the Federal Rules of Civil Procedure. Thus, the plaintiff's allegations were considered to be established,[173] and the adverse ruling regarding its tax-exempt status was nullified.[174]

169. *Id.* at 867, 1974-1 U.S. Tax Cas. at 83,048.

170. Plaintiff was permitted inspection of the IRS file concerning its application, at which time plaintiff discovered handwritten notes by the Assistant Director of the Interpretation Division with the notation "perhaps White House pressure." *Id.* at 867-68, 1974-1 U.S. Tax Cas. at 83,048-49. Apparently plaintiff's application had been channeled through the Interpretive Division of the Chief Counsel's Office because the IRS's primary concern with the plaintiff's proxy contest activities was a novel question. Subsequent to this objection, the plaintiff agreed to cease these activities. *Id.*

171. Depositions revealed inadequate compliance with discovery orders, including testimony that the search of White House files was limited and inadequate. The search, by someone unfamiliar with the files, failed to produce certain relevant documents and writings specifically referred to by John Dean and Patrick J. Buchanan in their Ervin Committee testimony. *Id.* at 872, 1974-1 U.S. Tax Cas. at 83,052, as well as the files of John Dean, Charles Colson, H. R. Haldeman, John Erhlichman, John Caulfield and others. *Id.* at 869 n.11, 1974-1 U.S. Tax Cas. at 83,050 n.11. In a second search, special counsel to the President did search some of these files, seeking documents relevant to the plaintiff, White House interest in tax-exempt status of left-wing activist organizations, and several other related areas, but found "no documents so relating." *Id.* at 870 n.14 and accompanying text, 1974-1 U.S. Tax Cas. at 83,050.

The IRS also failed to comply by searching its own files for "materials referring to White House interest in, concern with, or intervention in the decisions or actions of the Internal Revenue Service or the Treasury Department on tax-exempt organizations, including the granting or withholding of tax exemption rulings or the conducting of audits. . . ." *Id.* at 870, 1974-1 U.S. Tax Cas. at 83,050. In addition, the IRS failed to fully comply with interrogatories in substance or as to deadlines, which the court characterized as "another example of the Defendants' efforts to evade the Court's orders." *Id.* at 872, 1974-1 U.S. Tax Cas. at 83,052.

172. For text of FED. R. CIV. P. 37(b)(2), see note 117 *supra*. The court also requested the White House tape of a conversation between the President, Mr. Dean, and Mr. Haldeman regarding the use of the IRS against White House "enemies." Mr. J. Fred Buzhardt, Special Counsel to the President, stated that he was authorized to advise the Court that the White House was claiming executive privilege. 368 F. Supp. at 872, 1974-1 U.S. Tax Cas. at 83,053. However, the court ruled that only the President could make a formal claim. *Id.* at 872-3, 1974-1 U.S. Tax Cas. at 83,053 (citing United States v. Reynolds, 345 U.S. 1, 7-8 (1954) and Nixon v. Sirica & Cox, 487 F.2d 700, 704 (D.C. Cir. 1973)). The court held that this failure to comply without proper claim of executive privilege was also grounds for imposing rule 37(b)(2) sanctions (citing O'Neill v. United States, 79 F. Supp. 827, 830 (E.D. Pa. 1948)). 368 F. Supp. at 873, 1974-1 U.S. Tax Cas. at 83,053. *See generally*, Note, *supra* note 154, at 171-74.

173. Plaintiff's primary allegation was that it was denied a favorable tax exempt ruling because it was singled out for special treatment for political and other reasons having no bearing on the statutes and regulations. 368 F. Supp. at 871 n.17, 1974-1 U.S. Tax Cas. at 84,051 n.17.

174. *Id.* at 873, 1974-1 U.S. Tax Cas. at 83,053. The court noted that plaintiff would

Center on Corporate Responsibility illustrates the complexity of problems which may arise when broad discovery is granted, particularly when government documents are involved. Understandably, the courts are hesitant to grant such discovery without substantial evidence indicating extreme necessity.[175] Such necessity is seldom recognized in the summons enforcement proceeding.[176]

A possible compromise to the problems surrounding the production of government documents is an *in camera* inspection of the documents by the court. Arguably, this limited disclosure would protect the government's justifiable interest in maintaining confidentiality in its records while providing evidence enabling the court to decide whether to grant or deny discovery of the documents.[177] Although the *in camera* examination has been used in some instances,[178] courts still require a strong showing of improper purpose.[179] The courts could require a lesser showing of improper purpose to order this limited examination. The *in camera* inspection would then provide a tenable solution to the circular situation occuring when a taxpayer cannot show evidence of improper purpose without access to such documents and the court is hesitant to grant access without some evidence of improper purpose.

The *LaSalle* ruling could produce an increase in requests to examine governmental documents since examination represents the most expedient and trustworthy method of determining the institutional purpose of the IRS. Because a deposition of the special agent who issued the summons is of limited value under *LaSalle,* the taxpayer will inevitably look to a more direct method of uncovering purpose and thereby demonstrating a lack of good faith.[180] Although the interrogatory might provide the same information, IRS

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have been entitled to a favorable ruling even if political intervention had not been established, because it met all requirements. *Id.*

175. See note 153 *supra.* In some other areas of the law extensive discovery, often including government documents, has been routinely ordered. In the antitrust area, the lengthy discovery procedures which have sometimes dragged on for years have caused judicial concern. *See* Note, *Improved Definition of Discovery Relevance: A Path Out of the Antitrust Quagmire,* 30 U. FLA. L. REV. 751 (1978).

176. Generally, an individual taxpayer would not need such extensive discovery. It could, however, become more necessary when the taxpayer under investigation is a large corporation or a political organization, or other large group. Examples of such entities which appear in this work are the Church of Scientology (see text accompanying notes 131-134 *supra*); Center on Corporate Responsibility (see text accompanying notes 164-174 *supra*); Tax Reform Research Group (see note 152 *supra*); and General Motors Corp. (see notes 197-200 *infra* and accompanying text).

177. A new provision of the FOIA authorizes *in camera* examination of documents to determine whether FOIA exceptions apply. 5 U.S.C. §552 (1977).

178. *See, e.g.,* United States v. National State Bank, 454 F.2d 1249, 1972-1 U.S. Tax Cas. ¶9168 (7th Cir. 1972); United States v. Duke, 379 F. Supp. 545, 1974-1 U.S. Tax Cas. ¶9475 (N.D. Ill. 1974); United States v. Kessler, 364 F. Supp. 66, 1973-2 U.S. Tax Cas. ¶9781 (S.D. Ohio 1973).

179. See cases cited note 163 *supra.*

180. See notes 78-80 *supra.* The *in camera* examination would be one alternative. The district court in *LaSalle* did inspect the IRS investigative file *in camera* after refusing to permit respondent to do so. 98 S. Ct. 2357, 2361 n.5, 1978-2 U.S. Tax Cas. ¶9501 at 84,579 (1978).

documents seem preferable and, if produced in a timely manner, more expedient. Such documents would undoubtedly be more reliable because information could easily be omitted on an interrogatory. Of course, cooperation of the IRS is crucial to the workability of this discovery tool, and IRS resistance might cause judicial reluctance to order such discovery.

BALANCING OF INTERESTS

Several important considerations affect the court's decision on whether to grant discovery and if so, the method and amount of discovery to allow. The court must first recognize the duty of the IRS to administer and enforce the internal revenue laws. Because summons enforcement is a summary proceeding,[181] the government has a justifiable interest in the expediency and avoidance of unnecessary delay that could result from lengthy discovery procedures.[182]

On the other hand, as expressed by a district court judge, it is a "unique and particularly juridical task to see that precious individual rights are not trampled in the federal bureaucracy's headlong scramble toward ever higher levels of efficiency."[183] In attempting to prove improper purpose, the taxpayer assumes a heavy burden which has been continually increased by Supreme Court decision.[184] Because the criminal purpose doctrine has been limited to apply only after a referral to the Justice Department, subject to the prior good faith requirement, it will be of small value prospectively. Generally the referral is not made until the final stages of the investigation after the IRS has accumulated substantial incriminating evidence. Therefore, the only remaining defense for the taxpayer is lack of institutional good faith – improper purpose or absence of proper purpose – prior to the ultimate criminal referral. Without access to at least limited discovery, it will be nearly impossible for the taxpayer to produce sufficient evidence of improper purpose to justify denial of enforcement. However, before the taxpayer may be granted discovery, he must produce substantial evidence of improper purpose.[185] This circuitous situation permits little chance of success in the battle against summons enforcement. Indeed, very few taxpayers have been successful in the endeavor. Some courts have pointed to this lack of success, often resulting even when limited discovery was permitted, to justify a denial of discovery.[186]

181. The *Donaldson* Court approved the use of the summary proceeding for summons enforcement. 400 U.S. 517, 1971-1 U.S. Tax Cas. ¶9173 (1971).

182. See note 123 *supra*. *See also* Note, *supra* note 175.

183. United States v. Kessler, 364 F. Supp. 66, 69, 1973-2 U.S. Tax Cas. ¶9781 at 82,532 (S.D. Ohio 1973).

184. For the four major Supreme Court cases which have progressively increased this burden, see note 39 *supra*. *See* Note, *supra* note 72, at 265.

185. *See* United States v. Morgan Guar. Trust Co., 572 F.2d 36, 1978-1 U.S. Tax Cas. ¶9235 (2d Cir. 1978); United States v. National State Bank, 454 F.2d 1249, 1972-1 U.S. Tax Cas. ¶9168 (7th Cir. 1972); United States v. Newman, 441 F.2d 165, 1971-1 U.S. Tax Cas. ¶9329 (5th Cir. 1971).

186. *See, e.g.*, United States v. Salter, 432 F.2d 697, 1970-2 U.S. Tax Cas. ¶9648 (1st Cir. 1970). The *Salter* court stated that "taxpayers have been almost uniformly unsuccessful in proving an 'improper purpose' defense [footnote omitted]. Requiring an evidentiary hear-

However, these statistics may well be inconclusive and misleading because most taxpayers are either denied discovery or limited to a deposition or cross-examination of the special agent at the hearing. An examination of IRS files or officials would probably reveal additional information.[187] There is no way of knowing what information discovery might have produced in the myriad of cases where none was allowed or where the taxpayer was not allowed to intervene in the proceeding. Nonsuccess is certainly more likely when the taxpayer has no viable means of discovering the government's purpose.

In addition to the above considerations, the *LaSalle* Court saw a dangerous potential for expansion of criminal discovery when the summons is used to determine civil liability during a criminal investigation.[188] The Constitution provides for the grand jury as an investigative and accusatory body.[189] If the IRS oversteps its prescribed authority it may, thereby, usurp the authority of the grand jury without any of the traditional safeguards against investigatory abuse that operate in the grand jury context.[190] The *LaSalle* majority noted that the IRS cannot try its own prosecutions and that "[n]othing in section 7602 or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation."[191] For this reason, the Court terminated the summons authority at the point of referral to the Justice Department.[192] The Court

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ing will not preclude a respondent from raising and proving a 'improper purpose,' and we of course have no intention of precluding him from doing so. But we feel that the hearing requirement will have the salutary effect of eliminating discovery in cases in which it is clear that respondent will not be able to prove his allegations." *Id.* at 701, 1970-2 U.S. Tax Cas. at 84,644.

187. The special agent may lack authority to reveal certain information. *See, e.g.*, United States v. Wright Motor Co., Inc., 536 F.2d 1090, 1976-2 U.S. Tax Cas. ¶9605 (5th Cir. 1976) (special agent refused to answer questions on deposition pursuant to orders from his supervisor). See notes 116-118 *supra* and accompanying text. Another impediment to discovery by deposition is the issuing agent's possible bias concerning summons enforcement.

188. *See* United States v. LaSalle Nat'l Bank, 98 S. Ct. at 2365, 1978-2 U.S. Tax Cas. at 84,582 (1978); Abel v. United States, 362 U.S. 217, 226 (1960) (in case involving use of administrative warrant by Immigration and Naturalization Service, Court stated that "[t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts.").

189. Brief for Respondent at 16, United States v. LaSalle Nat'l Bank, 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978).

190. See Note, *supra* note 1, at 534.

191. 98 S. Ct. at 2365, 1978-2 U.S. Tax Cas. at 84,582. *See* United States v. Morgan Guar. Trust Co., 572 F.2d 36, 41-42, 1978-1 U.S. Tax Cas. at 83,428 (2d. Cir. 1978) ("[the] only rationale that has ever been offered for preventing an otherwise legitimate use of an Internal Revenue Service third party summons, [is] that Congress could not have intended the statute to trench on the power of the grand jury or to broaden the Government's right to discovery in a criminal case."). *Accord*, United States v. Weingarden, 473 F.2d 454, 458-59, 1973-1 U.S. Tax Cas. ¶9210 at 80,369-70 (6th Cir. 1973); United States v. O'Connor, 118 F. Supp. 248, 250-51, 1953-2 U.S. Tax Cas. ¶9591 at 48,614 (D. Mass. 1953).

192. United States v. LaSalle Nat'l Bank, 98 S. Ct. at 2365, 1978-2 U.S. Tax Cas. at 84,582.

suggested that although cooperation between the IRS and the Justice Department on the calculation of civil tax liability might be expected, an attempt to build a "partial information barrier" between the two executive branches would be unrealistic. Therefore, effective use of information to determine civil liability would "inevitably result in criminal discovery."[193] The Court admitted that the potential for expanding criminal discovery rights of the Justice Department or of usurping the role of the grand jury existed even at the point of recommendation by the special agent to his superior. The majority felt, however, that this possibility of abuse was remote before a formal recommendation to the Justice Department occurred and therefore did not warrant banning summons use before that point.[194] Nevertheless, this appears to be an inherent danger even prior to the referral because the summons is used almost exclusively in investigations with criminal overtones.

Diametrically opposed is the view that the IRS and the Justice Department must necessarily exchange information.[195] To a limited extent, this occurs regularly when the IRS uncovers information indicating tax fraud and turns it over to the Justice Department, which convenes a grand jury to continue the investigation and, if indicated, to present an indictment.[196] This is a one way flow of information, however, not involving an exchange between the two agencies. Concededly, unlimited cooperation between the two executive branches would probably result in an increased percentage of tax fraud convictions. However, our Constitution guarantees certain rights to the individual that provide the basis of our democracy. When various governmental branches combine efforts, this protection is jeopardized. Although enforcement of internal revenue laws is indeed a valid interest, it does not justify such a vitiation of the individual's rights.

The potential for this type of abuse is demonstrated in a recent case involving an IRS attorney appointed to conduct a grand jury investigation of alleged tax fraud.[197] The attorney had participated in the investigation of the taxpayer while an employee of the Internal Revenue Service and, in fact,

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193. *Id.*

194. *Id.* at 2365 n.15, 1978-2 U.S. Tax Cas. at 84,582 n.15. The Court seems to make a tenuous distinction between using civil information to determine criminal liability before the referral to the Justice Department and using it after the referral. It states that before the referral the possibility for abuse is "remote," but afterward, it is "inevitable." *Id.* at 2365 & n.15, 1978-2 U.S. Tax Cas. at 84,582 & n.15.

195. *See* General Motors Corp. v. United States (*In re* April 1977 Grand Jury subpoenas), 573 F.2d 936, 947, 1978-1 U.S. Tax Cas. ¶9413 at 84,096 (6th Cir.) (Merrit, J., dissenting), *appeal dismissed*, 584 F.2d 1366, 1978-2 U.S. Tax Cas. ¶9692 (6th Cir. 1978) (en banc).

196. *Id.* The dissent suggests that to continue this cooperation by "deputizing" an IRS attorney familiar with the facts to participate in the grand jury investigation would be a "natural, not a sinister, sequence of events." *Id. See* notes 197-200 *infra* and accompanying text.

197. General Motors Corp. v. United States (*In re* April, 1977 Grand Jury subpoenas), 573 F.2d 936, 1978-1 U.S. Tax Cas. ¶9413 (6th Cir. 1978), *appeal dismissed*, 584 F.2d 1366, 1978-2 U.S. Tax Cas. ¶9692 (6th Cir. 1978) (en banc) (after case was decided on the merits, Sixth Circuit en banc vacated panel opinion and dismissed GM's interlocutory appeal as improvidently granted, based on lack of appellate jurisdiction).

continued to be employed by the IRS.[198] The court found the appointment to be a conflict of interest resulting in an ethical violation.[199] As justification, the court stated that "Congress has granted to IRS adequate powers of investigation . . . and it should not be necessary for IRS to conduct a grand jury investigation in order to obtain evidence for its use in civil cases."[200]

Although the IRS has a statutory duty to investigate fraud,[201] the congressionally authorized purpose of the summons is not to aid in the prosecution of tax law violations but rather, "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability . . . ."[202] While upholding the right of the IRS to issue the summons when criminality is suspected, the courts frequently recognize the statutory authority of the IRS to investigate allegedly fraudulent or criminal activities.[203] However, the courts rarely note that the language of section 7602 authorizing issuance of the summons makes no reference to its use in criminal investigations.[204] Congress has granted to the IRS and Department of Justice the specific authority necessary to accomplish their separate purposes. Thus, their powers should not overlap any more than is required to achieve each distinct function.

SUGGESTED ALTERNATIVES

Recognizing the inherent danger of abuse in the use of the IRS summons,

198. *Id.* at 938, 1978-1 U.S. Tax Cas. at 84,089. This case arose from the 1975 audit of GM's 1972 tax returns and concerned GM's deductions from income of the cost of expense materials (materials which are used in production but do not become part of the finished product) when purchased. GM conducted a survey to determine its inventory expense as requested by the IRS. The IRS, however, questioned its accuracy and believed GM employees had falsified the survey. GM contended that IRS agents visited its plants and "berated" GM employees, using abusive tactics.

Believing the survey to be false, the IRS turned the investigation over to the Intelligence Division, which began requesting GM records and documents. When certain records were not produced, the IRS turned the case over to the Justice Department, which convened a grand jury. It was at this point that the Justice Department designated Piliaris, an attorney and accountant employed by the IRS, as a special attorney for the United States to assist in conducting the grand jury proceeding. Piliaris was familiar with the GM tax investigation and, in fact, had drafted the letter referring the case to the Justice Department for prosecution. He remained on the IRS payroll. *Id.* at 938-39, 1978-1 U.S. Tax Cas, at 84,088-89.

199. *Id.* at 942-44, 1978-1 U.S. Tax Cas. at 84,092-94. The court noted that even if no actual conflict existed, any appearance of impropriety violates Canon 9 of the Code of Professional Responsibility. *Id.*

200. *Id.* at 942, 1978-1 U.S. Tax Cas. at 84,092.

201. See note 25 *supra* and accompanying text.

202. Int. Rev. Code of 1939, ch. 34, §3614, 53 Stat. 438. This is a statutory predecessor of I.R.C. §7602. The legislative committees stated that they intended "no material change from existing law" when enacting the 1954 codification of I.R.C. §7602. H.R. REP. No. 1337, 83d Cong., 2d Sess., A436 (1954); S. REP. No. 1622, 83d Cong. 2d Sess., 617 (1954), *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 4025.

203. *See* United States v. LaSalle Nat'l Bank, 98 S. Ct. at 2364, 1978-2 U.S. Tax Cas. at 84,581-82 (1978).

204. For text of I.R.C. §7602, see note 7 *supra.*

the Administrative Conference of the United States suggested as one solution that special agents be permitted to issue a summons only when the purpose is primarily civil.[205] They would be required to obtain a court issued subpoena or search warrant for primarily criminal investigations. This proposal offers the taxpayer protection against arbitrary issuance. Also, the taxpayer, unaware of the government's interest in his suspected criminal violations and perhaps also unaware of his right to refuse compliance with the summons pending a court order, would be provided additional protection.[206] On the other hand, this approach might unduly hinder the IRS in its investigative capacity and overburden the courts with additional procedural matters.[207]

A compromise approach would require the special agent to discuss the individual case with and request approval from his immediate supervisor before issuing a summons. The agent might also be required to obtain approval from a higher IRS representative such as the District Chief of Intelligence or the Regional Director.[208] These proposals would provide some protection against arbitrary or impulsive summons issuance without subjecting the IRS to a time consuming judicial procedure.

A less burdensome alternative proposed by the Conference suggests that the summoned party be apprised of his rights and of available alternatives.[209] The IRS already requires that special agents advise individuals at the outset of an official interview of their fifth amendment rights and of their right to counsel.[210] Providing additional information concerning alternatives would

205. Note, *supra* note 1, at 539 & n.131 (citing ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, S. Doc. No. 266, 94th Cong., 2d Sess. 751 (1975)).

206. *See* Lipton, *Constitutional Rights in Criminal Tax Investigations*, 45 F.R.D. 323 (1968).

207. *See generally* Note, *supra* note 110. With the large number of IRS summons enforcement proceedings, courts would be kept quite busy issuing such subpoenas. This could lead to the procedure becoming automatic upon the IRS's recommendation and the consequent frustration of the plan.

208. Under IRS administrative policy, where a third party summons is served, advance supervisory approval is required. S. REP. NO. 94-938, 94th Cong., 2d Sess., 307 (1976), 1976-3 C.B. 367, *reprinted in* 4 U.S. CODE CONG. & AD. NEWS 3203.

209. There has been much litigation and commentary regarding the applicability of Miranda v. Arizona, 384 U.S. 436 (1966), to IRS proceedings. The Court has ruled that *Miranda* rights need not be given absent an arrest. *See* United States v. Habig, 474 F.2d 57, 1973-1 U.S. Tax Cas. ¶9189 (7th Cir.), *cert. denied*, 411 U.S. 972 (1973); Kohatsu v. United States, 351 F.2d 898, 1965-2 U.S. Tax Cas. ¶9715 (9th Cir. 1965); United States v. Sclafani, 265 F.2d 408, 1959-1 U.S. Tax Cas. ¶9357 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959); Duke, *supra* note 1, at 37-41.

210. The Internal Revenue Manual Handbook for Special Agents 242.13 (1977) provides:

"Duty to inform individual of his constitutional rights. 242.131 GENERAL; Special agents *must* abide by the instructions of IRM 9384 and any related Manual Supplements relative to advising individuals of their constitutional rights. 242.132 NON-CUSTODIAL INTERROGATIONS; (1) At the outset of the first official interview with the subject of an investigation, the special agent will properly identify himself/herself as a special agent of the Internal Revenue Service and will produce his/her authorized credential to the subject for examination. He/she will also state "As a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue Laws, and

curtail governmental evidence gathering before the taxpayer is fully aware of his rights and his option to refuse compliance pending court enforcement.[211] Unfortunately, these suggestions would not help the taxpayer during the enforcement proceeding when facing the problem of obtaining evidence showing that the IRS did not issue the summons in good faith.

SUGGESTED GUIDELINES FOR ORDERING DISCOVERY

Due process should require an evidentiary hearing with sufficient taxpayer discovery to disclose any existing evidence indicating lack of good faith or government failure to meet the *Powell* criteria for proper purpose. Discovery could be limited to a specific length of time, determined on a case-by-case basis, to avoid unnecessary delay.[212] An extension could be granted by the court when appropriate. Conversely, as suggested by the Fifth Circuit in *United States v. Roundtree*,[213] the court could curtail discovery if abused.

The amount of discovery which should be granted presents another judicial concern. The ultimate goal is to find the measure of discovery reasonably calculated to expose any improper purpose or absence of proper purpose without unduly hampering IRS functions. Even if the courts adopted a rule of reasonableness, the determination of how much discovery is "reasonable" is difficult because it is subject to differing interpretations.[214]

Courts might begin by granting the taxpayer discovery designed to produce sufficient evidence to indicate any improper governmental purpose. The court could separate the cases involving political figures or organizations from those involving the ordinary taxpayer. Those in the former category would

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related offenses. (2) The special agent will then advise the subject of the investigation substantially as follows: 'In connection with my investigation of your (or another person's) tax liability . . . I would like to ask you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding.'"

In some cases where the agent did not follow the provisions, courts have held that the manual is merely directory. *See, e.g.*, United States v. Duke, 379 F. Supp. 545, 1974-1 U.S. Tax Cas. ¶9475 (N.D. Ill. 1974).

211. The legislative history of I.R.C. §7609 regarding the third party summons, states that the committee expects the IRS to prepare a summary of the noticee's rights in layman's language which will be enclosed with each copy of the certified notice. Thus taxpayers and other noticees should not inadvertently lose their right to intervention. S. REP. NO. 94-938, 94th Cong., 2d Sess., (1976), 1976-3 C.B. 367, *reprinted in* [1976] 4 U.S. CODE CONG. & AD. NEWS 3204.

212. In United States v. Nunnally, 278 F. Supp. 843, 1968-1 U.S. Tax Cas. ¶9320 (W.D. Tenn. 1968), depositions and interrogatories were authorized for a period of three weeks. In some instances this might be sufficient, whereas other situations might require six months or more.

213. 420 F.2d 845, 1969-2 U.S. Tax Cas. ¶9733 (5th Cir. 1969). See notes 112-115 *supra* and accompanying text.

214. However, the "reasonable man" standard is frequently used in law; therefore, "reasonableness" is not impossible to determine.

generally need broader discovery due to the increased likelihood of an improper purpose.[215] In a case involving the average taxpayer where there is no immediate indication of improper purpose, different guidelines would apply. Generally, these taxpayers would not require broad discovery. Because there is no apparent reason to suspect improper purpose, however, it may be even more difficult to discover one when it does in fact exist. Four primary discovery tools which could be used are: (1) deposition, (2) interrogatory, (3) *in camera* examination of government documents, and (4) disclosure of government documents to the taxpayer.

The first, deposition, or its alternative, cross-examination of the special agent at the hearing,[216] is of limited value to the taxpayer, particularly if only the special agent is deposed.[217] The fourth discovery device, disclosure of IRS documents to the taxpayer, may be too broad, thus interfering with the functioning of the Service.[218] In balancing interests then, the interrogatory and the *in camera* inspection of government documents emerge as least likely to cause extreme hardship for either party. Both methods are particularly promising, as previously discussed,[219] to determine institutional purpose following the *LaSalle* holding.

Of the two alternatives, the *in camera* examination appears especially advantageous as evidenced by policy underlying the current trend toward increased governmental disclosure and public access to information.[220] When the Service has issued a summons for a legitimate purpose, it should not object to an *in camera* inspection of relevant documents but should welcome this means of expediting the summary proceeding while protecting its records from public disclosure. Additionally, the *in camera* examination is much less burdensome to the taxpayer than the interrogatory[221] and is more likely to reveal the true purpose of the IRS summons.[222] If the relevant documents are readily produced, the district court judge should have all information necessary to quickly dispose of the matter by enforcing the summons or authorizing further discovery. Use of the *in camera* examination procedure should more

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215. *See, e.g.*, United States v. Fensterwald, 553 F.2d 231, 1977-1 U.S. Tax Cas. ¶9266 (D.C. Cir. 1977), see notes 143-147 *supra*.

216. See notes 119-130 *supra* and accompanying text.

217. This follows from the *LaSalle* holding that institutional purpose is dispositive rather than the personal motive of the special agent. United States v. LaSalle Nat'l Bank, 98 S. Ct. 2357, 1978-2 U.S. Tax Cas. ¶9501 (1978).

218. See text accompanying note 151 *supra*.

219. See text accompanying notes 143-150 *supra* and 177-179 *supra*.

220. See text accompanying notes 157-162 *supra*.

221. An interrogatory necessitates determinations of the questions to ask to best elicit the information needed and to whom the interrogation should be directed. The latter may be particularly difficult because the structure of the IRS and the specific individuals within the Service are not generally known to the average taxpayer. On the other hand, it would be a simple matter to request an *in camera* examination of all records, files, and documents relevant to the taxpayer under investigation.

222. If all relevant documents are produced, they should present much clearer evidence of IRS purpose than testimony of one or two agents who would probably not be among the higher IRS officials and might not be aware of the total institutional purpose.