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**IRS USE OF THE CIVIL SUMMONS POWER:
THE INSTITUTIONAL GOOD FAITH REQUIREMENT—
UNITED STATES v. LASALLE NATIONAL BANK**

Evidence obtained against a taxpayer during the course of a civil tax investigation may be used in a subsequent criminal tax proceeding.¹ As a result, there has been considerable controversy² over the extent of the Internal Revenue Service's authority to gather information through the use of a civil summons.³ A recent decision by the United States Supreme Court, *United States v. LaSalle National Bank*,⁴ has increased the power of the IRS to obtain evidence for a criminal prosecution of a taxpayer by a civil summons. Particular safeguards⁵ that are applicable to criminal proceedings⁶ do not apply to a civil summons proceeding. Consequently, this decision represents a further infringement of the protections afforded to a taxpayer who may be the subject of a criminal tax prosecution.

This Note will discuss the *LaSalle* requirements for issuance of a civil summons from the perspective of the internal procedures followed by the Internal Revenue Service. It also will examine the statutory civil summons power of the IRS and the judicial evolution of standards applicable to its use. The Note will then explore the problems inherent in a liberal approach to the use of the civil summons. Finally, it will discuss the role of the courts in enforcing these judicially created standards and the problems which may be encountered under the new standards enunciated in *LaSalle*.

1. *Donaldson v. United States*, 400 U.S. 517 (1971); *United States v. Ponder*, 444 F.2d 816 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); *Venn v. United States*, 400 F.2d 207 (5th Cir. 1968); *Boren v. Tucker*, 239 F.2d 767 (9th Cir. 1956).

2. *See, e.g.*, *Fisher v. United States*, 425 U.S. 391 (1976) (a summons directing the taxpayers' attorneys to produce documents obtained from their accountants relating to the preparation of their tax returns did not violate the taxpayers' Fifth Amendment privilege against self-incrimination since that privilege is a personal privilege and protects only testimonial utterances); *Donaldson v. United States*, 400 U.S. 517 (1971) (a taxpayer had no protectable interest in the records of his former employer, and a summons is enforceable if issued in good faith and prior to a recommendation for criminal prosecution); *United States v. Powell*, 379 U.S. 48 (1964) (the IRS was not required to show probable cause to suspect fraud in order to obtain a taxpayer's records for which the three-year statute of limitations had run unless the taxpayer raised a substantial question that judicial enforcement of the summons would be an abuse of the court's process); *Reisman v. Caplin*, 375 U.S. 440 (1964) (taxpayers may not bring a suit in equity to obtain declaratory and injunctive relief against enforcement of a summons since they have an adequate remedy at law—the judicial proceeding necessary to enforce the summons).

3. Authority to issue an administrative summons is conferred upon the Internal Revenue Service by I.R.C. § 7602. *See* note 15 *infra*.

4. 437 U.S. 298 (1978).

5. The safeguards are both constitutional and statutory. *See* notes 89-96 and accompanying text *infra*.

6. For a discussion of the contrast in the constitutional rights of the person charged with tax fraud and those of the average criminal defendant, *see* Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation*, 44 TAXES 660 (1966).

AUTHORITY TO ISSUE CIVIL SUMMONS

The Internal Revenue Service was the first federal administrative agency authorized to use investigative subpoena powers.⁷ It uses its civil summons power to obtain financial records of taxpayers, including bank records,⁸ accountants' records,⁹ records of tax return preparers,¹⁰ and employment records.¹¹ The civil summons is also used to compel individuals to appear and testify.¹²

Legislative authorization for the IRS to issue civil summonses has remained substantially unchanged since codification of the 1939 Internal Revenue Code,¹³ when broad powers of investigation were customarily conferred by statute.¹⁴ Currently, section 7602¹⁵ of the Code authorizes the issuance of summonses, while sections 7402(b) and 7604(a) provide for their judicial enforcement.

7. The Act of June 30, 1864, ch.173, § 14, 13 Stat. 226-27, was the first legislative authorization to the IRS to issue summonses and to obtain judicial enforcement of those summonses. See Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations* (pt. 1), 47 MINN. L. REV. 939, 964-65 (1963).

8. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978).

9. *Couch v. United States*, 409 U.S. 322 (1973) (enforcing summons directing accountant to produce client's business records that had been given to him for preparation of client's tax returns).

10. *United States v. Carter*, 489 F.2d 413 (5th Cir. 1973) (enforcing summons requiring tax return preparer to produce names, addresses, and social security numbers of clients for whom he had prepared returns).

11. *Donaldson v. United States*, 400 U.S. 517 (1971) (enforcing summons to taxpayer's former employer requesting production of records of taxpayer's employment and compensation).

12. I.R.C. § 7602(2).

13. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 310, & 310 n.13 (1978). See Int. Rev. Code of 1939, §§ 3614, 3615, 3654, 53 Stat. 438-40, 446.

14. See 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3.03 (1958 & Supp. 1970), and note 16 *infra*.

15. I.R.C. § 7602. The section reads:

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 is authorized—

(1) To examine any books, papers, records, or any 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 may deem proper, to appear before the Secretary 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.

There is no statutory provision expressly prohibiting the issuance of a civil summons in aid of an investigation of criminal tax liability.¹⁶ Those limitations that are recognized have arisen as a result of judicial interpretations. Since the IRS has no power to enforce its own summonses, the courts traditionally have played a key role in determining the extent of the information that the IRS could obtain through the exercise of its civil summons power.

LIMITATIONS ON THE SUMMONS POWER

The first case in which the Supreme Court discussed the limitations on the use of the summons power was *Reisman v. Caplin*.¹⁷ This case held that taxpayers could not obtain declaratory and injunctive relief from enforcement of a summons, since they had an adequate remedy at law.¹⁸ The Court characterized an enforcement action as "an adversary proceeding"¹⁹ in which challenges to a summons could be judicially determined. In discussing the availability of a judicial forum where challenges to an IRS summons could be resolved, the Court, in dicta, stated that in an enforcement proceeding "[t]he witness may challenge the summons on any appropriate ground. This would include . . . the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution. . . ." ²⁰

The Supreme Court again discussed the adversary nature of a summons enforcement proceeding in *United States v. Powell*.²¹ In *Powell*, the Court

16. The dissenting justices in *LaSalle*, which was decided by a 5-4 majority, argue that since there is no express prohibition on the use of a civil summons to aid in a criminal investigation, an internal revenue summons should be enforceable if issued prior to a recommendation for criminal prosecution. 437 U.S. at 320. This argument overlooks the significance of the historical development of investigative powers of administrative agencies.

Courts prior to the 1940's were very hostile to the use of subpoenas to inquire into citizens' private affairs. See, e.g., *Jones v. SEC*, 298 U.S. 1 (1936) (an SEC subpoena was unenforceable where there was no probable cause established); *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924) (an FTC subpoena was unenforceable because it failed to show probable cause and to state its demands in specific terms); *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (a Congressional subpoena was unenforceable because Congress had no power to inquire into the private affairs of citizens). See 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3.01 (1958 & Supp. 1970). Consequently, Congress began to confer broad grants of investigatory powers to these agencies to counteract the effect of the narrow judicial interpretations of the statutes, *id.* at § 3.03, with the intention that the agencies would thereby be able to exercise at least the powers expressly spelled out in the grants. Since the statutory provisions granting the IRS the power to use the civil summons date back to 1939, they should today be read to authorize only those uses specifically granted by Congress. See 437 U.S. at 316-17 n.18 and note 13 *supra*.

17. 375 U.S. 440 (1964).

18. *Id.* at 445-50. For a general discussion of the Supreme Court's decision in *Reisman*, see Bender, *The Implications of Reisman v. Caplin in Fraud Cases*, 23 N.Y.U. INST. FED. TAXATION 1293 (1965).

19. *Reisman v. Caplin*, 375 U.S. 440, 446 (1964).

20. *Id.* at 449. The second defense suggested by the Court was that the material was protected by the attorney-client privilege. *Id.* But see note 93 and accompanying text *infra*.

21. 379 U.S. 48 (1964). For a general discussion of the *Powell* decision, see Note, *Proof*

delineated standards which the IRS must satisfy in order to obtain enforcement of a summons. These standards are that: (1) the investigation is being conducted for a legitimate purpose; (2) the inquiry is relevant to that purpose; (3) the IRS does not already possess the information sought; and (4) the administrative steps set out in the Internal Revenue Code have been followed.²² Once the IRS has made this showing, the burden shifts to the taxpayer to show that enforcing the summons would result in an abuse of the court's process. This abuse would be found when a summons had been issued for an improper purpose, such as "to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation."²³

Several years later, in *Donaldson v. United States*,²⁴ a taxpayer challenged an IRS summons on the ground that it could not be used to aid an investigation which potentially could result in a recommendation that he be criminally prosecuted.²⁵ The taxpayer based his argument on the dictum in *Reisman*.²⁶ The *Donaldson* Court analyzed the *Reisman* dictum and determined that it was only applicable to situations in which a criminal charge is pending or to an investigation "solely for criminal purposes."²⁷ After examining the statutory authority for use of civil summonses, the Court concluded that their use in investigating potentially criminal conduct was clearly authorized.²⁸ It then held²⁹ that an internal revenue summons was enforceable if it was "issued in good faith and prior to a recommendation for criminal prosecution."³⁰

Required to Open a "Closed Year"—United States v. Powell, 6 B.C. INDUS. & COM. L. REV. 922 (1965); Comment, *Commissioner May Examine Taxpayer's Records for Years Barred by Statute of Limitations Without Proving Reasonable Suspicion of Fraud—United States v. Powell*, 63 MICH. L. REV. 939 (1965); Note, *Enforcement of Subpoena Duces Tecum for Years Barred by Statute of Limitations*, 38 TEMP. L. Q. 462 (1965); 39 ST. JOHN'S L. REV. 397 (1965).

22. *United States v. Powell*, 379 U.S. 48, 57 (1964). Enforcement has been denied when these criteria were not met. See, e.g., *United States v. Coopers & Lybrand*, 550 F.2d 615, 621 (10th Cir. 1977), *aff'g* 413 F.Supp. 942 (D. Colo. 1975) (enforcement denied on failure to show relevancy); *United States v. Matras*, 487 F.2d 1271 (8th Cir. 1973) (enforcement denied when the IRS failed to show the relevancy of information demanded and failed to show it was not already in possession of the requested material).

23. *United States v. Powell*, 379 U.S. 48, 58 (1964).

24. 400 U.S. 517 (1971). The case involved a taxpayer's attempt to intervene in a proceeding to enforce summonses issued to his former employer to obtain records of his employment and compensation during the years that were being investigated.

25. *Donaldson v. United States*, 400 U.S. 517, 532 (1971).

26. See text accompanying note 20.

27. *Donaldson v. United States*, 400 U.S. 517, 533 (1971).

28. *Id.* at 535.

29. The holding with respect to the use of the summons was an alternate holding, since the main issue in the case was decided on the question of the taxpayer's standing to intervene in the enforcement proceeding. It was determined that he had no "proprietary interest" in the records of his former employer and therefore no protectable interest that would grant him the right to intervene. *Id.* at 530-31.

30. *Id.* at 536. For a discussion of the good faith requirement in *Donaldson*, see Note,

This, however, did not resolve the problem. In *United States v. LaSalle National Bank*³¹ it became necessary to take the *Donaldson* rationale one step further. The Court in *LaSalle* was required to determine the limitations applicable to the use of a civil summons where the sole purpose of the agent conducting the investigation was to gather evidence of criminal tax liability.

THE LASALLE DECISION

Development of the Case

The *LaSalle* case began when an IRS special agent³² was assigned³³ to investigate the tax liability of a Chicago taxpayer.³⁴ The nature of the assignment was "to investigate the possibility of any criminal violations of the Internal Revenue Code."³⁵ The tax returns of the taxpayer had disclosed rental income from real estate which was held in Illinois land trusts³⁶ by the LaSalle National Bank as trustee.³⁷ In order to determine the accuracy of the taxpayer's returns, the agent issued two summonses under the authority of section 7602 seeking production of the bank's files on those trusts and all other related documents in its possession.³⁸ On the advice of counsel, the bank refused to produce the requested material.

The government then filed a petition in the district court for enforcement of the summonses.³⁹ After hearing testimony⁴⁰ and examining the IRS case

Taxpayer Intervention at Summary Proceedings to Enforce an Internal Revenue Summons, 32 MD. L. REV. 143, 150-55 (1972).

31. 437 U.S. 298 (1978). The Court states that *LaSalle* is intended as a supplement to the decision in *Donaldson*. *Id.* at 299.

32. A special agent is a member of the Intelligence Division of the IRS, whose primary responsibility is the investigation of criminal tax liability, 26 C.F.R. § 601.107(a) (1978). Tax investigations are also conducted by revenue agents, who are members of the Audit Division of the Service and are primarily responsible for civil investigations, 26 C.F.R. § 601.105(b) (1978). Although the Intelligence Division and the Audit Division have been redesignated as the Criminal Enforcement Division and the Examination Division, this Note will refer to them by their former designations. See IRS News Release, February 6, 1978.

33. Special Agent Olivero had requested the assignment after receiving information from a confidential informant and from an unrelated investigation. 437 U.S. at 300.

34. Olivero received the assignment in 1975 to investigate the taxable years 1970-1972 of the taxpayer, John Gattuso. *Id.*

35. *Id.*

36. An Illinois land trust is a form of ownership of property in which the trustee holds both legal and equitable title to real property. The beneficiary's interest is solely an interest in personal property, although the beneficiary is entitled to all the benefits and enjoyment of the real estate. *Id.* at 301 n.2. ILL. REV. STAT. ch. 29, § 8.31 (1977).

37. This fact was revealed by land trust files collected by the IRS from banks. 437 U.S. at 301.

38. The summons specifically requested "all deeds, options, correspondence, closing statements, and seller statements, escrows, and tax bills pertaining to all property" held in the trusts in question. 437 U.S. at 302.

39. This procedure is authorized by I.R.C. §§ 7402(b) and 7604(a).

40. The testimony included Olivero's admission that the nature of the assignment was to investigate the possibility of criminal tax liability of Gattuso, 437 U.S. at 300, and testimony by a member of the law firm representing Gattuso and the bank that Olivero had told him that the

file, the court determined that the special agent had focused his investigation on the possible criminal activities of the taxpayer and was conducting his investigation for the sole purpose of "unearthing evidence of criminal conduct" by the taxpayer.⁴¹ It concluded that the use of the summons was improper under such circumstances,⁴² and accordingly denied enforcement.

Upon appeal by the government, the Seventh Circuit characterized the court's determination that the agent was conducting a solely criminal investigation as a finding of fact⁴³ and limited its review to an inquiry into whether the proper legal test had been applied. After examining the ways in which the other circuits⁴⁴ had interpreted the *Donaldson* standard, the court of appeals concluded that use of an internal revenue summons solely for criminal purposes was "a quintessential example of bad faith."⁴⁵ It then affirmed the decision of the district court.⁴⁶

The Supreme Court's Decision

The Supreme Court accepted the lower court's determination that the investigation was conducted solely for the purpose of obtaining evidence of criminal conduct. It concluded that *Donaldson* was not controlling in such a fact situation.⁴⁷ Rather, the Court stated that the issue before it was

investigation "was strictly related to criminal violations of the Internal Revenue Code." *Id.* at 303.

41. *United States v. LaSalle Nat'l Bank*, 76-1 U.S. Tax Cas. ¶ 9407, at 84,073; 37 A.F.T.R.2d ¶ 76-582, at 76-1240 (N.D. Ill. 1976).

42. The Court relied on *Reisman* and *Donaldson* to conclude that a summons issued before a recommendation for prosecution has been made is not issued in good faith and is unenforceable if the "focus and determination" of the IRS is on "criminal prosecution as the end and goal of its investigation." 76-1 U.S. Tax Cas. ¶ 9407, at 84,072; 37 A.F.T.R.2d ¶ 76-582, at 76-1240.

43. *United States v. LaSalle Nat'l Bank*, 554 F.2d 302, 305 (7th Cir. 1977), *rev'd*, 437 U.S. 298 (1978).

44. *See United States v. Friedman*, 532 F.2d 928, 932 (3d Cir. 1976) (a summons may be enforced if (1) the Intelligence Division of the IRS has not yet recommended prosecution, (2) the agent has not already formed a firm purpose to recommend prosecution, (3) the summons is not intended to harass the taxpayer, and (4) the IRS has not already inspected the material requested in the summons); *United States v. Zack*, 521 F.2d 1366, 1368 (9th Cir. 1975) (a summons used solely for criminal prosecution was not in good faith and therefore unenforceable even though issued prior to a recommendation for prosecution); *United States v. Weingarden*, 473 F.2d 454, 460 (6th Cir. 1973) ("the standard is whether the sole purpose of the issuance of the summons is for criminal prosecution"); *United States v. Wall Co.*, 475 F.2d 893, 895 (D.C. Cir. 1972) (an issuance of a summons would presumably be in bad faith if the investigatory agent had already decided to recommend criminal prosecution, even though no formal recommendation had been made).

45. 554 F.2d at 309.

46. *Id.*

47. 437 U.S. at 307. The *LaSalle* fact situation was distinguished from the *Donaldson* situation. In *Donaldson*, there was only a possibility that the investigation which the summons had been issued to aid could result in criminal prosecution of the taxpayer. In contrast, in *LaSalle* the taxpayer was being investigated for the sole purpose of discovering evidence of criminal conduct. *Id.*

whether a finding that a summons was issued for a solely criminal purpose led inevitably to the conclusion that such a summons was not issued "in good-faith pursuit of congressionally authorized purposes of § 7602."⁴⁸

In order to resolve the issue, the *LaSalle* Court adopted the approach followed in *Donaldson*.⁴⁹ It first analyzed the statutory enforcement system to ascertain the intent of Congress, giving special consideration to the inter-related nature of the civil and criminal penalties for tax fraud,⁵⁰ and concluded that the absence of statutory distinction between the civil and criminal aspects of a tax fraud investigation must be reflected in any limitation placed on the good faith use of an internal revenue summons.⁵¹ The internal organization of the Internal Revenue Service was also examined by the Court in an attempt to determine the importance of the special agent's role⁵² in a tax fraud investigation. Finally, the Court explored the policy reasons⁵³ for limiting the use of a civil summons in obtaining evidence for criminal prosecutions.

After considering these factors, the Court held that certain requirements must be met for a summons to be enforceable. First, the summons must be issued⁵⁴ prior to an IRS recommendation of criminal prosecution to the Department of Justice. This holding settled a dispute over whether a recommendation for criminal prosecution takes place at the time the IRS recommends criminal prosecution to the Department of Justice, or whether the key recommendation occurs at some level within the IRS.⁵⁵ Second, the

48. *Id.* at 308. The Court contended that its responsibility in *LaSalle* was "to examine the limits of the good-faith use of an Internal Revenue summons issued under § 7602." *Id.* at 307.

49. The *Donaldson* Court began its analysis by reviewing the statutory structure provided by Congress for the issuance and enforcement of IRS summonses, *Donaldson v. United States*, 400 U.S. 517, 523-25 (1971), adopting the review of this structure outlined in *Reisman v. Caplin*, 375 U.S. 440, 445-46 (1964). The Court also examined the internal organization of the IRS. 400 U.S. 517, 534-35.

50. 437 U.S. at 308. A taxpayer who wilfully files a false or fraudulent tax return is subject to criminal penalties under I.R.C. §§ 7206 and 7207, and to a civil penalty in the amount of 50% of the underpayment of the tax, under I.R.C. § 6653(b).

51. 437 U.S. at 311.

52. The layers of review through which an agent's recommendation for criminal prosecution must pass were considered significant by the Court, *Id.* at 314-16. *But see* notes 70-87 and accompanying text *infra* for a criticism of this position.

53. The Court advanced the following policy reasons for imposing a "prophylactic restraint" on the use of the summons power after criminal prosecution has been recommended: (1) the possibility of broadening the Justice Department's right to discovery in criminal litigation; and (2) the possible infringement of the "role of the grand jury as the principal tool of criminal accusation." *Id.* at 312.

54. Significantly, a summons issued prior to a recommendation for criminal prosecution may be enforced after this recommendation is made. *United States v. Cromer*, 483 F.2d 99, 101 (9th Cir. 1973); *United States v. Magnus, Mabee & Reynard, Inc.*, 311 F.2d 12, 17 (2d Cir. 1962), *cert. denied*, 373 U.S. 902 (1963). *See* Comment, *Use of the Summons, Intervention and Constitutional Rights*, 2 HOFSTRA L. REV. 135, 149-50 (1974).

55. *Compare* *United States v. Hodge and Zweig*, 548 F.2d 1347, 1351 (9th Cir. 1977) (holding that the recommendation to the Department of Justice is the operative recommendation);

civil summons must be used in the good faith pursuit of the congressionally authorized purposes of section 7602,⁵⁶ a concept encompassing two separate requirements. Not only were the good faith standards established in *Powell*⁵⁷ to be satisfied, but the IRS "in an institutional sense" could not be shown to have abandoned pursuit of a civil tax liability of the taxpayer.⁵⁸ The Court further stated that the personal motivation of the special agent involved was not dispositive of the issue of good faith,⁵⁹ and that the burden of proof was on the taxpayer to prove absence of any civil purpose for the summons. It then reversed the decision of the Seventh Circuit and remanded the case to the district court⁶⁰ for a determination of whether there had been a total absence of civil purpose for the summons.

The Court's enunciation of a standard of institutional good faith on the part of the IRS was an unexpected⁶¹ interpretation of the good faith requirement established in the earlier decisions.⁶² The courts of appeal had been split in their interpretations of the good faith standard. Some had maintained that the subjective good faith of the individual agent conducting the investigation was necessary,⁶³ while others held that an objective test for good faith was met whenever a summons was issued prior to a recommendation for

and *United States v. Billingsley*, 469 F.2d 1208, 1210 (10th Cir. 1972) (also finding the recommendation to Justice operative), *with United States v. Lafko*, 520 F.2d 622, 625 (3d Cir. 1975) (suggesting that a recommendation within the IRS might be sufficient).

56. 437 U.S. at 318.

57. *See* notes 21-23 and accompanying text *supra*.

58. 437 U.S. at 318.

59. The Court's reasoning in reaching this conclusion parallels the reasoning in *Donaldson*. The *Donaldson* Court refused to draw the line between permissible civil and impermissible criminal purposes for use of a summons at the point of the special agent's entry into an investigation, because to do so would "stultify enforcement of federal law." 400 U.S. 517, 535-36. Similarly, the *LaSalle* Court refused to draw that line on the basis of a special agent's personal intent, because to do so would "unnecessarily frustrate the enforcement of the tax laws." 437 U.S. at 316.

60. *Id.* at 319.

61. 437 U.S. at 319 (Stewart, J., dissenting). Prior to this opinion, the requirement of good faith had been read by the lower courts as referring only to the good faith of the special agent conducting the investigation. *See, e.g.*, *United States v. Friedman*, 532 F.2d 928, 932 (3d Cir. 1976); *United States v. McCarthy*, 514 F.2d 368, 375 (3d Cir. 1975); *United States v. Wall Corp.*, 475 F.2d 893, 895 (D.C. Cir. 1972). No other court has ever suggested or applied a standard of "institutional" good faith.

62. *Donaldson v. United States*, 400 U.S. 517, 536 (1971) (requiring a summons to be issued in good faith and before a recommendation for criminal prosecution); *United States v. Powell*, 379 U.S. 48, 58 (1964) (stating that a summons was issued for an improper purpose if the "particular investigation" was not in good faith); *Reisman v. Caplin*, 375 U.S. 440, 449 (1964) (stating that a summons could be challenged if issued for an improper purpose, such as for use in a criminal prosecution). These cases did not define "good faith" nor did they specify that the good faith of the particular agent was required. However, they also did not indicate that good faith was only required of the IRS "in an institutional posture."

63. *See United States v. Zack*, 521 F.2d 1366, 1368 (9th Cir. 1975); *United States v. Lafko*, 520 F.2d 622, 625 (3d Cir. 1975); *United States v. McCarthy*, 514 F.2d 368, 374-75 (3d Cir. 1975); *United States v. Weingarden*, 473 F.2d 454, 460 (6th Cir. 1973).

criminal prosecution.⁶⁴ The one-step objective test was endorsed by the government and the dissenting justices in *LaSalle*.⁶⁵ The new standard, requiring institutional good faith from the IRS, represents a compromise between the subjective good faith standard and the one-step objective test. As is often the result when such a compromise is reached, this new standard may prove to be both unrealistic and unworkable.⁶⁶

VALIDITY OF THE INSTITUTIONAL GOOD FAITH STANDARD

The concept of institutional good faith established in *LaSalle* presents certain problems as it relates to the internal procedures followed by the IRS. Good faith has been defined as "[a]n honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render [the] transaction unconscientious."⁶⁷ Its existence can be ascertained by examining the subjective intent of a party⁶⁸ or by using objective standards.⁶⁹ The *LaSalle* court's compromise standard, the institutional good faith standard, is neither a strictly subjective test, based on the motivation of the individual agent issuing the summons, nor a completely objective standard, considering only the time of issuance of the summons. Examination of this standard from the perspective of the internal procedures of the IRS demonstrates its questionable validity.

Internal responsibility for the investigation of all alleged violations of the Internal Revenue Code rests with the Intelligence Division of the IRS.⁷⁰

64. This position had been accepted by a number of the lower courts. *Sée* *United States v. Morgan Guaranty Trust Co.*, 572 F.2d 36, 41-42 (2d Cir. 1978); *United States v. Hodge and Zweig*, 548 F.2d 1347, 1351 (9th Cir. 1977); *United States v. Billingsley*, 469 F.2d 1208, 1209 (10th Cir. 1972); *United States v. National State Bank*, 454 F.2d 1249, 1252 (7th Cir. 1972); *United States v. Troupe*, 438 F.2d 117, 119 (8th Cir. 1971).

65. 437 U.S. at 320-21 (Stewart, J., dissenting).

66. 437 U.S. at 321 (Stewart, J., dissenting).

67. *See* BLACK'S LAW DICTIONARY 822 (4th ed. 1968).

68. *See, e.g.,* *Nora Springs Co-op Co. v. Brandau*, 247 N.W.2d 744, 750 (Iowa Sup. Ct. 1976) (good faith under Uniform Commercial Code refers to honesty in fact); *Farmer's Co-op Elevator, Inc. v. State Bank*, 236 N.W.2d 674, 678 (Iowa Sup. Ct. 1975) (test of good faith under U.C.C. is wholly subjective test of honesty); *Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 207 N.W.2d 282, 287 (Minn. Sup. Ct. 1973) (good faith test under U.C.C. requires honesty of intent). *See* note 63 and accompanying text *supra*.

69. *See, e.g.,* *United States v. Rundle*, 368 F.Supp. 1186, 1190 (E.D. Pa. 1973) (good faith required of prison warden under Civil Rights Act of 1871 constituted reasonable reliance on existing procedures rather than subjective absence of malice or ill will); *Meyer v. State of New York*, 344 F.Supp. 1377, 1378 (S.D.N.Y. 1971) (good faith required by statute allowing appeals in forma pauperis was judged by objective standards). *See* notes 64-65 and accompanying text *supra*.

70. 26 C.F.R. § 601.107(a) (1978); [1979] 5 INTERNAL REVENUE MANUAL—AD. (CCH) ¶ 9122.1. (The Internal Revenue Manual is the official policy manual of the IRS, which is reprinted by Commerce Clearing House.) For an overview of the operating procedures of the Intelligence Division, *see* Carles, *Special Agent's Manual Gives Insight into IRS Procedures for Tax Fraud Audit*, 43 J. TAX. 290 (1975); Walters, *IRS Intelligence Division Operating Procedures: From 1040 Through Criminal Trial*, 32 N.Y.U. INST. FED. TAX. 1195 (1974).

Special agents carry out the actual investigations⁷¹ and institutional policy is to leave experienced agents largely unsupervised when conducting investigations.⁷² The agents have the authority to issue civil summonses on their own initiative,⁷³ with no review of the agent's actions or the appropriateness of issuing a summons being made at the time the summons is served.⁷⁴

If the subpoenaed party does not comply within six working days, enforcement action will be undertaken.⁷⁵ It is at this point that the first review of the agent's conduct takes place. A description of the investigation and a recommendation must be given to the head of the Intelligence Division⁷⁶ before enforcement proceedings are undertaken.⁷⁷ If the request for enforcement is approved, the report is then sent on to the regional counsel for his approval.⁷⁸

The significant lack of supervision prior to issuance of a summons is made possible for two reasons: (1) the express goal of the IRS is to achieve "the highest possible degree of voluntary compliance with the internal revenue laws";⁷⁹ and (2) a common practice of many IRS agents is to use the summons power as a threat to coerce voluntary compliance.⁸⁰ If a taxpayer complies voluntarily with an agent's request, no review of the agent's conduct will ever take place. The agent is the only representative of the IRS the taxpayer will ever encounter. Consequently, the good faith of the agent⁸¹ is of more practical concern to the taxpayer than the "motivation" of the institution, which at this point in the process is only aware of the taxpayer through the agent.

The internal policies of the IRS tend to cast doubt on whether it does in fact exercise good faith as a matter of policy. The *LaSalle* Court contended that only in an extraordinary situation would an IRS investigation be solely criminal, as opposed to being interrelated⁸² in nature.⁸³ It stated that a

71. 26 C.F.R. § 601.107(a) (1978).

72. [1979] 5 INTERNAL REVENUE MANUAL—AD. (CCH) ¶ 9162(2).

73. Commissioner's Del. Order No. 4 (rev. 6), 1978-46 I.R.B. 15, 769 STAND. FED. TAX REP. (CCH) ¶ 6298; T.D. 7297, 1974-1 C.B. 364, 749 STAND. FED. TAX REP. (CCH) ¶ 6303.

74. After an agent has served a summons, the original of the summons is placed in the administrative file of the division issuing the summons. [1979] 5 INTERNAL REVENUE MANUAL—AD. (CCH) ¶ 9367.

75. *Id.* at ¶ 936(10).2(4).

76. *Id.* at ¶ 936(10).4(1),(2).

77. Special Agent Olivero, however, testified in *LaSalle* that he had made no report about the case to his superiors at the time the enforcement petition was filed against the *LaSalle National Bank*, 437 U.S. at 302. Therefore, it is evident that agents do not always comply with even these minimal review procedures.

78. [1979] 5 INTERNAL REVENUE MANUAL—AD. (CCH) ¶ 936(10).4(2).

79. 26 C.F.R. § 601.107(a) (1978).

80. [1979] 5 INTERNAL REVENUE MANUAL—AD. (CCH) ¶ 9362.4.

81. The Court conceded that the motivation of the individual special agent may have to be examined in evaluating the good faith requirements of *Powell* (see notes 21-23 and accompanying text *supra*), 437 U.S. at 316, n.17.

82. See note 50 and accompanying text *supra*.

83. 437 U.S. at 314.

single agent's attempt to build a criminal case does not necessarily negate the institutional responsibility to determine and collect civil tax liabilities.⁸⁴

According to the IRS's own policies, however, all civil action with respect to a taxpayer must be frozen while a criminal investigation is in progress,⁸⁵ unless it is determined that the civil action will not jeopardize "the successful criminal prosecution of the taxpayer."⁸⁶ This represents a policy decision to give priority to successful criminal prosecutions. It also suggests that institutional policy is to manipulate the relevant procedures in such a manner as to have them comply with the letter of the law while violating the spirit. If civil actions were not frozen during criminal investigations, the IRS could proceed to a final settlement of civil liability, thus precluding further use of the civil summons.⁸⁷ However, if civil action is suspended, the summons can be used freely to aid criminal investigations, since pursuit of civil tax liability has not yet been abandoned. Such a policy is indicative of a lack of institutional good faith.

IMPACT OF *LaSALLE*

The Supreme Court's decision in *LaSalle* has expanded the scope of the IRS's power to obtain, through a civil summons, evidence that may be used against a taxpayer in a criminal tax prosecution. This decision will limit the ability of the courts to fulfill their traditional function of safeguarding the interests of the taxpayer in summons enforcement proceedings,⁸⁸ since one effective check on the summons power, the requirement of good faith, has been narrowly interpreted. The expanded power of the IRS will aggravate some of the problems which already exist in this area and will probably create new ones.

One of the major existing problems in allowing the liberal use of the administrative summons power is the restricted scope of many constitutional and statutory protections available to a defendant in the context of an administrative summons proceeding.⁸⁹ For example, the Fourth Amendment requirement that searches and seizures be reasonable has been found to be satisfied when the administrative summons was not indefinite and was shown

84. *Id.*

85. [1979] 2 INTERNAL REVENUE MANUAL—AUDIT (CCH) ¶ 4565.41.

86. *Id.*

87. See *United States v. Tosie*, 336 F.Supp. 1051, 1052 (E.D. Mo. 1971) (denying enforcement of a summons where the taxpayer had previously settled the fact of and the amount of its civil liability because no proper purpose for the summons existed.)

88. See *Donaldson v. United States*, 400 U.S. 517, 524-25 (1971); *Reisman v. Caplin*, 375 U.S. 440, 446 (1964).

89. See *Hewitt, Constitutional Rights of the Taxpayer in a Fraud Investigation*, 44 TAXES 660 (1966); *Hunke, The Lawyer's Role in a Criminal Tax Evasion or Fraud Case Prior to Indictment*, 46 N. DAK. L. REV. 9 (1969); *Johnston, Present Status of Taxpayer's Rights and Privileges with Respect to Self-Incrimination, Searches and Seizures, and Privileged Communications*, 26 S. CALIF. TAX INST. 1017 (1974).

to be relevant to the investigation being conducted.⁹⁰ Also, the Fifth Amendment protection against compulsory self-incrimination has been limited to testimonial utterances⁹¹ and does not apply to corporations.⁹² The attorney-client privilege was held to apply only to information communicated to an attorney in professional confidence,⁹³ and accountant-client privileges provided by state law have not been recognized in internal revenue proceedings.⁹⁴ The work-product privilege also has afforded little protection. In fact, it has been seriously questioned whether that privilege has any rele-

90. See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (FTC did not exceed its investigatory power by ordering salt companies to file reports showing continued compliance with a cease and desist order because the inquiry was within the authority of the agency, not indefinite, and reasonably relevant); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946) (subpoenas duces tecum issued by the Department of Labor ordering corporations to produce specified records to determine existence of violations of Fair Labor Standards Act were relevant to authorized purposes of the inquiry); *United States v. Carter*, 489 F.2d 413, 415 (5th Cir. 1973) (summons to tax preparer requesting names, addresses, and social security numbers of clients was relevant and material); *United States v. Giordano*, 419 F.2d 564, 566 (8th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970) (summons requiring production of corporate records relating to operation of corporation was not overly broad); *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968) (summons issued to bank requesting records of transactions of four customers were not overly indefinite).

91. *Fisher v. United States*, 425 U.S. 391, 408 (1976) (documents in the hands of the taxpayers' attorney were not protected by taxpayers' Fifth Amendment privilege because production of documents, however incriminating, involves no testimonial self-incrimination). For a general discussion of the Fifth Amendment's application to private papers, see Note, *Private Papers Now Subject to Reasonable Search and Seizure*, 26 DEPAUL L. REV. 848, 850-61 (1977).

92. E.g., *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 205-08 (1946) (Fifth Amendment did not protect a corporation or its officers from producing corporate records and papers in response to an administrative subpoena or order); *United States v. White*, 322 U.S. 694, 700-01 (1944) (Fifth Amendment applies only to natural persons); *United States v. Scornovacco's Restaurant, Inc.*, 528 F.2d 19, 24 (7th Cir. 1975) (Fifth Amendment privilege was not available to a sole proprietorship that was validly incorporated under state law and was holding itself out as a corporation); *United States v. Giordano*, 419 F.2d 564, 569 (8th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970) (order to produce corporate books and records did not violate individual's privilege against self-incrimination). See Lipton & Petrie, *Constitutional Safeguards and Corporate Records*, 23 N.Y.U. INST. FED. TAX. 1315, 1325-30 (1965).

93. *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974) (attorney's records relating to receipt of fees were not privileged); *United States v. Brown*, 478 F.2d 1038, 1040 (7th Cir. 1973) (three-page memorandum prepared by attorney summarizing notes and legal judgments made at a meeting was not protected by attorney-client privilege); *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963) (summons requiring attorney to answer questions on date and general nature of legal services performed and on nature of documents retained, and requiring production of retained income tax returns, did not violate the attorney-client privilege). For further discussion of the attorney-client privilege in the IRS summons setting, see Comment, *Use of the Summons, Intervention and Constitutional Rights*, 2 HOFSTRA L. REV. 135, 185-225 (1974).

94. E.g., *United States v. Bowman*, 358 F.2d 421, 422-23 (3d Cir. 1965); *Falsone v. United States*, 205 F.2d 734, 741-42 (5th Cir. 1953), *cert. denied*, 346 U.S. 864 (1953); *United States v. Tsukuno*, 341 F.Supp. 839, 840-41 (N.D. Ill. 1972); *United States v. Jaskiewicz*, 278 F.Supp. 525, 530-31 (E.D. Pa. 1968).

vancy in an IRS enforcement proceeding.⁹⁵ Where its relevancy has been recognized, the burden of proof placed on the government to overcome this protection has been light.⁹⁶ If the IRS is given the power to use the summons more liberally, an expanded group of taxpayers probably will be subjected to administrative summons proceedings. Accordingly, the impact of these restrictions on the taxpayer's constitutional and statutory protections will become proportionally more serious.

Another important problem in this area is that only limited discovery is available to a taxpayer contesting an internal revenue summons. Although the taxpayer has the right to use the discovery tools available under the Federal Rules of Civil Procedure,⁹⁷ that right has been restricted⁹⁸ by the courts. Concern that allowing extensive discovery to taxpayers would create attendant long delays and thus frustrate the legitimate actions of the IRS was the rationale underlying these restrictions.⁹⁹ Thus, in order to be allowed discovery, a taxpayer resisting enforcement of a summons is required to go beyond a mere allegation that the purpose for the summons was improper and instead must offer proof that enforcement would be an abuse of the court's process.¹⁰⁰

95. *United States v. McKay*, 372 F.2d 174, 176 (5th Cir. 1967).

96. *United States v. Brown*, 478 F.2d 1038, 1041 (7th Cir. 1973) (government met its burden of showing good cause to overcome work-product privilege by expressing a good faith belief that the document summoned was necessary for a correct determination of the taxpayer's tax liabilities and that the information contained therein could be obtained from no other source).

97. FED. R. CIV. P. 81(a)(3) authorizes the use of the discovery procedures contained therein. See *United States v. Powell*, 379 U.S. 48, 58 n.18 (1964); *United States v. Church of Scientology of Cal.*, 520 F.2d 818, 821 (9th Cir. 1975); *United States v. Moriarty*, 278 F.Supp. 187, 189 (E.D. Wis. 1967); *Kennedy v. Rubin*, 254 F.Supp. 190, 192 (N.D. Ill. 1966).

98. The district courts have discretion under FED. R. CIV. P. 81(a)(3) to restrict discovery. See, e.g., *United States v. Church of Scientology of Cal.*, 520 F.2d 818, 824 (9th Cir. 1975); *United States v. Turner*, 480 F.2d 272, 275-76 (7th Cir. 1973); *United States v. Bell*, 448 F.2d 40, 42 (9th Cir. 1971); *United States v. Benford*, 406 F.2d 1192, 1194 (7th Cir. 1969). Discovery is usually limited for policy reasons, *United States v. Proctor & Gamble*, 356 U.S. 677, 681 (1958); *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953); *Hickman v. Taylor*, 329 U.S. 495, 512 (1947).

99. See *United States v. Salter*, 432 F.2d 697, 700-01 (1st Cir. 1970); *United States v. Troupe*, 317 F. Supp. 416, 422 (W.D. Mo. 1970), *aff'd*, 438 F.2d 117 (8th Cir. 1971).

100. In *United States v. Salter*, 432 F.2d 697, 700 (1st Cir. 1970), the court established a procedure to be followed in granting discovery. It ruled that if a taxpayer offered some support of its allegations, the district court should conduct a hearing at which the summoinee could examine the agent concerning his purpose in issuing the summons. The court could then make a determination on whether further discovery was necessary to establish the validity of the government's purpose.

This procedure has been endorsed and followed in other circuits. See *United States v. Church of Scientology of Cal.*, 520 F.2d 818, 824-25 (9th Cir. 1975) (church's allegations of bad faith harassment raised sufficient doubts about the purpose of the IRS to require a limited evidentiary hearing to determine whether discovery was warranted); *United States v. McCarthy*, 514 F.2d 368, 376 (3d Cir. 1975) (allegations that enforcement of summons would result in a second inspection or that the IRS already possessed the information sought were sufficient to warrant evidentiary hearing); *United States v. National State Bank*, 454 F.2d 1249, 1252 (7th Cir. 1972) (mere allegations of improper purpose in issuance of summons were insufficient to justify further discovery).

The courts have applied a balancing test¹⁰¹ to determine whether, and to what extent, discovery should be allowed. The taxpayer's difficulty in meeting his burden of proving that the summons was improper is weighed against the government's need for efficient tax collection. Obtaining discovery in a summons enforcement proceeding has become almost as difficult¹⁰² as successfully contesting an IRS summons.

In order to prove that the IRS, as an institution, has abandoned all intent of pursuing a civil tax liability,¹⁰³ a taxpayer would need to conduct extensive discovery. This increased need for discovery could substantially alter the balance¹⁰⁴ between the taxpayer and the IRS, and the courts accordingly will be faced with a difficult choice. They may be compelled to reduce the criminal prosecution defense to a meaningless remedy because of the taxpayer's inability to gain access to the proof necessary to substantiate his claim. If instead the courts choose to follow their traditional role of protector of the interests of the taxpayer¹⁰⁵ in summons enforcement proceedings, they may find themselves authorizing discovery which could seriously infringe upon the government's interest in prompt and efficient tax collection.¹⁰⁶

An additional problem created by the *LaSalle* decision is the possibility that the new standard will have a chilling effect on the exercise of the taxpayer's right to contest a summons. The protection of taxpayers from overzealous special agents depends upon review of the agents' actions either by

101. *United States v. Wright Motor Freight Co.*, 536 F.2d 1090, 1094 (5th Cir. 1976); *United States v. Church of Scientology of Cal.*, 520 F.2d 818, 824 (9th Cir. 1975).

102. For further discussion of the discovery process in these cases, see Stroud, *The Criminal Prosecution Defense: A Defense to a 7602 Summons?* 4 AM. J. CRIM. L. 152, 176-78 (1976); Comment, *Constraints on the Administrative Summons Power of the Internal Revenue Service*, 63 IOWA L. REV. 526, 537-39 (1977).

103. 437 U.S. at 316.

104. See note 101 and accompanying text *supra*.

105. *Donaldson v. United States*, 400 U.S. 517, 524-25 (1971); *Reisman v. Caplin*, 375 U.S. 440, 446 (1964).

106. One lower court has already dealt with the problem of discovery under the *LaSalle* standard. In *United States v. Marine Midland Bank*, 585 F.2d 36 (2d Cir. 1978), taxpayers alleged that a summons was issued in bad faith because the IRS had already recommended criminal prosecution to the Regional Counsel's office. The taxpayers contended that under *LaSalle* a taxpayer's opposition to a summons should not be determined solely on the basis of affidavits, arguing that this determination may be made only after "reasonable discovery and an evidentiary hearing."

The taxpayers' allegation of bad faith was supported by a letter from the Regional Counsel to the taxpayers' attorney. The letter stated that a recommendation for criminal prosecution had begun to be processed through the IRS, but there was no indication as to what internal level that recommendation had reached at the time of issuance of the summons. See 437 U.S. at 313-16 for a description of the layers of review through which such a recommendation must pass.

The *Marine Midland* court concluded that this information sufficiently raised the issue of bad faith to require more information, but that only disclosure by IRS affidavit was necessary. It stated that "[n]o full-dress discovery and trial would seem necessary here, since the issue in this case is only whether the IRS 'in an institutional sense had abandoned its pursuit of . . . civil tax liability.'" 585 F.2d 36, 39, citing 98 S. Ct. at 2368, reported in 437 U.S. at 318.

their superiors or by the courts. By making it more difficult to effectively challenge an internal revenue summons, the Supreme Court has increased the likelihood that taxpayers will not exercise their right to make this challenge. Consequently, neither review will take place.¹⁰⁷

CONCLUSION

In *United States v. LaSalle National Bank*, the Supreme Court attempted to clarify a standard which has been troubling the courts for many years. If it had affirmed the lower court's holding that a summons is unenforceable if the sole purpose of the special agent conducting the investigation is to obtain evidence of criminal tax liability, the Court would have protected the interests and rights of taxpayers. If instead the Court had accepted the government's position and held that any summons issued before a recommendation for criminal prosecution has been made to the Department of Justice is enforceable, it would have provided a clear, objective standard for the lower courts to follow. By attempting to arrive at a compromise between the two positions, however, the Court has created a standard that may prove to be both unrealistic and unworkable. In practice, the institutional good faith standard established in *LaSalle* will probably provide no greater protection to the taxpayer than the one-step objective test advocated by the government. Therefore, the Court would have been wiser to have adopted the objective test.¹⁰⁸ Although that standard would not afford much protection to the taxpayer, it would at least lessen the difficulties the lower courts are likely to experience in attempting to adhere to the new standard.

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107. The inherent danger that improper summonses may be complied with before they have been reviewed was recognized some years ago in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 219 (1946) (Murphy, J., dissenting). Justice Murphy stated there that:

It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.

108. In *United States v. Marine Midland Bank*, 585 F.2d 36 (2d Cir. 1978), the court criticized the *LaSalle* decision for not adopting the objective standard for resolving the good faith inquiry. It described *LaSalle* as "leav[ing] the door open to a taxpayer (although perhaps only slightly) even if there has been no recommendation to the Justice Department." *Id.* at 38.

