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**TAXPAYER INTERVENTION AT SUMMARY PROCEEDINGS
TO ENFORCE AN INTERNAL REVENUE
SERVICE SUMMONS**

*Donaldson v. United States*¹

The Internal Revenue Code of 1954² authorizes the Internal Revenue Service (IRS) to compel the production of records and testimony by means of an administrative summons.³ The use of this summons against third parties who may have records relevant to the taxpayer's civil or criminal tax liability has, in recent years, produced a number of suits by taxpayers to prevent the government from obtaining the desired information.

In *Donaldson v. United States*,⁴ the IRS issued summonses to the taxpayer's former employer, Acme Circus Operating Company, and its accountant, demanding the production of records pertaining to Donaldson's employment and commanding an appearance to testify before the

1. 400 U.S. 517 (1971).

2. Hereinafter cited in text as the Code.

3. INT. REV. CODE OF 1954 § 7602(2) provides *inter alia*:

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 . . . [t]o summon . . . any person having possession, custody, or care of books of account . . . to appear before the Secretary or his delegate . . . and to produce . . . records . . . and to give such testimony, under oath, as may be relevant or material to such inquiry

4. 400 U.S. 517 (1971).

issuing agent. The taxpayer enjoined compliance and moved to intervene at the enforcement proceeding subsequently initiated by the IRS.⁵ The district court denied the motion to intervene and the Fifth Circuit affirmed.⁶ Before the Supreme Court, Donaldson argued that the IRS was attempting to use the section 7602 summons improperly to gather evidence to be used against him in a future criminal prosecution. He based his right to intervene on the provisions of rule 24(a)(2) of the Federal Rules of Civil Procedure⁷ as interpreted in a prior decision of the Supreme Court.⁸

The Supreme Court affirmed the lower court's denial of intervention,⁹ holding that any use of the section 7602 summons is valid if the summons is issued in good faith prior to a recommendation for prosecution; and that Donaldson did not have a significantly protectable interest in the records sought, such as one arising from ownership or a legally recognized privilege and, therefore, did not meet the "interest" requirement of rule 24(a)(2). The Court also held that the taxpayer was not guaranteed intervention of right under rule 24(a)(2) because rule 81(a)(3)¹⁰ specifically provides that the district courts may limit the applicability of the Federal Rules in summary enforcement proceedings.

The *Donaldson* opinion is significant for several reasons. First, it clarified language in a previous opinion by the Supreme Court which had indicated that the section 7602 summons could not be used for the purpose of gathering evidence for use in a criminal prosecution. Second, it settled a controversy among the circuits as to whether taxpayers may intervene at enforcement proceedings as a matter of right. Third, it indicated that taxpayers will not be permitted to delay enforcement

5. INT. REV. CODE OF 1954 §§ 7402(b) and 7604(a) are almost identical. Section 7402(b) provides:

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

6. *United States v. Mercurio*, 418 F.2d 1213 (5th Cir. 1969), *aff'd sub nom. Donaldson v. United States*, 400 U.S. 517 (1971).

7. FED. R. CIV. P. 24(a)(2) provides:

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

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

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

10. See note 22 *infra* and accompanying text.

of Internal Revenue summonses without a showing that some significantly protectable interest will be affected. Finally, the Court indicated that if the IRS abuses the courts' process through the unlawful use of the section 7602 summons, evidence obtained should be excluded at any subsequent criminal trial.

I. TAXPAYER INTERVENTION AT SECTION 7602 ENFORCEMENT PROCEEDINGS

The IRS seldom issues its administrative summons to a taxpayer under investigation because the taxpayer may assert valid constitutional objections as to papers in his possession.¹¹ The IRS does use the summons quite extensively, however, for the purpose of obtaining the records and testimony of third parties which pertain to the liability of the taxpayer. If the third party refuses to comply or if the taxpayer is able to obtain an injunction against his compliance,¹² the IRS must petition the district court to enforce the summons pursuant to section 7402 of the Code.¹³ It is at this later enforcement proceeding that the taxpayer may move to intervene and present the merits of his position against production of the records.

Taxpayers efforts to intervene at section 7602 enforcement proceedings began after the decision in *Reisman v. Caplin*,¹⁴ in which, for the first time, the Supreme Court confronted the knotty problem of what procedures should be followed by objecting taxpayers or summoned parties. In that case, the taxpayer's attorney had hired an accounting firm to assist him in pending criminal and civil tax litigation. The IRS issued an administrative summons directing the accountants to produce all the taxpayer's records which were in their possession. The accountants expressed willingness to comply but the taxpayer's attorney sought an injunction against enforcement of the summons, claiming the records sought were protected by the attorney-client privilege. The Court held that the merits of the taxpayer's attempt to avoid

11. A source within the IRS has indicated that there is an unwritten IRS policy that taxpayers under investigation should rarely be summoned by means of the section 7602 summons. While the Supreme Court long ago rejected the claim that the summons is violative of the fourth amendment prohibition against unreasonable searches and seizures [*First Nat'l Bank v. United States*, 267 U.S. 576 (1925), *aff'g* 295 F. 142 (S.D. Ala. 1924)], a taxpayer can raise fifth amendment objections as to papers in his possession. *See, e.g., United States v. Cohen*, 250 F. Supp. 472 (D. Nev. 1965).

12. "[E]ither the taxpayer or any affected party might restrain compliance, as the Commissioner suggests, until compliance is ordered by a court of competent jurisdiction." *Reisman v. Caplin*, 375 U.S. 440, 450 (1964).

13. *See* note 5 *supra*.

14. 375 U.S. 440 (1964), *noted in* 14 CATHOLIC U.L. REV. 99 (1965); 17 OKLA. L. REV. 425 (1964).

production of the records should be argued through intervention in the enforcement proceedings, not in a proceeding seeking to enjoin production or through simple refusal to comply with the summons. Justice Clark stated:

[T]he Government concedes that a witness or any interested party may attack the summons before the hearing officer. There are cases among the circuit which hold that both parties summoned and *those affected by a disclosure* may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. . . . We agree with that view . . .¹⁵

Resolving any ambiguity as to whether this view pertained to the taxpayer under investigation, the Court stated that "in the event the taxpayer is not a party to the summons . . . he, too, may intervene."¹⁶

In *Donaldson*, the taxpayer sought to intervene¹⁷ in the enforcement proceeding, relying upon the language contained within rule

15. 375 U.S. at 445 (emphasis added).

16. *Id.* at 449 (emphasis added). In the period after *Reisman*, courts relied on this dictum in determining whether the taxpayer had the right to intervene. The First, Second and Fifth Circuits concluded that intervention was limited to situations in which the taxpayer could show a legal privilege or some proprietary interest in the records sought by the Government. For instance, in *United States v. Mercurio*, 418 F.2d 1213 (5th Cir. 1969), *aff'd sub nom.* *Donaldson v. United States*, 400 U.S. 517 (1971), the court of appeals emphasized that no privileged relationship existed between Donaldson and his former employer and that *Boren v. Tucker*, 239 F.2d 767 (9th Cir. 1956), made it clear that improper use of the summons to secure information to be used in a criminal action was not a valid objection prior to indictment. The taxpayer's claim that the *Reisman* Court had authorized intervention because his liability was the subject of the investigation was rejected as going "too far" in its interpretation of the dictum. See also *O'Donnell v. Sullivan*, 364 F.2d 43 (1st Cir. 1966); *In re Cole*, 342 F.2d 5 (2d Cir. 1965), *cert. denied*, 381 U.S. 950 (1965). On the other hand, the *Reisman* language was read by the Third, Sixth and Seventh Circuits as conferring upon the taxpayer intervention of right. Typical of these decisions was *United States v. Benford*, 406 F.2d 1192 (7th Cir. 1969), in which the treasurer of three corporations was summoned to testify and produce records in an investigation of the taxpayer. Benford refused to comply and at the enforcement proceeding the taxpayer sought to intervene. On appeal from an order which directed compliance and denied the motion to intervene, the Seventh Circuit held that intervention was a matter of right when the records sought pertained to the possible tax liability of the applicant, stating: "We interpret [*Reisman*] as adopting the judicial policy with respect to I.R.S. inquisitorial summonses that the person whose tax liability is the subject of the investigation can intervene and challenge enforcement if he sees fit." *Id.* at 1194. See also *United States v. Monsey*, 429 F.2d 1348 (7th Cir. 1970); *United States v. Bank of Commerce*, 405 F.2d 931 (3d Cir. 1969); *Justice v. United States*, 365 F.2d 312 (6th Cir. 1966). What occurred, in short, in the period after *Reisman* was a divergence of views among the circuits going to the very root of the intervention issue. It was this conflict which the *Donaldson* Court attempted to resolve.

17. The practice of intervention dates to Roman law, in which it was used extensively. Ecclesiastical courts brought it to England where it became a common

24(a)(2),¹⁸ as well as the dictum contained within the *Reisman* opinion, asserting in the language of the rule, " 'an interest relating to the property or transaction which is the subject of the [enforcement] action and [that] he [was] so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest,' and that his interest [was] not adequately represented by the parties"¹⁹ He argued that his intervention became a matter of right when he met the requirements contained within the rules, a viewpoint which has been accepted by other courts²⁰ and commentators.²¹

The Supreme Court rejected this argument, however, concluding that a taxpayer's intervention at a summary enforcement proceeding is only permissive, regardless of whether the motion to intervene is based on rule 24(a)(2) or on rule 24(b). The Court supported its limitations of taxpayer intervention by citing rule 81(a)(3),²² which provides

procedure in in rem and admiralty cases. In the United States prior to 1912, intervention was normally provided for in the rules of local courts or by state statutes; after that date Equity Rule 37 [quoted in 3B J. MOORE, *FEDERAL PRACTICE* ¶ 24.04, at 24X71 (2d ed. 1970)] the progenitor of the present federal rule, governed intervention in federal equity proceedings. However, between 1912 and 1938 state rules governed actions at law under the Conformity Act of 1872 [17 Stat. 196] and federal courts frequently avoided the state rules by deeming the intervention motion an ancillary bill in equity. Admiralty continued to have its own rule. The existence of this patchwork of rules made the issue of intervention unduly complex. To remedy this situation, Congress in 1938 promulgated specific intervention standards in rule 24 of the Federal Rules of Civil Procedure. The original rule was quite restrictive, however, and to circumvent the rigid requirements, the courts were forced to develop mechanisms which would allow intervention in cases in which it was deemed desirable. In response to inconsistent application of the rule in the federal courts, Congress in 1966 amended rule 24 to liberalize and standardize the requirements for intervention.

Intervention in any judicial proceeding, including proceedings to enforce administrative summonses, is accomplished pursuant to rule 24 of the Federal Rules of Civil Procedure which gives the applicant an absolute right to intervene if certain requirements are satisfied. The applicant must show an interest in the action into which intervention is sought, that the applicant's interest will be impaired if he is absent from the proceeding and that the applicant's interest is not adequately represented by existing parties. For a brief history of intervention see 3B J. MOORE, *supra*, ¶ 24.04 *et seq.* See also Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 Ky. L.J. 329 (1969).

18. See note 7 *supra*.

19. 400 U.S. at 527-28.

20. See, e.g., *Kozak v. Wells*, 278 F.2d 104, 109 (8th Cir. 1960) (Blackmun, J.).

21. "As a result of the 1966 revision," Professor Moore states, "the *absolute right* now exists under present Rule 24(a)(2) when the petitioner claims an interest in the subject of the action." 3B J. MOORE, *supra* note 17, ¶ 24.07(1) at 24-152 (emphasis added).

22. FED. R. CIV. P. 81(a)(3) provides:

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

that the district court may limit the application of any of the rules to enforcement proceedings by local rule or by an order in a particular case. The language in *Reisman v. Caplin*, which indicated that intervention was a proper remedy, was explained as being permissive only; that is, the district court *could*, upon a proper showing, permit intervention, but *Reisman* should not have been taken to mean that courts *had* to sustain a motion to intervene by any taxpayer whose liability was being investigated through the use of a third party summons.²³ "Were we to hold otherwise," the Court stated, "we would unwarrantedly cast doubt upon and stultify the Service's every investigatory move."²⁴ The Court concluded that the district court must balance opposing equities in deciding motions to intervene by taxpayers under investigation.

The Court further stressed that Donaldson had no proprietary interest in the routine business records of Acme Circus or its accountant, and that even if the IRS had acquired the desired records by other means,²⁵ the taxpayer could not have objected to the use of these records at a subsequent trial. The Court concluded: "This interest cannot be the kind contemplated by Rule 24(a)(2) when it speaks in general terms of 'an interest relating to the property or transaction which is the subject of the action.' What is obviously meant there is a significantly protectable interest."²⁶

The effect of the decision in *Donaldson* would, therefore, seem to be that if the district court finds no significantly protectable interest in the applicant's objections to enforcement, intervention under rule 24(a)(2) will be denied; however, even if the applicant meets the requirements contained within the rule, the district court can avoid the applicability of rule 24(a) under the provisions of rule 81(a)(3)

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.

23. "[T]he *Reisman* language," the Court stated, "does not guarantee intervention for the taxpayer. . . . The language recognizes that the District Court, upon the customary showing, may allow the taxpayer to intervene. Two instances where intervention is appropriate were specified, namely, where 'the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution' or where 'it is protected by the attorney-client privilege.' Thus, the Court recognized that intervention by a taxpayer in an enforcement proceeding might well be allowed when the circumstances are proper." 400 U.S. at 529-30.

24. 400 U.S. at 531.

25. The Court suggested that the records might have been included in routine reports made to the Government by Acme or could have been proffered voluntarily, depriving Donaldson of even the knowledge of the disclosure. *Id.* at 531.

26. *Id.* at 531.

and deny intervention. The result of the *Donaldson* decision, therefore, is to eliminate intervention as a matter of right in taxpayer cases.²⁷

The cases following the *Donaldson* decision have not, however, been uniform in their interpretation of this conclusion. Some courts have denied intervention because of a similarity between the facts before them and the facts in *Donaldson*.²⁸ Other courts have interpreted the decision to mean that intervention by the taxpayer is at the discretion of the district court.²⁹ The decision has been misread completely in some cases.³⁰

It is suggested that, in the area of taxpayer intervention, courts should adopt an approach similar to the one taken to enforce subpoenas duces tecum issued by other governmental agencies.³¹ That is, if the taxpayer moves to intervene under rule 24(a)(2) or rule 24(b), the district court should hold a hearing to determine if the facts warrant the taxpayer's presence at the enforcement proceeding. Facts which would justify intervention would include ownership of the records summoned, privilege or abuse of the court's process. While under rule 81(a)(3), the district court could deny discovery in summary enforcement proceedings, some courts³² have properly permitted discovery by either the taxpayer or the summoned party to aid the court in determining the validity of the summons. This limited application of the discovery rules should be permitted if the applicant is seeking

27. The Federal Rules of Civil Procedure have been held to be applicable to the enforcement of Internal Revenue summonses. See, e.g., *United States v. Powell*, 379 U.S. 48 (1964); *Daly v. United States*, 393 F.2d 873 (8th Cir. 1968); *Justice v. United States*, 365 F.2d 312 (6th Cir. 1966) (disapproved in the *Donaldson* case). *Contra*, *United States v. Rugeiro*, 300 F. Supp. 968 (C.D. Cal. 1969), *aff'd*, 425 F.2d 1069 (9th Cir. 1970), *cert. denied*, 401 U.S. 922 (1971).

28. E.g., *United States v. Diracles*, 439 F.2d 795 (8th Cir. 1971); *United States v. White*, 326 F. Supp. 459 (S.D. Tex. 1971).

29. E.g., *United States v. Newman*, 441 F.2d 165 (5th Cir. 1971); *United States v. Lococo*, 440 F.2d 1067 (5th Cir. 1971).

30. E.g., *SEC v. First Security Bank*, 447 F.2d 166 (10th Cir. 1971), wherein the court applied the significantly protectable interest requirement enunciated in *Donaldson* to a rule 24(b) intervention case. Rule 24(b) has no interest requirement. See note 33 *infra*.

31. See, e.g., *FTC v. Browning*, 435 F.2d 96 (D.C. Cir. 1970) (no abuse of discretion to deny discovery); *FTC v. Sherry*, 13 FED. RULES SERV. 2d 81a.33, Case 1 (D.C. Cir. 1969); *FTC v. Kujawski*, 298 F. Supp. 1288 (N.D. Ga. 1969) (discovery should be allowed in summary enforcement proceedings as the only way for the court to be able to decide whether to enforce the summons); *FMC v. N.Y. Terminal Conference*, 262 F. Supp. 225 (S.D.N.Y. 1966), *aff'd*, 373 F.2d 424 (2d Cir. 1967); *United States v. Associated Merchandising Corp.*, 256 F. Supp. 318 (S.D.N.Y. 1966) (FTC subpoena duces tecum); *FMC v. Transoceanic Terminal Corp.*, 252 F. Supp. 743 (N.D. Ill. 1966).

32. See *United States v. Salter*, 432 F.2d 697 (1st Cir. 1970). See also *United States v. Rutland Hosp., Inc.*, 320 F. Supp. 583 (D. Vt. 1970); *United States v. Learner*, 298 F. Supp. 1104 (S.D. Ill. 1969).

to intervene because a valid objection to enforcement has been raised but the truth of the objection can be ascertained only by acquisition of facts known only to the Government. The district court under either rule 24(a) or rule 24(b)³³ would have to balance the taxpayer's position and interest, as set forth in the proposed pleading, against the summary nature of the enforcement proceeding, and make the discretionary decision to permit or deny intervention. Only an abuse of discretion would warrant reversal on appeal.³⁴

II. ENFORCEMENT OF THE SECTION 7602 SUMMONS: AN ABUSE OF PROCESS

The most frequent objection to enforcement raised by taxpayers is that the civil summons is to be used for the improper purpose of gathering evidence for use in a criminal prosecution. *United States v. O'Connor*³⁵ was the first case in which an IRS summons was quashed on this specific ground.³⁶ In that case, IRS agents tried to compel the production of papers belonging to the accountant of the taxpayer after the taxpayer had been indicted for fraud. The accountant objected to this use of the summons, arguing that the Treasury Department had no power to subpoena records to aid the Justice Department in preparing for a criminal prosecution. The court agreed, holding that such use of an administrative summons would violate the intent of the rigid federal criminal discovery rules.³⁷

33. FED. R. CIV. P. 24(b) provides *inter alia*:

Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

34. Rule 81(a)(3) expressly makes the Rules applicable to appeals from enforcement proceedings. See 7 J. MOORE, *supra* note 17, ¶ 81.06(2), at 4443, and *Committee Note to Amended (a)*, cited at ¶ 81.01(6), at 4413. The district courts should make clear, however, when intervention is being permitted under rule 24(a) and when it is being permitted under rule 24(b), since a decision under rule 24(a) requires an examination of the merits on appeal whereas a decision under rule 24(b) merely requires a determination as to whether the district court judge abused his discretion. See 3B J. MOORE, *supra* note 17, ¶ 24.07. The Fifth Circuit in *United States v. Newman*, 441 F.2d 165, 172-73 (5th Cir. 1971), stated, however, that "[i]t is the *intervention* in such situations, not the technical basis — as of right or permissive — for permitting it which thwarts and defeats" the Congressional policy and that policy would be "adversely affected if this 'outsider' were permitted to take over the controversy significantly."

35. 118 F. Supp. 248 (D. Mass. 1953).

36. *Accord, In re Myers*, 202 F. Supp. 212 (E.D. Pa. 1962).

37. FED. R. CRIM. P. 16 provides for discovery and inspection of documents in criminal proceedings. Rule 16(c) permits limited discovery by the Government. Internal documents prepared by an attorney or his agent are excluded, as are state-

Confronted with a similar fact situation the Ninth Circuit, in *Boren v. Tucker*,³⁸ rejected the argument that because the taxpayer's records *might* be used in a future criminal prosecution, acquisition by an administrative subpoena was prohibited. The court recognized that any Internal Revenue investigation might disclose either criminal or civil liability³⁹ and that even if the examiner concluded that there was a possibility that criminal liability existed there would be no certainty that criminal prosecution would be commenced. The *O'Connor* case was distinguished because, in that case, the taxpayer had already been indicted and the IRS summons had been issued to aid the Justice Department in preparing its case. This distinction has been applied in subsequent decisions, rendering the criminal use prohibition applicable only to situations in which the taxpayer was under either indictment or prosecution.⁴⁰ Although this result may leave room for abuse of the civil process,⁴¹ the dual nature of tax investigations, at least in the early stages, warrants no other practical solution.⁴²

ments made by the accused, his attorney or agent. The court may permit discovery of medical reports, books and records as a condition to like discovery on behalf of the accused. In this context it should be noted that the *O'Connor* court, while dealing with a factual situation in which indictment preceded issuance of the summons, emphasized that Congress did not intend statutory administrative summonses to be used in criminal investigations. The court stated:

To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under § 3614 was granted for one purpose, and is now sought to be used in a direction entirely un contemplated by the lawgivers.

118 F. Supp. at 251.

38. 239 F.2d 767 (9th Cir. 1956).

39. The court stated that "[w]hile it is true that once a possible criminal prosecution comes into existence there can be no settlement of tax until that possibility has been ruled out, yet the existence of the *possibility* of criminal prosecution does not necessarily mean that there *will* be criminal prosecution." *Id.* at 772.

40. See, e.g., *Howfield, Inc. v. United States*, 409 F.2d 694 (9th Cir. 1969); *McGarry v. Riley*, 363 F.2d 421 (1st Cir. 1966); *United States v. Ruggiero*, 300 F. Supp. 968 (C.D. Cal. 1969), *aff'd*, 425 F.2d 1069 (9th Cir. 1970), *cert. denied*, 401 U.S. 922 (1971). *Accord*, *United States v. Rutland Hosp., Inc.*, 320 F. Supp. 583 (D. Vt. 1970), where IRS agents sought hospital records indicating the names of patients treated by the taxpayer without indicating whether the investigation was civil or criminal; the taxpayer's request for discovery was denied on the ground that the motives of the agents seeking the records were irrelevant. See also *United States v. Learner*, 298 F. Supp. 1104 (S.D. Ill. 1969). *Contra*, *United States v. Roundtree*, 420 F.2d 845 (5th Cir. 1969); *United States v. Moriarty*, 278 F. Supp. 187 (E.D. Wis. 1967); *Kennedy v. Rubin*, 254 F. Supp. 190 (N.D. Ill. 1966).

41. See *DiPiazza v. United States*, 415 F.2d 99 (6th Cir. 1969).

42. For instance, in *In re Magnus, Mabee & Reynard, Inc.*, 311 F.2d 12 (2d Cir. 1962), the Second Circuit concluded that since the summons was issued ten months prior to taxpayer's indictment, it would be impossible to hold other than that the summons was not issued in contemplation of the prosecution.

In *Reisman v. Caplin*,⁴³ however, the Supreme Court stated in dictum⁴⁴ that an administrative summons may be challenged on the ground "that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution."⁴⁵ Although by citing *Boren v. Tucker* the Court was impliedly accepting the distinction between a *potential* criminal prosecution and one that was already in progress, taxpayers frequently relied upon the *Reisman* language to support the contention that the information sought in particular cases could not be acquired with a section 7602 summons if it was for the purpose of gathering evidence of tax fraud.⁴⁶ The *Donaldson* Court clearly laid to rest the notion that the summons is used improperly if a criminal prosecution might result.⁴⁷ The Court interpreted the *Reisman* language in light of its citation to *Boren* and concluded that if the summons were issued prior to a recommendation for prosecution,⁴⁸ there could be no valid objection to its use on the ground that evidence obtained might later be used in a criminal prosecution.⁴⁹

The *Donaldson* Court's rejection of the taxpayer's argument regarding improper criminal use should not be taken to mean that an improper use cannot arise before a recommendation for prosecution; the Court indicated that if the taxpayer or the party summoned could show a lack of good faith on the part of the investigating agent, abuse of process would be a valid objection to enforcement of the summons.⁵⁰

43. 375 U.S. 440 (1964).

44. In holding that equity was without jurisdiction, the Court made its lengthy discussion of legal intervention dictum.

45. 375 U.S. at 449.

46. See, e.g., *Venn v. United States*, 400 F.2d 207 (5th Cir. 1968).

47. The *Donaldson* decision has been considered dispositive of this issue in subsequent cases. See, e.g., *United States v. Diracles*, 439 F.2d 795 (8th Cir. 1971); *United States v. Troupe*, 438 F.2d 117 (8th Cir. 1971); *United States v. Kyriaco*, 326 F. Supp. 1184 (C.D. Cal. 1971).

48. The decisions before *Donaldson* stated that the line should be drawn at the indictment stage [*United States v. Monsey*, 429 F.2d 1348 (7th Cir. 1970)] or after a criminal prosecution has begun [e.g., *Wild v. United States*, 362 F.2d 206 (9th Cir. 1966)]. The *Donaldson* Court held that criminal use of the section 7602 summons becomes improper after a recommendation for prosecution has been sent to the Justice Department.

49. The Fifth Circuit had approved the use of the third party section 7602 summons *after* indictment of the taxpayer. *United States v. Mercurio*, 418 F.2d 1213, 1218 (5th Cir. 1969). Other cases have held that a section 7602 summons may be used even if the sole purpose is to uncover crime. See, e.g., *United States v. Erdner*, 422 F.2d 835, 836 (3d Cir. 1970); *Howfield, Inc. v. United States*, 409 F.2d 694, 697 (9th Cir. 1969). In a case construing the *Donaldson* decision on use of the section 7602 summons in a criminal case, referral of the matter to the Justice Department for prosecution was held ground to quash the summons. *United States v. Kyriaco*, 326 F. Supp. 1184 (C.D. Cal. 1971).

50. Of course, if the taxpayer is not permitted to intervene and discover what information the Government possesses, a showing of abuse of process might be difficult. See cases cited note 18 *supra*.

The Court did not describe the circumstances which would evidence absence of good faith in the issuance of an administrative summons. However, in a prior decision, the Supreme Court had discussed what would constitute a lack of good faith on the part of the issuing agent so as to render the use of the summons unlawful as an abuse of process. In *United States v. Powell*,⁵¹ the Court stated:

It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the 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.⁵²

It is arguable, therefore, that the *Donaldson* Court contemplated that improper use of the section 7602 summons would encompass more than the notion that the summons should not be issued to aid a pending criminal prosecution.⁵³

The Court recognized that evidence could be illegally obtained by the use of the section 7602 summons. However, it indicated that the proper remedy for this abuse was not for the taxpayer to intervene at the enforcement proceedings but was for him to raise his objections at any subsequent criminal trial. While the Court implied that evidence acquired improperly would be excluded,⁵⁴ citing dictum in *United States v. Blue*,⁵⁵ the decision arguably left room for abuse of process to go unchecked, as it has in the past.

51. 379 U.S. 48 (1964). The *Powell* Court held that the Commissioner of Internal Revenue need not show probable cause to suspect fraud in order to issue a section 7602 summons for records pertaining to years relative to which further legal action would be barred, absent fraud, by the Code's statute of limitations. The circuits had required various showings, ranging from a strict probable cause standard [*Lash v. Nighosian*, 171 F. Supp. 121 (D. Mass. 1959), *aff'd*, 273 F.2d 185 (1st Cir. 1959)] to no standard at all. *Globe Constr. Co. v. Humphrey*, 229 F.2d 148 (5th Cir. 1956). The *Powell* decision is noted in 63 MICH. L. REV. 939 (1965), and 38 TEMP. L.Q. 462 (1965).

52. 379 U.S. at 58.

53. See, e.g., *United States v. Pritchard*, 438 F.2d 969 (5th Cir. 1971), in which the court, citing the *Powell* decision, held that the Commissioner must show that the records sought through use of the section 7602 summons were not already in the Government's possession and that such a showing had not been made. See also *Venn v. United States*, 400 F.2d 207 (5th Cir. 1968) (Wisdom, J.).

54. The *Donaldson* Court stated that "the taxpayer, to the extent . . . he may claim abuse of process, may always assert that . . . claim in due course at its proper place in any subsequent trial." 400 U.S. at 531.

55. 384 U.S. 251 (1966). "[T]his Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the

For instance, in *DiPiazza v. United States*,⁵⁶ the defendants were convicted of violating gambling and wagering laws by using interstate telephone lines for gambling operations. Intelligence agents of the IRS acquired toll records of appellants' telephone calls and other federal authorities used these records to establish probable cause to search appellants' homes. A provision of the Communications Act of 1934⁵⁷ requires that evidence of crimes involving interstate telephone lines be acquired by "other lawful authority,"⁵⁸ but the Court had no difficulty holding that the use of a section 7602 summons was not improper in that case. The Court's rationale was that civil tax liability theoretically could have resulted from the use of the summons, so there was a conceivable lawful purpose for the search.⁵⁹ The dissent pointed out that civil or criminal tax liability was never an object of the investigation because Revenue agents had never been assigned to the case; Intelligence Division agents merely used the summons to acquire evidence for use by the Federal Bureau of Investigation. "The record in these cases establishes," the dissent found, "that Government agents obtained the evidence which led to Appellants' indictments and convictions through an indiscriminate abuse of civil process, the § 7602 summons."⁶⁰

Because the appellants in *DiPiazza* had not been recommended for prosecution at the time the section 7602 summons was issued, the *Donaldson* Court's first rule with regard to improper criminal use of the section 7602 summons was not violated. Indeed, the *DiPiazza* Court relied upon a rule similar to the one later enunciated by the *Donaldson* Court.⁶¹ The section 7602 summons, however, was clearly not designed to provide the basis for probable cause in investigations by the FBI. While *Boren v. Tucker*,⁶² justifiably permitted use of the summons in a civil investigation which could have led to criminal liability, the justification disappears when civil or criminal income tax liability is not even arguably the basis for issuance of the summons.⁶³

accused's rights under the Constitution, federal statutes or federal rules of procedure." *Id.* at 255.

56. 415 F.2d 99 (6th Cir. 1969).

57. 47 U.S.C. §§ 151 *et seq.* (1970).

58. 47 U.S.C. § 605 (1970).

59. The court of appeals reported that the district court had rejected the appellants' claim of abuse of process at the hearing on a motion to suppress. 415 F.2d at 107.

60. 415 F.2d at 108 (Celebrezze, J., dissenting).

61. The *DiPiazza* court stated: "Where the investigation may produce both civil and criminal evidence, the summons under section 7602 is a proper device for obtaining records." *Id.* at 103.

62. 239 F.2d 767 (9th Cir. 1956). See notes 38-39 *supra* and accompanying text.

63. See notes 40-42 *supra* and accompanying text.

It seems clear that the result in *DiPiazza* has been repudiated by implication through the *Donaldson* Court's requirement that the section 7602 summons be issued in "good faith." Moreover, the Court specifically addressed itself to the definition of "tax" in delineating the scope of the section's coverage.⁶⁴ The section 7602 summons, therefore, should never be issued except in connection with actual civil or criminal *tax* investigations. Still unsettling in light of *DiPiazza* is the possibility that barely colorable tax liability will be sufficient to permit the issuance of the summons. If the case is interpreted in this way, the exclusionary rule implied in *Donaldson* will not be effective in preventing abuse of process in taxpayer investigations.

CONCLUSION

Although the *Donaldson* decision firmly rejected the argument that the section 7602 summons may not be issued in aid of a criminal investigation prior to a recommendation for prosecution, taxpayers have continued to assert the objection in efforts to intervene at enforcement proceedings.⁶⁵ The decision on that point was clearly correct and the objection has been properly rejected by the cases decided since the *Donaldson* decision.⁶⁶ However, because the Supreme Court interpreted rule 81(a)(3) and rule 24(a)(2) in a way which will drastically reduce taxpayer intervention at summary enforcement proceedings, it will be necessary for the district courts to lend a sympathetic ear to a taxpayer alleging abuse of process either at the enforcement proceeding or at a subsequent trial for fraud. Having lost one remedy against overzealous use of the administrative summons by Internal Revenue Service agents, taxpayers should not be deprived of another.

64. The Court made frequent references to the fact that the section 7602 summons is to be used only in tax investigations. It also quoted INT. REV. CODE OF 1954, § 7601 ["to proceed . . . and inquire after and concerning" all persons 'who may be liable to pay any internal revenue tax,' 400 U.S. at 523]; § 7602 ["Section 7602 authorizes the Secretary or his delegate for 'the purpose of ascertaining the correctness of any return . . . determining the liability of any person for any internal revenue tax . . . or collecting any such liability . . . [t]o summon the person liable for tax . . . '"] 400 U.S. 524]; and cited the Treasury Regulations and the Code section which define "tax." In reference to the duties of Intelligence agents, who investigate fraud, the Court quoted the language of Internal Revenue Service Organization and Functions § 1112 *et seq.*, 35 Fed. Reg. 2417 *et seq.* (1970), which provides that the Intelligence Division shall develop programs for the investigation of tax frauds and "certain other civil and alleged criminal violations of tax laws." *Id.* at § 1114(10), quoted in 400 U.S. at 534.

65. *See, e.g.,* United States v. Schoeberlein, Misc. No. 709-T (D. Md., filed Nov. 3, 1971).

66. *See, e.g.,* United States v. Diracles, 439 F.2d 795 (8th Cir. 1971); United States v. Troupe, 438 F.2d 117 (8th Cir. 1971); United States v. Kyriaco, 326 F. Supp. 1184 (C.D. Cal. 1971).