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Administrative Law - Internal Revenue Service (IRS) Summons Enforcement - When an IRS Investigation Has Been Coordinated by a Justice Department Strike Force, the District Court Must Determine That Each Summons Issued Was Not Used for an Improper Criminal Investigation Purpose

Angela Baker

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ADMINISTRATIVE LAW—INTERNAL REVENUE SERVICE (IRS) SUMMONS ENFORCEMENT—WHEN AN IRS INVESTIGATION HAS BEEN COORDINATED BY A JUSTICE DEPARTMENT STRIKE FORCE, THE DISTRICT COURT MUST DETERMINE THAT EACH SUMMONS ISSUED WAS NOT USED FOR AN IMPROPER CRIMINAL INVESTIGATION PURPOSE.

United States v. Serubo (1979)

A Special Agent of the Intelligence Division of the Internal Revenue Service (IRS or Service) conducted a joint civil and criminal tax investigation of the defendant Serubo.¹ During the first phase of the investigation,² the agent, acting alone, issued twenty-two administrative summonses to obtain Serubo's tax records.³ Subsequently, the Justice Department's Philadelphia Strike Force,⁴ suspecting that Serubo had contacts with organized crime,⁵ became involved in the investigation.⁶ Thirteen additional administrative summonses were issued during this second phase of the investigation,⁷ which was coordinated by a Strike Force attorney.⁸

As a result of this joint investigation,⁹ an indictment was returned against Plachter and Serubo, as officers and controlling stockholders of the

1. *United States v. Serubo*, 460 F. Supp. 689, 695-96 (E.D. Pa. 1978), *vacated and re-manded*, 604 F.2d 807 (3d Cir. 1979). A Special Agent assigned to the narcotics group of the Intelligence Division—the criminal branch—of the IRS received information from the Federal Drug Enforcement Administration suggesting that Serubo was involved with organized crime, loansharking, and the financing of narcotics transactions. 460 F. Supp. at 695. An investigation was commenced on June 6, 1974, to determine whether these allegations were true, and, if so, whether the income from the alleged illegal activities had been reported for tax purposes. *Id.* at 696. For a discussion of the power of the IRS to investigate both civil and criminal violations, see notes 22-26 and accompanying text *infra*.

2. The district court found that the investigation was conducted in two phases. 460 F. Supp. at 696. During the first phase, between June, 1974, and April, 1975, the IRS acted alone in its investigation of Serubo. *Id.*

3. *Id.* Section 7602 of the Internal Revenue Code authorizes the Service to issue summonses. I.R.C. § 7602. For the text of § 7602, see note 27 *infra*.

4. The Philadelphia Strike Force is an office of the Organized Crime and Racketeering Section of the Justice Department. 460 F. Supp. at 696. The Intelligence Division of the IRS investigates alleged criminal violations of the tax laws. See note 23 *infra*. IRS special agents are employed by the Intelligence Division to carry out criminal investigations and, if enough evidence is gathered, the IRS may recommend prosecution to the Department of Justice. *Id.* For a discussion of the organization of the IRS and its interaction with the Department of Justice, see notes 21-26 and accompanying text *infra*.

5. 460 F. Supp. at 696. In the summer of 1974, the Philadelphia Strike Force learned of the possibility that Plachter-Serubo Cadillac Company of which the defendant was a controlling stockholder, was involved with elements of organized crime. *Id.*

6. *Id.* In April, 1975, the IRS was authorized by the Department of Justice to disclose information concerning the income tax investigation to the Strike Force. *Id.* On April 29, 1975, the investigations of Serubo by the Justice and Treasury Departments were coordinated under the supervision of a Strike Force attorney. *Id.*

7. *Id.* at 697.

8. *Id.* See note 6 *supra*.

9. The IRS agent participating in the second phase of the investigation did not recommend criminal prosecution until January, 1977, and a formal recommendation from the IRS to the Justice Department was not forthcoming until November, 1977. 460 F. Supp. at 697.

Plachter-Serubo Cadillac Company, charging each of them with conspiracy to evade corporate taxes and with evasion of personal income taxes.¹⁰ The defendants moved to dismiss the indictment or to suppress certain evidence, charging, *inter alia*,¹¹ that the IRS had used its civil summons power to conduct a criminal investigation.¹²

The United States District Court for the Eastern District of Pennsylvania denied these pretrial motions¹³ and, with regard to the first stage of the investigation, denied the defendants' request for additional discovery of records obtained from the IRS investigation because the defendants had failed to establish that the summonses had been issued in bad faith.¹⁴ Although the district court suspected that the summonses involved in the second stage of the investigation might have been issued in bad faith, the trial judge found it unnecessary to suppress the evidence since he believed the special agent's testimony that none of the evidence had been used for criminal prosecution purposes.¹⁵ Immediately prior to both the trial and their sentencing, the defendants moved for reconsideration of their pretrial mo-

10. *Id.* at 692. The indictment charged Plachter and Serubo with falsely labeling personal expenditures as business expenses on corporate tax returns and with failing to report the expenditures as personal income. *Id.* Defendant Brown, as Comptroller of the Company, was charged with aiding and abetting Plachter and Serubo in the commission of these crimes. *Id.* See 604 F.2d at 809.

11. The defendants' pretrial motions also charged the government attorneys with prosecutorial misconduct before the grand jury, claiming that the defendants had been investigated and prosecuted by means of an invidiously discriminatory process. 460 F. Supp. at 701. The court denied the motion on the ground of lack of evidence. *Id.* The defendants also moved to dismiss for preindictment delay due to a four year time lapse between the commencement of the investigation and the return of the indictment. *Id.* The court denied the motion on the ground that the defendants had failed to prove substantial prejudice as a result of the delay. *Id.* at 700. The defendants moved for severance of the personal and corporate income tax charges, claiming that the indictment failed to allege the necessary factual connection between the counts as required by rule 8 of the Federal Rules of Criminal Procedure. *Id.* at 693. The court also denied this motion, finding that the connection between the counts was sufficient under rule 8. *Id.* at 694. See FED. R. CRIM. P. 8.

12. 460 F. Supp. at 695. For a discussion of the impropriety of the IRS using its civil summons power to conduct criminal investigations, see notes 31-33 and accompanying text *infra*.

13. 460 F. Supp. at 695.

14. *Id.* at 698-99. The court determined that, although the investigation of Serubo had initially been undertaken to discover criminal activity, the IRS was also concerned with discovering Serubo's civil liability. *Id.* at 698. During the first phase of the investigation, the agent had not made a decision to recommend criminal prosecution and did not transmit any of the evidence obtained to any criminal investigation agency. *Id.* Having thus found a proper civil purpose for the summonses, the court concluded that there was no bad faith present on the part of the IRS during the first phase of the investigation. *Id.* Further finding that the defendants had failed to make even a colorable showing of bad faith, the court refused their request for additional discovery of government records which might have revealed evidence of bad faith. *Id.* For a discussion of the test which the court relied upon to determine the existence of bad faith, see notes 30-31 and accompanying text *infra*.

15. 460 F. Supp. at 699. The court reasoned that, since none of the evidence obtained through the summonses had been presented to the Grand Jury and was not to be presented at trial, no evidence existed which could be suppressed and, therefore, the issue was rendered moot. *Id.*

tions for additional discovery.¹⁶ The district court denied the motion for reconsideration¹⁷ and the defendants appealed.¹⁸

The United States Court of Appeals for the Third Circuit¹⁹ reversed the district court's denial of the defendants' motions and remanded for additional discovery to examine the purpose for each of the summonses issued during the second phase of the investigation,²⁰ *holding* that when an IRS investigation has been coordinated by a Strike Force attorney, the district court must determine that each summons issued was not used for the improper purpose of conducting a criminal investigation. *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979).

The IRS is responsible for the enforcement of the federal tax laws.²¹ The Service is organized into a civil²² and a criminal branch.²³ The civil Audit Division and the criminal Intelligence Division may coordinate their investigative activities in order to accommodate the possible existence of both civil and criminal violations in a particular case.²⁴ Upon a recommen-

16. 604 F.2d at 809. On the day of trial, defendants pleaded guilty to all counts after the court had denied their motions for reconsideration of the motions to dismiss the indictment. *Id.*

17. *Id.*

18. *Id.* at 808. The defendants' guilty pleas were conditioned upon their retention of the right to appeal from the denial of their pretrial motions. *Id.* For a discussion of these motions, see notes 11-12 and accompanying text *supra*.

19. The case was decided by Judges Aldisert, Gibbons, and Van Dusen. Judge Gibbons wrote the opinion.

20. 604 F.2d at 813. The Third Circuit did not address the district court's holding that the suppression issue was moot but must have rejected this finding since it remanded for additional discovery relating to the validity of the summonses. *Id.* For a discussion of the suppression issue, see note 15 and accompanying text *supra*.

21. See Internal Revenue Service Organization and Functions, 39 Fed. Reg. 11,572 (1974). Section 1111.1 of this Administrative Notice provides:

The mission of the Service is to encourage and achieve the highest possible degree of voluntary compliance with the tax laws and regulations and to maintain the highest degree of public confidence in the integrity and efficiency of the Service. This includes communicating the requirements of the law to the public, determining the extent of compliance and causes of non-compliance, and doing all things needful to a proper enforcement of the law.

Id.

22. *Id.* at 11,578. The Audit Division is the civil branch of the IRS and is responsible for encouraging voluntary compliance with the tax laws by developing and supervising examination programs. *Id.*

23. *Id.* at 11,607. The Intelligence Division is charged with the enforcement of criminal statutes involving the tax laws through investigation of alleged criminal violations of such laws and the recommendation of prosecution to the Department of Justice in appropriate cases. *Id.* Upon request, the Division will assist other Intelligence offices in special inquiries, including those involving organized wagering, racketeering, and other illegal activity, and will also assist United States Attorneys and the IRS Regional Counsel in the preparation and trial of cases. *Id.*

24. *Id.* at 11,581. Section 1113.563 of the IRS organization and functions notice authorizes the Audit Division to participate with special agents of the Intelligence Division in conducting tax fraud investigations. *Id.*

ation from the Service,²⁵ the Department of Justice is responsible for prosecution of any criminal violation of the federal revenue laws.²⁶

In order to aid the Service in its investigative function, section 7602 of the Internal Revenue Code authorizes the examination of all relevant books and records and provides for the use of a summons to obtain production of these materials.²⁷ Enforcement of the summons rests with the district court²⁸ which is required to hold a hearing and decide whether or not to

25. *Id.* at 11,602 Section 1116(3) of the IRS organizations and functions notice provides in pertinent part:

The Regional Counsel's office is responsible for the performance of legal services in the field in connection with criminal cases arising under the internal revenue laws. The office reviews recommendations of prosecution in criminal cases received in the field, and prepares and refers such cases . . . to the Department of Justice or, where authorized by the Department of Justice, directly to United States Attorneys. . . .

Id.

26. *See* 28 U.S.C. § 547(1)(1976). Violation of the federal tax laws carries both civil and criminal penalties. Tax evasion and failure to pay an imposed tax are both felonies punishable by fines or imprisonment. I.R.C. §§ 7201-02. The filing of fraudulent returns is also a felony. *Id.* § 7206. Section 6653(b) of the Internal Revenue Code provides, *inter alia*, for the addition of a fine in an amount equal to the amount of any underpayment due to the filing of a fraudulent tax return. *Id.* § 6653(b). *See also id.* §§ 7203-05, 7207 (authorizing penalties of fines and/or imprisonment).

The legislative history of the summons authority under the Internal Revenue Code of 1954 supports the conclusion that the federal revenue laws are both civil and criminal in nature. *See* H.R. REP. NO. 1337, 83d Cong. 2d Sess. A436 (1954), *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 4584; S. REP. NO. 1622, 83d Cong., 2d Sess. 617 (1954), *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 5268 (discussing predecessor statute from which I.R.C. § 7602 is derived without change in meaning).

27. I.R.C. § 7602. Section 7602 provides:

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 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.

Id.

28. *Id.* § 7604(a). Section 7604(a) provides in pertinent part:

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

Id.

compel compliance.²⁹ At the summons enforcement proceeding, the taxpayer may challenge the validity of the summons on the ground that it was issued for an improper purpose.³⁰ Proof that a summons was issued solely to obtain evidence for a criminal prosecution is enough to establish an improper purpose and serves as an effective defense to judicial enforcement of a section 7602 summons.³¹

Faced with an improper criminal investigation purpose challenge in *Donaldson v. United States*,³² the United States Supreme Court created a two-pronged test for evaluating the validity of an IRS summons by holding that "under [section] 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommenda-

29. For a discussion of the procedure followed by the district court when a person refuses to obey a summons, *see id.* § 7604(b).

30. *United States v. Powell*, 379 U.S. 48 (1964). The Supreme Court held in *Powell* that it would be an abuse of judicial authority to enforce a summons that 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." *Id.* at 58. The *Powell* Court established the following standards which must be met before a court will enforce a summons:

- (1) the investigation must be conducted pursuant to a legitimate purpose;
- (2) the inquiry must be relevant to that purpose;
- (3) the information sought must not be already within the possession of the Service;

and

- (4) the administrative procedures of the Code must have been followed.

Id. at 57-58. A showing that any one of these requirements has not been met is a defense to the enforcement of an administrative summons. *Id.*

31. *United States v. O'Connor*, 118 F. Supp. 248 (D. Mass. 1953) In *O'Connor*, one of the first cases to deal with the improper criminal investigation purpose defense, the taxpayer's accountant was summoned by a special agent of the Intelligence Division of the IRS to produce certain records. *Id.* at 249. At the time the summons was issued, the taxpayer was under indictment and the special agent admitted that one of his purposes in issuing the summons was to aid the Department of Justice in the criminal prosecution. *Id.* at 250. Finding that the special agent had no civil interest in the case, the court held that the IRS is not authorized to issue a summons solely to aid a criminal prosecution since it is the province of a grand jury to conduct criminal investigations. *Id.* at 251. The court based its conclusion on the constitutional role of the grand jury as "the inquisitorial body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization." *Id.* The fifth amendment establishes the grand jury as the sole body with the power to return federal criminal indictments. *See* U.S. CONST. amend. V.

The United States Supreme Court first addressed this improper purpose issue by way of dictum in *Reisman v. Caplin*, 375 U.S. 440 (1964). In *Reisman*, a taxpayer sought to enjoin the enforcement of a summons but the Court ordered enforcement, concluding that the taxpayer had been provided with a full opportunity for judicial review before coercive sanctions were imposed. *Id.* at 450. The *Reisman* Court stated that a taxpayer may challenge a summons on the ground that the "material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." *Id.* at 449 (dictum) (citations omitted).

32. 400 U.S. 517 (1971). An IRS special agent issued a summons to the taxpayer's former employer ordering the production of employment records that might relate to the taxpayer's tax liability. *Id.* at 519. The taxpayer claimed that the agent was investigating him solely for a criminal prosecution purpose and obtained a temporary restraining order preventing compliance with the summons. *Id.* at 521. The United States moved for enforcement of the summons and the motion was granted. *Id.* at 520. The Fifth Circuit affirmed the district court's decision to enforce the summons and, on appeal, the Supreme Court also affirmed. *Id.* at 522.

tion for criminal prosecution.”³³ Among the circuits addressing the issue of the proper standard to apply in summons enforcement proceedings, two approaches for assessing the validity of a summons, based upon differing interpretations of the *Donaldson* test, have emerged.³⁴ Some circuits have applied the mechanical or objective approach which provides for the non-enforcement of a summons only when it is issued at the time of a pending criminal charge or prior to a recommendation for criminal prosecution.³⁵ Others have employed the good faith or subjective approach which requires a determination of whether the summons was issued solely for a criminal investigation purpose and focuses upon whether or not the summons was issued in good faith by examining the subjective intent of the special agent investigating the case.³⁶

33. *Id.* at 536. The *Donaldson* Court recognized the dual civil and criminal investigative purposes of the tax laws and the likelihood that many civil tax investigations will eventually result in criminal prosecutions. *Id.* at 534-35. The appearance of a special agent in a case, it was held, does not in itself render an investigation impermissible and deprive a summons of its validity. *Id.* at 535-36. The Court only proscribed the enforcement of a summons “where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution.” *Id.* at 533 (emphasis added). The Court adopted the good faith standard of *United States v. Powell*, 379 U.S. 48 (1964), for application in summons enforcement proceedings. See 400 U.S. at 526-27, 536. For a discussion of the good faith requirements enunciated in *Powell*, see note 30 *supra*.

34. For a discussion of the various interpretations of the *Donaldson* standard, see notes 35-36 and accompanying text *infra*. All of the courts applying *Donaldson* agree that the use of a § 7602 summons to aid tax investigations with the potential for both civil and criminal consequences is proper but that it is an abuse of the summons authority to use it solely for criminal investigation purposes. See cases cited notes 35-36 *infra*.

35. See *United States v. Morgan Guar. Trust Co.*, 572 F.2d 36 (2d Cir. 1978); *United States v. Hodge & Zweig*, 548 F.2d 1347 (9th Cir. 1977); *United States v. Troupe*, 438 F.2d 117 (8th Cir. 1971). The objective approach emphasizes the second prong of the *Donaldson* test. See note 33 and accompanying text *supra*.

In *Troupe*, the Eighth Circuit enforced a summons despite evidence revealing that the investigation was initiated on information that the taxpayer was included in a list of alleged underworld figures. 438 F.2d at 119. Since no criminal charge was pending against the taxpayer, the court concluded that the summons had been issued for a proper purpose. *Id.*

Similarly in *Hodge & Zweig*, the Ninth Circuit found a summons to be enforceable against the taxpayer's attorney despite the fact that the taxpayer was under indictment at the time of its issuance. 548 F.2d at 1351. The court stated: “Absent an independent showing of bad faith or an improper purpose, . . . enforcement of an IRS summons under the *Donaldson* rule should be denied only if the summons is issued after the IRS has made a formal recommendation to the Justice Department for criminal prosecution.” *Id.*

Finally, in *Morgan Guaranty*, the IRS issued a summons to the taxpayers' bank for the production of certain records relevant to its investigation. *Id.* at 37. The taxpayers ordered the bank not to comply and intervened in the action to prevent enforcement of the summons on the ground that it had been issued solely in aid of a criminal investigation. *Id.* at 38. This allegation was based on the IRS agent's oral statement that his interest in the taxpayers was only for purposes of a criminal investigation. *Id.* The court concluded that this statement did not justify denying enforcement since no recommendation for prosecution had been made, and since the IRS still had “an appropriate interest in determining whether the taxpayers were liable for [civil] deficiencies and penalties.” *Id.* at 42. The Second Circuit construed *Donaldson* as “laying down an objective test prior to a recommendation for criminal prosecution, that would avoid a need for determining the thought processes of special agents.” *Id.* at 41.

36. See *United States v. LaSalle Nat'l Bank*, 554 F.2d 302 (7th Cir. 1977), *rev'd*, 437 U.S. 298 (1978); *United States v. Friedman*, 532 F.2d 928 (3d Cir. 1976); *United States v. Lafka*, 520 F.2d 622 (3d Cir. 1975); *United States v. Weingarden*, 473 F.2d 454 (6th Cir. 1973); *United States v. Wall Corp.*, 475 F.2d 893 (D.C. Cir. 1972). This subjective approach focuses on the first prong of the *Donaldson* test. See note 33 and accompanying text *supra*.

The recent Supreme Court decision in *United States v. LaSalle National Bank*³⁷ resolved this conflict between the circuits by adopting a modification

In *Wall*, the IRS issued a summons to a corporation for the production of records pertaining to the tax liability of its sole stockholder. 475 F.2d at 893. The taxpayer challenged the validity of the summons on the ground that it had been used solely for the purpose of gathering information to be used in a criminal prosecution. *Id.* at 894. The District of Columbia Circuit upheld enforcement, finding that although the only agent working on the case was with the Intelligence Division—whose function is to investigate criminal allegations—this fact alone “was insufficient to establish bad faith in the sense of a fixed purpose to recommend criminal prosecution.” *Id.* at 895. Nevertheless, the court also found that a showing that criminal prosecution had not been recommended was not enough, by itself, to establish a proper purpose; rather, good faith must also be shown. *Id.* As the *Wall* court stated:

Our inquiry is not ended upon a determination that prosecution has neither been instigated nor recommended, since *Donaldson* also requires that a summons be issued “in good faith.” Thus, if it can be shown that the investigating agent had already formed a firm purpose to recommend criminal prosecution even though he had not as yet made a formal recommendation, issuance of the summons would presumably be in bad faith. Similarly, if the civil liability were already determined, the summons would appear to be solely for a criminal purpose.

Id.

In *Weingarden*, the IRS issued a summons to the taxpayer’s accountant to obtain records that were pertinent to the investigation. 473 F.2d at 456. The accountant failed to comply with the summons and the IRS agent filed a petition in the district court for enforcement of the summons. *Id.* at 457. The taxpayer intervened and the Sixth Circuit upheld enforcement, finding that the investigation was to determine civil liability and not for the purpose of criminal prosecution. *Id.* The court rejected the interpretation of *Donaldson* which emphasizes the recommendation of prosecution issue and found the proper standard to be “whether the sole purpose of the issuance of the summons is for criminal prosecution.” *Id.* at 460. Thus, *Weingarden* illustrates that, under the subjective approach, a determination of good faith turns on the purpose for which the summons is issued. *Id.*

In *Friedman*, the IRS issued summonses to banks and an accountant for the purpose of investigating the tax liabilities of two individuals and a corporation. 532 F.2d at 928. The taxpayers intervened and challenged the enforcement of the summonses based on allegations that they were issued solely to obtain evidence of criminal violations. *Id.* at 932. The Third Circuit upheld enforcement, finding that the investigating agents had formed no firm purpose to recommend prosecution at the time the summonses were issued. *Id.* The court found that the special agents’ recommendation of prosecution would be the “sole bar to judicial enforcement.” *Id.* See also *United States v. Lafko*, 520 F.2d at 622.

In *Lafko*, the Audit and Intelligence divisions of the IRS conducted a joint investigation of the taxpayer. *Id.* at 623. In September, 1973, the special agent recommended to the Regional Counsel’s office that the taxpayer be prosecuted criminally. *Id.* In December, 1973, the IRS issued a § 7602 summons to the taxpayer’s accountant for the production of the taxpayer’s federal income tax returns and attached work papers. *Id.* at 624. The taxpayer intervened and challenged enforcement on the ground that the IRS was improperly using its summons authority to obtain evidence for a criminal prosecution. *Id.* The Third Circuit denied enforcement of the summons and remanded for a further evidentiary hearing to determine whether the summons had been issued in good faith. *Id.* at 627. The court determined that the question of good faith is entirely separate from the question of whether a formal recommendation of prosecution has been made, and held that a “Justice Department recommendation to prosecute is not the *sine qua non* for proving that an Internal Revenue summons was issued for an improper purpose.” *Id.* at 625. The court interpreted the relevant language in *Donaldson* to mean that a recommendation to prosecute made within the IRS by an agent to his superiors is enough to cast doubt on the validity of summonses issued after such a recommendation. *Id.* For a further discussion of *Lafko*, see notes 43-44 and accompanying text *infra*.

Finally, in *LaSalle*, the Seventh Circuit considered the agent’s personal motivation in using the summons to be the correct test for determining whether it was solely for use in a criminal prosecution. 554 F.2d at 309. For subsequent developments as a result of the *LaSalle* appeal, see notes 37-46 and accompanying text *infra*.

37. 437 U.S. 298 (1978), *rev’d* 554 F.2d 302 (7th Cir. 1977). In *LaSalle*, an IRS special agent

of the objective approach and retaining the good faith inquiry of the subjective approach only for summonses issued prior to a recommendation of prosecution.³⁸ The Court accepted the proposition that a summons issued solely to gather evidence for a criminal investigation is improper and should not be enforced.³⁹ However, a summons issued in good faith and before the Service recommends criminal prosecution to the Justice Department is valid.⁴⁰ According to the Court, the relevant inquiry for determining whether an investigation is solely for a criminal purpose focuses on whether or not the Service, as an institution,⁴¹ has abandoned the good faith pursuit of civil tax determination or collection.⁴² The Court rejected the approach

was assigned to investigate possible criminal violations of the Internal Revenue Code by taxpayer John Gattuso. 437 U.S. at 300. The respondent bank held land trusts for Gattuso and the special agent issued two § 7602 summonses to the respondent in order to determine the accuracy of Gattuso's income reports. *Id.* at 301. After the respondent had refused to produce the requested material, the United States petitioned the district court for enforcement of the summonses. *Id.* at 302. The court denied enforcement, finding that the special agent had conducted the investigation for the sole purpose of uncovering criminal conduct in violation of the *Donaldson* provision that a summons must be issued in good faith. *Id.* at 304. The Seventh Circuit affirmed the denial of enforcement, 554 F.2d at 309, but its decision was reversed by the Supreme Court. 437 U.S. at 304.

38. 437 U.S. at 318. For a review of the conflict over whether to apply the objective or subjective approach in summons enforcement proceedings, see notes 34-36 and accompanying text *supra*.

39. 437 U.S. at 316 n. 18. Recognizing the interrelated criminal and civil nature of a tax fraud inquiry, the Court stressed that "[f]or a fraud investigation to be solely criminal in nature would require an extraordinary departure from the normally inseparable goals of examining whether the basis exists for criminal charges and for the assessment of civil penalties." *Id.* at 314.

40. *Id.* at 318. It should be noted that this holding reaffirms the two-pronged test of *Donaldson*. See note 33 and accompanying text *supra*. The Court also incorporated the standards of good faith enunciated in *United States v. Powell*, 379 U.S. 48 (1964), into its holding and stated that "the Service at all times must use the summons authority in good-faith pursuit of the congressionally authorized purposes of § 7602." 437 U.S. at 318. For a discussion of the *Powell* standards, see note 30 *supra*.

41. Given the many levels of review to which the recommendations of a single IRS agent are subject, the Court concluded that an examination of the agent's subjective intent would not be dispositive in determining the actual purpose of the investigation. 437 U.S. at 315-16.

Before being forwarded to the Justice Department, the agent's recommendation is reviewed by various divisions of the IRS. See 26 C.F.R. §§ 601.107(b)-(c) (1977). The *LaSalle* Court noted that the case is only sent to the Justice Department when the officials of at least two stages of review agree with the recommendation to prosecute. 437 U.S. at 315. As the Court pointed out, "[a]t any of the various stages, the Service can abandon the criminal prosecution, can decide instead to assert a civil penalty, or can pursue both goals." *Id.* Thus, the Court concluded, any judicial inquiry must focus on the motives of the Service as an institution. *Id.* at 318. The Court expressed disapproval of an intentional delay in submitting a recommendation to the Justice Department merely to gather additional evidence for the prosecution. *Id.* at 317. Such a delay would, the Court asserted, be tantamount to the IRS becoming "an information-gathering agency" for the Department of Justice. *Id.*

42. 437 U.S. at 316. This good faith inquiry focuses upon the institutional posture of the IRS. *Id.* Courts applying this standard must determine whether the IRS is honestly pursuing the goals of § 7602—*i.e.*, the investigation of civil liability. *Id.*

In establishing this standard, the Court determined that the burden is upon those opposing enforcement of a summons to disprove the existence of a valid civil purpose and admitted that this burden is a "heavy one." *Id.* For a further discussion of the burden of proof issue, see note 50 *infra*.

adopted by the Third Circuit in *United States v. Lafko*,⁴³ which focused on whether the individual investigating agent has recommended prosecution to his superiors.⁴⁴

While the institutional posture test answered the question of what standard to apply in determining the validity of a summons, the *LaSalle* Court offered no guidance as to what constitutes institutional good faith,⁴⁵ thus leaving the circuits to fashion their own procedural requirements. In applying the institutional posture standard to summons enforcement proceedings, the Second and Fourth Circuits have accepted an affidavit from the Service, asserting a proper civil purpose of the IRS, as proof of institutional good faith in satisfaction of the *LaSalle* test.⁴⁶

The Third Circuit, however, has taken a more restrictive view and is the only circuit to require a summons-by-summons inquiry.⁴⁷ In *United*

43. 520 F.2d 622 (3d Cir. 1975). For a review of the *Lafko* decision, see note 36 *supra*.

44. 437 U.S. at 313 n.15. In a footnote to its opinion, the *LaSalle* Court indicated that the Third Circuit's view that *Donaldson* intended to "draw a line at the recommendation to the Service's district office from the Special Agent, rather than at the recommendation from the Service to the Justice Department," was a misreading of the *Donaldson* Court's intent. *Id.* For a review of *Donaldson*, see notes 32-33 and accompanying text *supra*.

45. 437 U.S. at 318. Although the Court reaffirmed the standards of good faith enunciated in *United States v. Powell*, 379 U.S. 48 (1964), it gave no direction as to how these standards would apply to the institutional posture test. 437 U.S. at 318.

LaSalle was a five to four decision by the Supreme Court. *Id.* at 299. Justice Stewart, joined by Chief Justice Burger and Justices Rehnquist and Stevens, dissented vigorously, stating that the "elusiveness of 'institutional good faith' as described by the Court can produce little but endless discovery proceedings and ultimate frustration of the fair administration of the Internal Revenue Code." *Id.* at 320 (Stewart, J., dissenting). The dissenters would have adopted the objective approach enunciated by the Second Circuit in *United States v. Morgan Guar. Trust Co.*, 572 F.2d 36 (1978). *Id.* For a review of this objective approach, see note 35 and accompanying text *supra*.

46. See *United States v. McGuirt*, 588 F.2d 419 (4th Cir. 1978); *United States v. Marine Midland Bank*, 585 F.2d 36 (2d Cir. 1978). The Fourth Circuit delayed its decision in *McGuirt* until after *LaSalle* was decided. 588 F.2d at 420. In applying the institutional posture test, the court held that "[t]he petition with its supporting affidavit which asserted the continuing good faith purpose of the IRS prior to any institutional recommendation for prosecution to the Department of Justice, constituted a *prima facie* showing sufficient to warrant enforcement." *Id.* at 421.

In *Marine Midland Bank*, the Second Circuit stated: "Enforcement delays and litigation can best be avoided by prompt and full disclosure by the IRS, by affidavit or otherwise, of the point to which criminal recommendations have gone and the extent to which civil collection efforts are continuing at the time of consideration of applications for enforcement orders." 585 F.2d at 38-39.

In *United States v. Schutterle*, 586 F.2d 1201 (8th Cir. 1978), the Eighth Circuit merely examined the time gap between issuance of the summons and recommendation of prosecution and, upon finding no unreasonable delay, concluded that there had been no abandonment of a civil purpose in an institutional sense. *Id.* at 1204. The Eighth Circuit appears to have the most liberal requirements for establishing institutional good faith of all the post-*LaSalle* decisions. The Third Circuit, on the other hand, is the most stringent. See text accompanying note 47 *infra*.

47. See *United States v. Genser*, 595 F.2d 146 (3d Cir.), *cert. denied*, 444 U.S. 928 (1979); notes 48-52 and accompanying text *infra*. Compare note 46 and accompanying text *supra* with notes 48-57 & 66-78 and accompanying text *infra*.

States v. Genser (Genser II),⁴⁸ the court, reviewing the matter for the second time after having remanded the case for an evidentiary hearing in a previous decision (*Genser I*),⁴⁹ held that *LaSalle* required a judicial inquiry to determine whether an individual summons was issued for a legitimate civil purpose, rather than whether there was a general civil purpose for the investigation as a whole.⁵⁰ The court held that a particular summons which is found to have been issued solely for a criminal investigation purpose must be suppressed⁵¹ regardless of the existence of a proper civil purpose for the

48. 595 F.2d 146 (3d Cir.) cert. denied, 444 U.S. 928 (1979). The appellants diverted money they had received from their supplier to a separate account in which they were the only signatories. *United States v. Genser*, 582 F.2d 292, 295 (3d Cir. 1978) (*Genser I*). The funds were used to purchase municipal bearer bonds but the appellants never reported the funds or the interest from the bonds as income, nor did they record the money as an asset for corporate taxation purposes. *Id.* The appellants were indicted and convicted of income tax evasion and of subscribing to corporate tax returns which understated their adjusted gross income. *Id.* at 294.

49. *United States v. Genser*, 582 F.2d 292 (3d Cir. 1978). In *Genser I*, the appellants challenged the district court's refusal to hold an evidentiary hearing to determine whether the summonses, used in the investigation which led to their conviction, had been issued in good faith and before any recommendation of criminal prosecution. *Id.* at 299. The Third Circuit remanded the case with instructions that the district court conduct an evidentiary hearing. *Id.* at 311. As noted by the *Genser II* court, at the evidentiary hearing, the district court found that all of the summonses were valid because the IRS had remained interested in pursuing civil tax liabilities throughout the investigation. 595 F.2d at 148. However, finding that the district court had failed to address the issue of whether the IRS had institutionally committed itself to criminal prosecution before its recommendation to the Justice Department, the Third Circuit in *Genser II* remanded the case for a second evidentiary hearing to make the necessary inquiry. *Id.* at 151.

50. 595 F.2d at 150. Recognizing that there are some limitations on such an inquiry, the court indicated that not every summons issued in an investigation need be examined by the district court. *Id.* at 151. Since, under *LaSalle*, the subjective intent of the individual agent is not binding on the IRS as an institution, "summonses issued by an investigating agent before that agent recommended prosecution would be virtually unassailable." *Id.* The Third Circuit required affirmative proof to establish that a link exists between each summons and the proffered civil purpose and noted that the presence of certain indicators will entitle the taxpayer to additional discovery. *Id.* at 152. Those indicators are: 1) evidence that the Justice Department influenced the conduct of an IRS investigation; 2) issuance of a summons after the date of the agent's recommendation of prosecution to his superiors; 3) issuance of a summons during "inordinate and unexplained delays" in recommendation of prosecution. *Id.*

In *Genser*, 116 summonses had been issued under § 7602. *Id.* at 148. While recognizing the institutional good faith test of *LaSalle*, the Third Circuit did not find the existence of a general civil purpose to be dispositive. *Id.* at 150. The court offered two arguments in support of its contention that the existence of a general civil purpose is not the only relevant inquiry for establishing the good faith purpose of a summons: 1) the court claimed that such a test would allow the IRS to delay recommendation to the Justice Department in order to gather additional evidence for trial; and 2) such a test would impose an impossible burden of proof on the taxpayer. *Id.* The Third Circuit reasoned: "[N]ot only would [the taxpayer] be required to prove a negative, the nonexistence of a general civil purpose for the investigation, but he also would be required to disprove what already has been postulated, the congruence of civil and criminal liability." *Id.* at 150-51.

51. *Id.* at 150. In *Genser I*, the Third Circuit noted that the taxpayer may challenge the validity of a summons at either the investigatory or the trial stage. 582 F.2d at 302, citing *Donaldson v. United States*, 400 U.S. at 537; *United States v. Friedman*, 532 F.2d 928 (3d Cir. 1976) (finding of an illegal summons may affect the use of the information in subsequent criminal and civil proceedings). The *Genser I* court stated that, at the trial level, the "only effective remedy for violation of [the policy of evaluating the good faith purpose of summonses at en-

institutional investigation.⁵² Although *Genser II* established a presumption of validity for prerecommendation summonses,⁵³ the court held that this presumption could be overcome by showing that an agent issued a summons at the request of a United States attorney or that he delayed recommendation of prosecution at the request of his superiors solely to further a criminal investigation.⁵⁴ Finally, the Third Circuit enumerated guidelines for discovery in cases where the validity of an IRS summons is at issue.⁵⁵ These guidelines indicate that the taxpayer is entitled to know the nature and dates of any contacts between the IRS and the Department of Justice during the investigation.⁵⁶ If this information raises the suspicion of an improper criminal purpose, the court held that further discovery must be permitted.⁵⁷

The participation of a Strike Force in an IRS investigation presents special problems for courts applying the *LaSalle* standard.⁵⁸ A Strike Force is a

forcement proceedings] is to require suppression of the evidence obtained as the evidentiary fruits of an illegal summons." 582 F.2d at 309. Providing a rationale for this interpretation, the court stated that such a summons "is no less illegal merely because it escapes detection at the investigatory stage." *Id.* Further, the court noted that "the prophylactic principles which operate at the enforcement level are equally appropriate to the trial stage, and suppression is the only practical remedy at that point to cure the statutory abuse." *Id.* at 308.

52. 595 F.2d at 151.

53. *Id.* See note 50 *supra*.

54. 595 F.2d at 150. The Third Circuit characterized such actions as abuses that "would go to the heart of the protections afforded taxpayers by *LaSalle*." *Id.* at 151. In his dissenting opinion in *Genser II*, Judge Biggs stressed the combined civil and criminal elements present in a tax investigation and added that the "IRS must not abandon its institutional authority to determine the existence of violation of criminal laws relating to taxation." *Id.* at 154 (Biggs, J., dissenting). With regard to the majority's concern about the delays in recommending criminal prosecution, Judge Biggs found the time factor to be irrelevant where the investigation is concerned with both civil and criminal liability. *Id.*

55. *Id.* at 152. For a discussion of these guidelines, see notes 56-57 and accompanying text *infra*.

56. 595 F.2d at 152. The court stated:

At a minimum, the taxpayer should be entitled to discover the identities of the investigating agents, the date the investigation began, the dates the agent or agents filed reports recommending prosecution, the date the district chief of the Intelligence Division or Criminal Investigation Division reviewed the recommendation, the date the Office of Regional Counsel referred the matter for prosecution, and the dates of all summonses issued under 26 U.S.C. § 7602. Furthermore, the taxpayer should be entitled to discover the nature of any contacts, relating to and during the investigation, between the investigating agents and officials of the Department of Justice.

Id.

57. *Id.* The *Genser II* court indicated that, in proper cases, the taxpayer could be given an opportunity to examine the IRS agents and to discover documents involved in the investigation. *Id.* Such examination, the court noted, "should be carefully tailored to meet the purpose of the inquiry." *Id.*

The Third Circuit has continued to apply the strict standard of summons-by-summons inquiry in two recent post-*Serubo* cases. See *United States v. First Nat'l State Bank*, 616 F.2d 668 (3d Cir. 1980) (taxpayer will succeed in a challenge to enforcement where it appears that the investigating agent has recommended prosecution to his superiors); *United States v. Garden State Nat'l Bank*, 607 F.2d 61 (3d Cir. 1979) (if allegations of bad faith are factually supported by the taxpayer's affidavit, the taxpayer is entitled to an evidentiary hearing and to *Genser II* discovery).

58. See notes 59-65 and accompanying text *infra*.

project coordinated by the Criminal Division of the Justice Department in which various federal enforcement and regulatory agencies investigate organized crime subjects.⁵⁹ Since the particular focus of a Strike Force investigation is criminal in nature, courts considering the validity of summonses issued thereunder must address the question of whether they are issued solely for a criminal investigation purpose in violation of the *LaSalle* standard.⁶⁰ In *United States v. Chemical Bank*,⁶¹ the Second Circuit recognized that the concern over the presence of a Strike Force stems from the "continuing cooperation maintained between IRS and the Justice Department attorneys who coordinate the Strike Force."⁶² The court concluded that, since cooperation does not, per se, render the IRS an "information-gathering agency for the Department of Justice,"⁶³ there is no violation of the dictates of *LaSalle*.⁶⁴ Therefore, despite the problem of Strike Force participation, an affidavit alleging that no evidence had been transmitted to the Department of Justice was considered sufficient to establish the good faith purpose of the investigation.⁶⁵

59. See *United States v. Chemical Bank*, 593 F.2d 451, 456 (2d Cir. 1979), citing IRS HANDBOOK ON DISCLOSURE OF OFFICIAL INFORMATION, IRM 1272 §§ 4566.6, 4566.7 (1976). These Joint Strike Forces are coordinated by the Criminal Division of the Department of Justice and include a representative of the IRS. 593 F.2d at 454. See also note 4 *supra*.

60. *United States v. Chemical Bank*, 593 F.2d 451, 456 (2d Cir. 1979).

61. 593 F.2d 451 (2d Cir. 1979). A revenue agent of the IRS was conducting an in-depth audit as a member of the Brooklyn Strike Force Program. *Id.* at 453. A summons was issued as part of this tax investigation and the corporate taxpayer challenged it as being solely for the purpose of a criminal prosecution. *Id.* The court rejected the taxpayer's contention that any IRS involvement with a Strike Force was forbidden by *LaSalle*. *Id.* at 454.

62. *Id.* at 456. The court reasoned: "At the outset, we cannot assume that the Department of Justice would create a Strike Force whose very activity would be unlawful from the start." *Id.* at 455. It would seem that the involvement of a Strike Force in an IRS investigation would be highly suspect in the Third Circuit, in light of the language in *Genser II* to the effect that, if evidence exists that the Justice Department influenced the conduct of an IRS investigation, a summons-by-summons inquiry is required. See notes 50-54 and accompanying text *supra*.

63. 593 F.2d at 456. The critical factor, in the court's view, is that the IRS does not become "institutionally subservient" to the Department of Justice during periods of cooperation with the Strike Force, since Revenue agents remain under the control of the Service. *Id.* The Second Circuit noted that IRS agents are prevented from becoming conduits for the transmission of information to the Strike Force by the disclosure provisions of the Internal Revenue Code. *Id.* See generally I.R.C. § 6103(h). Section 6103(h) provides in pertinent part:

In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) personally and directly engaged in, and solely for their use in, any proceeding before a Federal Grand Jury or preparation for any proceeding (or investigation which may result in such proceeding) before a Federal Grand Jury or any Federal or State court, but only if—

(A) the taxpayer is or may be a party to the proceeding . . . ;

(B) the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation; or

(C) such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation.

Id.

64. 593 F.2d at 456.

65. *Id.* at 458. The Second Circuit was not the first court of appeals to address the issue of Strike Force involvement in IRS investigations. In *United States v. Cleveland Trust Co.*, 474

In *Serubo*, the Third Circuit began its analysis with an examination of *LaSalle*, focusing on the Supreme Court's determination that a delay in recommending prosecution, after an institutional commitment to do so, is impermissible as is the situation where the IRS acts as an "information-gathering agency for other departments."⁶⁶ The court viewed this language as justification for the further proposition that summonses issued after an agent has recommended prosecution are highly suspect.⁶⁷ Thus, in *Serubo*, the Third Circuit affirmed its holding in *Genser II*⁶⁸ that, in determining the validity of a suspect IRS summons, the focus must be on the purpose of each individual summons and not on the general civil purpose of the investigation.⁶⁹

Addressing the validity of the summonses issued in the first stage of the investigation, the *Serubo* court concluded that there was no need for an individual determination of the purpose of each one.⁷⁰ Since the twenty-two summonses involved had all been issued long before the IRS had recommended prosecution, the court found them to be presumptively valid under the *Genser II* standard.⁷¹ The court chose to accept the testimony of the Federal Drug Enforcement Administration (DEA) agent that none of the summonses had been used for a criminal investigation purpose.⁷² Further-

F.2d 1234 (6th Cir.), cert. denied, 414 U.S. 866 (1973), a pre-*LaSalle* decision, the Sixth Circuit remarked that it "does not see why the transmission of information between two different units of the federal government pertaining to a possibility of tax liability should be the subject of judicial condemnation." 474 F.2d at 1236. *Cleveland Trust* involved a civil tax investigation initiated by a Strike Force agent. *Id.* The district court found bad faith and denied judicial enforcement of the § 7602 summons. *Id.* According to the Sixth Circuit, the relevant inquiry should be whether there was a good faith investigation of civil liability or whether the investigation was solely for the purpose of criminal prosecution. *Id.* Further, the court remarked: "[W]e know of no reason why . . . the fact that information was provided to the civil side of the Internal Revenue Audit Division by agents usually concerned with criminal prosecution should immunize the taxpayer corporation from investigation as to its civil liability for additional taxes." *Id.* The Second Circuit found this reasoning persuasive and quoted this language in its *Chemical Bank* decision. See 593 F.2d at 455, quoting *United States v. Cleveland Trust Co.*, 474 F.2d at 1236. See also notes 61-64 and accompanying text *supra*.

66. 604 F.2d at 811. See *United States v. LaSalle Nat'l Bank*, 437 U.S. at 317. The institutional good faith standard does not permit such action on the part of the IRS. *Id.* For a discussion of *LaSalle*, see notes 37-45 and accompanying text *supra*.

67. 604 F.2d at 811. The court further stated that summonses issued by an agent after he has decided to recommend prosecution are subject to individual examination to determine whether any one of them was issued solely to aid a criminal investigation. *Id.* If this is found to be the case, "the fruits of that summons would have to be suppressed, even in the face of an overwhelmingly civil purpose of the investigation as a whole." *Id.*, quoting *United States v. Genser*, 595 F.2d at 150.

68. For a review of the *Genser II* standards, see notes 47-57 and accompanying text *supra*.

69. 604 F.2d at 811. See note 50 and accompanying text *supra*.

70. 604 F.2d at 812-13.

71. *Id.* at 812. The court explained that *Genser II* was concerned with summonses issued during a delay occurring after the decision to recommend prosecution has been made. *Id.* No evidence of such a delay was found in *Serubo*. *Id.*

72. *Id.* The court stated that, although there was some evidence of contact between the IRS and the DEA, the district court properly accepted the testimony of the IRS agent that no evidence had been passed on to the DEA. *Id.*

more, while recognizing that, under *Genser II*, the defendants' request for further discovery into the circumstances surrounding the issuance of these summonses would be permissible,⁷³ the *Serubo* court did not consider the denial of the defendants' discovery motion to be an abuse of the district court's discretion since the minimum *Genser II* discovery requirements had been met⁷⁴ and there was no evidence of an unexplained delay or an improper criminal investigation purpose.⁷⁵

Turning to the second phase of the investigation, the Third Circuit concluded that, under *Genser II*, a summons-by-summons inquiry was required.⁷⁶ Although the summonses in *Serubo* had been issued before a recommendation of prosecution, the court found that supervision by a Strike Force attorney presented "a real likelihood that the IRS was used as an information-gathering agency" for the Department of Justice in violation of the *LaSalle* standard.⁷⁷ The court explained that the investigating agent's testimony that the summonses were not used by the grand jury or at trial was not a sufficient substitute for judicial inquiry into the basis of each summons.⁷⁸

It is submitted that the Third Circuit's application of a summons-by-summons inquiry as the preferred standard in summons enforcement proceedings reflects an overly restrictive interpretation of the institutional posture test set forth in *LaSalle*.⁷⁹ Since summonses are issued by individual agents,⁸⁰ any inquiry into the purpose of each summons necessarily involves an examination of that agent's subjective intent.⁸¹ Such an inquiry shifts the focus from the institutional posture of the IRS to the individual purpose of the investigating agent and, as the *LaSalle* Court pointed out, does not conclusively demonstrate the existence of an improper criminal investigation

73. *Id.* The defendants had requested further discovery in order to attack the credibility of the IRS agent's testimony that no decision to prosecute and no contact with the DEA agents had been made during the first stage of the investigation. *Id.*

74. *Id.* at 813. For a review of the *Genser II* discovery requirements, see notes 55-57 and accompanying text *supra*.

75. 604 F.2d at 813. It should be noted that the existence of these factors would entitle the taxpayer to discovery under *Genser II*. See 595 F.2d at 152; note 56 *supra*.

76. 604 F.2d at 813.

77. *Id.* The Third Circuit concluded that a *Donaldson-LaSalle* violation had been established with respect to the second stage of the investigation, and thus, that the defendants were entitled to additional discovery. *Id.*

78. *Id.* The court noted that *Genser I* had held that the government has the burden of showing a "taint-free" basis for the evidence it relies upon in criminal prosecutions. *Id.* For a review of *Genser I*, see note 49 and accompanying text *supra*; notes 50-51 *supra*.

79. For a discussion of the institutional posture test, see notes 41-44 and accompanying text *supra*.

80. For a review of the procedure for the issuance of summonses, see notes 27-31 and accompanying text *supra*.

81. See *United States v. LaSalle Nat'l Bank*, 437 U.S. at 314; notes 41-42 and accompanying text *supra*. Because the purpose of an IRS summons is to obtain facts which will almost always pertain to both civil and criminal tax liability, an inquiry into the specific purpose of a given summons will necessarily involve a determination of the individual agent's motivation for issuing the summons. 437 U.S. at 314.

purpose.⁸² Thus, it is submitted that the *LaSalle* Court's determination that the only relevant inquiry is whether the IRS has recommended prosecution,⁸³ coupled with its specific rejection of the Third Circuit's approach in *United States v. Lafko*,⁸⁴ clearly demonstrates the inherent difficulty in focusing on the purpose of the individual agent to determine whether the IRS has abandoned the pursuit of civil enforcement.⁸⁵

It is suggested that the acceptance, by other circuits, of an affidavit asserting the continuing good faith purpose of the IRS⁸⁶ is an approach which better effectuates the legitimate goal of civil tax collection by avoiding enforcement delays due to frivolous challenges and unnecessary litigation, while still affording relief to the taxpayer upon a clear showing that the sole objective of the investigation was a criminal prosecution.⁸⁷ The Third Circuit's requirement that the defendant be permitted discovery concerning the second phase of the investigation represents a rejection of this less restrictive interpretation of *LaSalle*,⁸⁸ and shifts the burden from the taxpayer by requiring the IRS to disprove the existence of a solely criminal prosecution purpose for the investigation.⁸⁹ It is submitted that such a result will en-

82. See 437 U.S. at 314; notes 41-42 and accompanying text *supra*. The *LaSalle* Court criticized such an individual focus, stating that it would "unnecessarily frustrate the enforcement of the tax laws by restricting the use of the summons according to the motivation of a single agent without regard to the enforcement policy of the Service as an institution." 437 U.S. at 316.

83. 437 U.S. at 313 n. 15. The *LaSalle* Court stated:

Given the interrelated criminal/civil nature of tax fraud investigation whenever it remains within the jurisdiction of the Service, and given the utility of the summons to investigate civil tax liability, we decline to impose the prophylactic restraint on the summons authority any earlier than at the recommendation to the Department of Justice. We cannot deny that the potential for expanding the criminal discovery rights of the Justice Department or for usurping the role of the grand jury exists at the point of the recommendation by the special agent. But we think the possibilities for abuse of these policies are remote before the recommendation to Justice takes place and do not justify imposing an absolute ban on the use of the summons before that point. Earlier imposition of the ban, given the balance of policies and civil law enforcement interests, would unnecessarily hamstring the performance of the tax determination and collection functions by the Service.

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

84. 437 U.S. at 313 n.15. See 520 F.2d 622 (3d Cir. 1975); notes 43-44 and accompanying text *supra*. The Court used the Third Circuit's decision in *Lafko* as an example of the misinterpretation of the recommendation of prosecution issue. 437 U.S. at 313 n.15. For discussion of the *Lafko* decision, see note 36 *supra*.

85. See notes 41-42 and accompanying text *supra*.

86. See note 46 and accompanying text *supra*. These affidavits have been accepted whether or not Strike Force involvement was present. See cases cited note 46 *supra*. It should be noted that the Fourth Circuit considers such an affidavit to be a "prima facie showing sufficient to warrant enforcement" of the summons. See *United States v. McGuirt*, 588 F.2d 419, 421 (4th Cir. 1978); note 46 *supra*.

87. See notes 46 & 65 and accompanying text *supra*.

88. See 604 F.2d at 813; notes 76-78 and accompanying text *supra*.

89. See note 50 *supra*. *LaSalle*, on the other hand, placed a heavy burden of proof on the taxpayer. See 437 U.S. at 316. In *Genser II*, the Third Circuit characterized *LaSalle*'s burden of proof requirement as an "impossible" one. 595 F.2d at 150. See note 50 *supra*. Instead, *Genser II* required that the IRS affirmatively prove a link between each summons and the civil purpose of the investigation. 595 F.2d at 150. By applying this *Genser II* standard in *Serubo*, and thus

courage abuse of the discovery process, enforcement delays, and unwarranted challenges designed to disrupt the fair administration of the federal revenue laws.⁹⁰

It is further submitted that the *Serubo* court's decision to grant additional discovery concerning the summonses issued during the second phase of the investigation was based upon the assumption that the very presence of a Strike Force attorney may render an IRS investigation criminal in nature.⁹¹ While the court found support for this conclusion in *LaSalle*,⁹² it is suggested that, in the absence of an institutional delay by the IRS in recommending prosecution, the *LaSalle* Court would permit Strike Force involvement where, as in *Serubo*, the agent involved testifies that none of the evidence obtained from the investigation was used for criminal prosecution.⁹³ While recognizing the legitimacy of the taxpayer's interest in chal-

shifting the burden from the taxpayer to the IRS, it is submitted that the Third Circuit disregarded the *LaSalle* requirement that the burden is upon the taxpayer to disprove the existence of a valid civil purpose for the summons.

90. For a discussion of the *Serubo* court's approach, see notes 67-78 and accompanying text *supra*. Considering that a summons-by-summons inquiry restricts the ability of the IRS to validly issue summonses if there is any suspicion of criminal involvement, application of the *Genser II* standard will severely hamper the IRS in its central role—*i.e.*, the pursuit of civil tax enforcement. See notes 39-44 and accompanying text *supra*. As was indicated in *LaSalle*, every tax investigation will inevitably possess both civil and criminal elements. See 437 U.S. at 314. Under a summons-by-summons inquiry, discovery would be necessary in practically every case to determine whether criminal agencies were involved in the investigation or whether individual agents had recommended prosecution. See notes 39 & 41 *supra*. As the *LaSalle* court pointed out, any inquiry into the motivation of a single agent "would delay summons enforcement proceedings while parties clash over, and judges grapple with, the thought processes of each investigator." 437 U.S. at 316 (footnote omitted).

In two subsequent cases, the Third Circuit has continued to apply the strict standard of summons-by-summons inquiry first articulated in *Genser II*. See note 57 *supra*.

91. See 604 F.2d at 813. It is evident that the court found the supervision by a Strike Force attorney during the second phase of the investigation to be serious enough to cast doubt on the good faith purpose of the IRS. *Id.* at 812-13. It is submitted, however, that the *Serubo* court's decision to credit the testimony of the IRS agent concerning the first phase of the investigation, but not the second, represents a restrictive stance by the court towards one law enforcement agency (Strike Force/Justice Department) and a permissive stance towards another (DEA). See *id.* at 811-13. Both the DEA and the Strike Force are government agencies charged with investigating criminal violations. *Id.* at 809-11. It is equally possible that evidence obtained from summonses issued during the first phase may have been used by the DEA at some point during its investigation and later prosecution. Consequently, it is not clear why the *Serubo* court reached different conclusions regarding the veracity of the individual agents. See *id.* It is suggested, however, that, given *LaSalle*'s recognition of the combined civil and criminal nature of tax investigations, the presence of either of these agencies bears little relevance to whether the IRS has maintained its civil interest throughout the investigation. See 437 U.S. at 316. See also notes 92-95 and accompanying text *infra*.

92. 604 F.2d at 811. For a review of the language in *LaSalle* relied upon by the *Serubo* court, see notes 66-69 and accompanying text *supra*.

93. See note 15 and accompanying text *supra*. Under *LaSalle*, it is only when the sole objective of the IRS, as an institution, is to obtain evidence for use in a criminal investigation that an impermissible purpose is shown. See 437 U.S. at 316 n.18. The *Serubo* court noted that the investigating agent had not recommended prosecution to his superiors until January, 1977, and that the IRS had not submitted its formal recommendation to the Justice Department until

lenging the validity of summonses issued during an IRS investigation,⁹⁴ the *LaSalle* decision clearly evidenced a desire to protect the IRS summons authority from unwarranted or meritless claims designed to undermine enforcement of the tax laws.⁹⁵ Considering that the creation of the Strike Force envisioned a consolidated effort of federal agencies,⁹⁶ it is submitted that the Second Circuit's conclusion in *Chemical Bank*, that Strike Force cooperation does not create a presumption that the IRS is being used as an information-gathering agency for the Justice Department,⁹⁷ is preferable to that of the Third Circuit in *Serubo*.⁹⁸ The interest of the IRS in civil tax enforcement is not diminished by the presence of criminal allegations,⁹⁹ and the investigating agents remain under IRS control during periods of Strike Force cooperation, thus decreasing the possibility of Justice Department domination.¹⁰⁰

Finally, while expressing a concern that Strike Force involvement in an IRS tax investigation may be impermissible, the Third Circuit in *Serubo* did not establish a clear rule as to what degree of Strike Force participation in such an investigation will invalidate the summonses issued thereunder. Until the Third Circuit clarifies its holding on this issue,¹⁰¹ Strike Force attorneys will have no way of determining the contours of acceptable involvement in tax investigations and the IRS may find it necessary to impose its own limita-

November, 1977. 604 F.2d at 810. Considering that all of the challenged summonses had been issued by July, 1975—two years prior to any recommendation of prosecution—they were well within the “safe harbor” created by *LaSalle*. *Id.* Furthermore, *LaSalle* held that the primary limitation on summons enforcement occurs after the IRS recommends prosecution to the Justice Department. *See* 437 U.S. at 311.

94. 437 U.S. at 315-17. The *LaSalle* Court attempted to balance the competing interests of the IRS in civil tax collection and enforcement with those of the taxpayer in challenging the validity of summonses issued solely for criminal investigation purposes. *Id.* *See* notes 39-40 and accompanying text *supra*.

95. 437 U.S. at 316-17.

96. *See* *United States v. Chemical Bank*, 593 F.2d at 455-56. *See* notes 58-64 and accompanying text *supra*.

97. *See* notes 63-64 and accompanying text *supra*.

98. *See* *United States v. Chemical Bank*, 593 F.2d at 456; note 63 *supra*. The reasoning of the Second Circuit is highly persuasive when viewed in light of the dual civil and criminal purposes of tax fraud investigations, the existence of regulatory provisions encouraging cooperation between the IRS and other enforcement agencies, and the existence of statutes designed to prevent abuses of such cooperation. For a discussion of these factors, *see* notes 21-26 & 63 and accompanying text *supra*.

99. *See* *United States v. LaSalle*, 437 U.S. at 311-12. The *LaSalle* Court recognized that, even after there has been a recommendation to the Justice Department, the IRS “does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins.” *Id.*

100. *See* *United States v. Chemical Bank*, 593 F.2d at 456. *See* also note 63 *supra*.

101. In *United States v. Garden State Nat'l Bank*, 607 F.2d 61 (3d Cir. 1979), the Third Circuit reaffirmed its holding in *Serubo* that, where it appears that “an IRS agent was actually working with the United States Attorney,” a summons-by-summons inquiry is required. *Id.* at 70. *See* note 57 *supra*.

tions on Strike Force cooperation in order to ensure that the fruits of its investigative efforts are not declared to be the result of an impermissible overstepping of IRS authority.¹⁰²

Angela Baker

102. The IRS might limit or refuse cooperation with Strike Force attorneys in order to avoid summons challenges. Such action, however, may be contrary to IRS regulations providing for cooperation with other federal agencies, as well as in violation of substantive legislation providing for IRS disclosure of information to the Justice Department. For a review of these substantive provisions, *see* notes 23, 25, 59 & 63 *supra*.