Proper Standard for Enforcing an Internal Revenue Service Section 7602 Summons: *United States v. LaSalle National Bank*[1]—In May, 1975, John F. Olivero, a special agent with the Intelligence Division of the Chicago District of the Internal Revenue Service, was assigned to investigate the tax liability of John Gattuso for the 1970-1972 tax years.[2] Gattuso's tax returns for the years under investigation disclosed rental income from real estate,[3] held in Illinois land trusts by respondent LaSalle National Bank as trustee for Gattuso.[4] To determine the accuracy of Gattuso's income reports, Agent Olivero issued two summonses to the bank pursuant to section 7602 of the Internal Revenue Code.[5] The summonses, each relating to different land trusts, directed the bank, as trustee, to appear before Olivero and to produce all rec-

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[1] 98 S. Ct. 2357 (1978).

[2] *Id.* at 2359. Olivero requested the assignment, which he pursued without the assistance of a revenue agent, after having solicited and received information from various departments and agencies—including the Federal Bureau of Investigation, the United States Attorney for the Northern District of Illinois, the Secret Service, the Department of Housing and Urban Development, the IRS Collection Division, and Cosmopolitan National Bank of Chicago. *Id.*

The functions of revenue agents and special agents—and the departments to which they are assigned—differ. Special agents, through the Intelligence Division enforce the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alochol, tobacco, narcotics and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. Internal Revenue Service Organization and Functions § 1118.6, 39 Fed. Reg. 11,607 (1974).

In contrast, revenue agents, operating in the Audit Division, conduct a program involving the classification of returns for field and office audits, the conduct of district conferences in unagreed cases, and participation with special agents in the conduct of tax fraud investigations, and are responsible for providing manpower for the annual overseas taxpayer compliance program. *Id.* at § 1113.563, 39 Fed. Reg. 11,581 (1974). Thus, the Intelligence Division focuses solely on criminal violations while the Audit Division is primarily concerned with civil liability.

The Intelligence and Audit Divisions have now been redesignated as the Criminal Enforcement Division and the Examination Division, respectively. IRS News Release, February 6, 1978.

[3] 98 S. Ct. at 2359.

[4] *Id.*

[5] *Id.* I.R.C. § 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—
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> (1) To examine any books, papers, records or other data which may be relevant or material to such inquiry;
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> (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 hav-

ords relating to the trusts for the period from 1970 through 1972.[6] Joseph W. Lang, a bank vice-president, appeared in response to the summonses, but on advice of counsel, refused to produce any of the material requested.[7]

The United States and Agent Olivero sought to enforce the summonses in the United States District Court for the Northern District of Illinois.[8] Acting upon the petition for enforcement, the district court entered an order to show cause for denying the enforcement of the summonses.[9] At the subsequent hearing, respondents argued that Olivero's investigation was "purely criminal" in nature, and that the summonses were unenforceable because issued for a purpose—criminal investigation—unauthorized by section 7602.[10] In this regard, respondents contended that they did not have to show that the summonses lacked a civil purpose.[11] The district court agreed with respondents' arguments, and held that a section 7602 summons issued solely for the purpose of obtaining evidence of criminal conduct was not issued in good faith pursuit of a purpose authorized by section 7602. Accordingly, the court denied enforcement of Olivero's summonses.[12] Although an IRS summons might properly unearth evidence of criminal conduct—if issued in good faith and prior to a recommendation for criminal prosecution—the district court maintained that an IRS summons issued solely to discover criminal conduct would be improper. Relying heavily on the personal motive of Special Agent Olivero,[13] the court found that the respondents had met their burden of

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> ing 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 or his delegate at a time and place named in the summons and to produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
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> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

[6] 98 S. Ct. at 2360.

[7] *Id.*

[8] *Id.* The petition, filed pursuant to I.R.C. §§ 7402(b) and 7604(a), alleged the necessity of requested materials to determine Gattuso's tax liability for the years in question, and that the petitioner did not possess the information requested. At the filing, Olivero testified that he had not as yet determined whether criminal charges were warranted nor had he issued a report or made a recommendation about the case to his superiors. *Id.*

[9] *Id.*

[10] *Id.* This argument was based upon Olivero's alleged comment to respondents' counsel in June 1975 that the Gattuso investigation "was strictly related to criminal violations of the Internal Revenue Code." *Id.* At the hearing, Olivero testified that the nature of the assignment was "[t]o investigate the possibility of any criminal violations of the Internal Revenue Code." *Id.* at 2359.

[11] *Id.*

[12] United States v. LaSalle National Bank, 37 A.F.T.R. 2d 76–1239, 76–1240 (N.D. Ill. 1978).

[13] *Id.*

proof in challenging the summonses by demonstrating that his activities were directed solely at unearthing evidence of criminal conduct by Gattuso.[14] On this basis the court found no justification for the summonses under section 7602.

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision.[15] Using a clearly erroneous standard of review,[16] the circuit court maintained that despite Agent Olivero's testimony suggesting a civil purpose for his investigation, the district court was justified in finding that the investigation was designed solely to unearth evidence of criminal conduct.[17] In determining whether the district court's refusal to enforce the summonses was correct, the circuit court turned first to the Supreme Court's decision of *Donaldson v. United States,*[18] and subsequently, to a review of the differing interpretations of the *Donaldson* standard which were developed in the circuit courts.[19] Relying particularly on the Ninth Circuit's decision in *United States v. Zack,*[20] the circuit court concluded that if an IRS

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[14] *Id.* The district court judge explicitly commented on the lack of any evidence showing that Olivero ever considered a civil investigation. In addition, after refusing to allow respondents to examine the IRS investigative file, the court agreed to an *in camera* inspection of the file commenting that if nothing was found to give more weight to the Government position than Olivero's testimony did, it would conclude "that he was at all times involved in a criminal investigation, at least in his own mind." 98 S. Ct. at 2631. The judge considered this dispositive of the issue at trial holding that such a purpose precludes a finding of good faith as required by Donaldson v. United States, 400 U.S. 517 (1971). 37 A.F.T.R. 2d 76-1239, 76-1240 (N.D. Ill. 1978). In accord *see, e.g.,* United States v. Hodge and Zweig, 548 F.2d 1347, 1351-52 (9th Cir. 1977); United States v. Zack, 521 F.2d 1366, 1368 (9th Cir. 1975); United States v. Lafko, 520 F.2d 622, 624-25 (3d Cir. 1975); United States v. McCarthy, 514 F.2d 368, 374-75 (3d Cir. 1975); United States v. Theodore, 479 F.2d 749, 753 (4th Cir. 1973); United States v. Weingarden, 473 F.2d 454, 459-60 (6th Cir. 1973); United States v. Wall Corp., 475 F.2d 893, 895 (D.C. Cir. 1972).

[15] 554 F.2d 302, 309 (7th Cir. 1977).

[16] After concluding that the district court's finding of a criminal purpose was a factual rather than a legal conclusion, the circuit court limited its review of the district court's finding to the clearly erroneous standard as outlined in Fed. R. Civ. P. 52(a). *Id.* at 305-06. The circuits have split on whether "criminal purpose" is a factual rather than a legal finding. *See,* United States v. National State Bank, 454 F.2d 1249, 1252 (7th Cir. 1972) (fact). *But see,* United States v. Weingarden, 473 F.2d 454, 460 (6th Cir. 1973) (either a mixed finding of fact and conclusion of law or a finding of ultimate fact based on legal principles).

[17] 554 F.2d at 306. In response to a direct question by the district court, Olivero stated that he had not yet made a determination in his own mind whether to recommend criminal prosecution. *Id.* at 304. After hearing testimony, however, the court stated that nothing in Olivero's testimony suggested that the thought of a civil investigation ever crossed his mind. *Id.* at 305.

[18] 400 U.S. 517 (1971). The case and the developments it effected are treated in depth in a subsequent section. See text at note 78 *infra.*

[19] 554 F.2d at 306-08.

[20] 521 F.2d 1366 (9th Cir. 1975). The Ninth Circuit held that a summons issued solely for a criminal purpose is not issued in good faith, despite the lack of a recommendation for prosecution. *Id.* at 1368. See text at note 78 *infra.*

summons was issued solely to elicit information for use in a criminal action, it could not be issued in good faith, even if a criminal prosecution had not yet been recommended.[21] Indeed, the court characterized the use of a summons solely for criminal purposes as a classic manifestation of bad faith.[22] Thus, since the district court's finding of sole criminal purpose was not clearly erroneous, the circuit court sustained its denial of enforcement.[23]

The Supreme Court granted certiorari "[b]ecause of the importance of the issue in the enforcement of the internal revenue laws, and because of conflict among the courts of appeals concerning the scope of IRS summons authority under § 7602 . . . ."[24] In a five to four decision, the Court reversed the judgment of the court of appeals and HELD: Only the institutional posture of the IRS, and not the personal intent of an agent, is relevant in determining whether a summons is issued in pursuit of a civil tax determination or solely for a criminal investigation.[25] The Court also reaffirmed its prior holding[26] that Internal Revenue summonses are enforceable so long as they are issued in good faith pursuit of a congressionally authorized purpose under section 7602, and prior to a formal IRS recommendation for criminal prosecution.[27] The latter requirement was clarified by the Court's statement that such recommendation must be the formal one by the IRS to the Department of Justice.[28] Finally, contrary to the view of the district court, the Court found that the party opposing enforcement of a summons bears the burden of proving the absence of a valid civil tax determination or collection purpose by the IRS rather than the burden of proving an improper purpose for issuance of the summons.[29]

Justice Stewart, writing in dissent, argued that section 7602 does not expressly prohibit the use of the summons power for solely criminal purposes.[30] Consequently, he found the Court's analysis of purpose to be irrelevant in ruling on the validity of a summons. Expressly adhering to precedent stating that there are but two limits on the enforcement of a summons—it must be issued in good faith and prior to a recommendation for criminal prosecution[31]—the dissent would have reversed the lower courts without remand.[32]

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[21] 554 F.2d at 308-09.
[22] *Id.* at 309.
[23] *Id.*
[24] 98 S. Ct. at 2362.
[25] *Id.* at 2367.
[26] *See Donaldson,* 400 U.S. 517 (1971).
[27] 98 S. Ct. at 2368.
[28] *Id.* at 2365-66 and n.15.
[29] *Id.* at 2367. The Court found this approach necessary since the purpose of the good faith inquiry is to determine whether the Service is honestly pursuing the goals of § 7602 in issuing the summons. *Id.*
[30] *Id.* at 2369. Justice Stewart was joined in his dissent by the Chief Justice, Justice Rehnquist and Justice Stevens.
[31] *Id.* The dissent relied on *Donaldson, supra* note 18.
[32] *Id.* at 2370.

The Supreme Court's decision in *LaSalle National Bank* is significant for its procedural effect on the tax law enforcement process. This effect will be most evident in determining whether a summons has been issued in good faith pursuit of an authorized purpose under section 7602. Under *LaSalle*, the intent of the IRS as an institution is now the proper focal point—supplanting the intent of an individual agent. Furthermore, after *LaSalle*, a recommendation for criminal prosecution made during the IRS administrative processes will no longer render the summons power under section 7602 void. Rather, the Service now may continue to issue administrative summonses in good faith until a formal recommendation for prosecution is made to the Department of Justice. Lastly, a taxpayer challenging enforcement of a summons now faces the heavy burden of disproving a valid civil purpose for its issuance, making the task of quashing a summons exceedingly difficult.

This note will begin with an in-depth discussion of the Supreme Court's analysis in *LaSalle*, followed by an historical investigation of this area of the law to provide the background for a critical analysis of the Court's opinion. It will then be submitted that the Court's standard, while appearing to be two-pronged in nature, functions, as a practical matter, as a single spectral standard. Potential problems of implementation concerning the standard adopted by the Court will be discussed. In this regard, it will be submitted that the Court lost sight of the policies it was originally trying to protect. This note will then conclude with a prediction of the probable ramifications of *LaSalle*.

I. The Analysis of the Court

The statutory provisions of section 7602 provided the starting point for the *LaSalle* Court's analysis. As an initial premise, the majority posited that section 7602 limits the use of IRS summonses. The Service does not possess the inherent authority to compel the production of the private papers of citizens, the Court noted. Rather, the Service may exercise only the limited authority affirmatively granted to it by Congress under section 7602.[33] Further, section 7602 authorizes the use of the summons power for four purposes only, none of which include sole criminal investigation.[34] Therefore, the summons power must be limited to prevent its use for sole criminal investigation purposes.

After concluding that a limitation on the summons power is inherent in section 7602, the Court addressed the criteria to be considered in determining

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[33] *Id.* at 2367 n.18. A careful reading of § 7602 reveals that Congress intended the Service to utilize its summons authority only to aid in the determining and collecting of taxes, which purposes "do not include the goal of filing criminal charges against citizens." *Id.* This analysis clearly conflicts with the logic of the dissent in *LaSalle*. The dissent would permit the use of an administrative summons for solely criminal purposes on the ground that the statute contains no prohibition against such use. The fallacy of this logic, as pointed out by the majority, results from the dissenting justices' search for a prohibitive clause on the face of the statute rather than an affirmative grant of such authority. *Id.*

[34] *Id.*. See note 5 *supra*.

when the limitation must be imposed. In addressing this issue, the *LaSalle* Court particularly noted the need to protect the grand jury's role in the criminal justice system by avoiding the expansion of the Justice Department's powers of criminal discovery through unrestricted use of the summons power.[35] Additionally, in recognizing that section 7602 is a statutory grant of power to the IRS, the Court required that such power at all times be used in good faith pursuit of the congressionally authorized purposes of section 7602.[36] While listing several improper purposes,[37] as enumerated in *United States v. Powell,*[38] the Court nevertheless noted that use of a summons with civil and possible criminal liabilities is acceptable under section 7602.[39] The Court further noted, however, that the *Powell* list of improper purposes was not meant to be all inclusive,[40] and has received one important addition from the circuit courts—the issuance of a summons for a sole criminal purpose.[41] In accepting this addition, the *LaSalle* Court stated that validating such a purpose would expand the criminal discovery powers of the Department of Justice thereby infringing on the grand jury's role. Accordingly, the Court held that a sole criminal purpose was an improper basis for issuing a section 7602 summons.[42]

Having held that a sole criminal purpose acts to invalidate the summons power under section 7602, the Court then undertook to define such a purpose. In so doing, the Court ultimately focused on the institutional posture of the IRS to determine the presence of a criminal investigatory purpose, and not the personal motive of an agent. In reaching this conclusion, the Court observed that since Congress has created a tax law enforcement system in which civil and criminal elements are inherently intertwined, a special agent is

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[35] *Id.* at 2365.

[36] *Id.* at 2368.

[37] *Id.* at 2366.

[38] 379 U.S. 48 (1964). The Court in *Powell* stated that:

> [The Service] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . . [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.*

Id. at 57-58 (emphasis added).

[39] 98 S. Ct. at 2363. The willful submission of a fraudulent tax return can carry not only criminal penalties but also a civil penalty of 50% of the underpayment. I.R.C. § 6653(b). As the Court noted, then, in issuing a summons for one or all of the purposes delineated in § 7602, the Service may examine for suspected tax fraud and for determination of the civil penalty. The statute draws no distinction between the civil and criminal aspects, as was noted in Donaldson v. United States, 400 U.S. 517, 535 (1971).

[40] 98 S. Ct. at 2368 n.19.

[41] *Id.* at 2366. See cases enumerated at note 14 *supra.*

[42] *Id.* at 2367 and n.18.

authorized to issue a civil summons in aid of a tax investigation with both civil, and possible criminal, consequences.[43] The Court felt that the institutional obligations of the Service under the Code, in preventing civil and criminal violations of the tax laws, are not necessarily undermined by the motive of a single agent in building a criminal case.[44] In particular, the Court expressed a fear that distinguishing between acceptable civil and unacceptable criminal purposes on the basis of an agent's motivation would have two detrimental results. First, such a distinction would impose an unnecessary burden on tax law enforcement by restricting the use of the summons power based on an agent's motivation without considering the enforcement policy of the Service in an institutional sense.[45] Second, it would act to delay enforcement proceedings since a standard based on an agent's subjective intent in issuing a summons would necessitate analyzing the agent's thought processes.[46] Thus, while seeking to avoid the evils inherent in issuing a summons solely for a criminal purpose, the Court attempted to maintain the utility of the summons process in investigating civil tax liability.[47] On this basis, the Court concluded that the institutional posture of the IRS provides the best yardstick by which to measure whether a summons was issued solely for a criminal purpose.[48]

The Court supported this conclusion with an analysis of the multi-layered procedure which an investigation must follow before a decision to recommend prosecution is reached.[49] The Court gave great weight to the fact that officials of at least two layers of review must concur with the conclusion of a special agent before a recommendation to the Department of Justice is made and, thus, the criminal tangent can be dropped at any layer.[50] That these numerous reviews also afford a taxpayer substantial protection against a hasty, erroneous judgment of a special agent further influenced the Court's decision to focus on Service rather than agent intent.[51]

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[43] *Id.* at 2363.

[44] *Id.* at 2366.

[45] *Id.* at 2367.

[46] *Id.*

[47] *Id.* at 2365-66 n.15.

[48] *Id.* at 2367.

[49] *Id.* at 2366-67. As the Court noted, the agent's final recommendation is reviewed by the district chief of the Intelligence Division. The Office of Regional Counsel also reviews a case before it is sent to the National Office of the Service or the Department of Justice. In the event that the Regional Counsel and the Assistant Regional Commissioner for Intelligence cannot reach an agreement concerning the disposition of a case, it is completely reviewed again at the national level by the Criminal Tax Division of the Office of General Counsel. Therefore, since a recommendation to the Department of Justice only occurs after officials of at least two layers have concurred in the special agent's recommendation, his motivation was held not to be dispositive by the Court. *Id.*

[50] *Id.* at 2367.

[51] *Id.* The taxpayer may obtain a conference with officials at the district Intelligence Division either upon request or whenever the chief of the Division concludes that the Government's best interests would be served by such a conference. If prosecution has been recommended and the case referred to Regional Counsel, the chief so notifies the taxpayer. *Id.*

The *LaSalle* Court further set forth an objective standard for determining when the Service has acted with an improper criminal purpose.[52] In this regard, the Court pinpointed an IRS recommendation to prosecute a taxpayer as the triggering event. As previously held by the Court in *Donaldson,*[53] the point of recommendation objectively manifests the Service's intent to prosecute.[54] Accordingly, the *LaSalle* Court maintained that issuance of a summons after that point would likely be to gather additional evidence for use in the criminal proceeding. The collection of such evidence clearly would constitute an unwarranted expansion of criminal discovery rights. In limiting the summons power at the time of a prosecution recommendation, the *LaSalle* Court attempted to clarify its prior holding in *Donaldson*—that a summons issued after a recommendation for prosecution was invalid—by stating that the dispositive recommendation is the Service's formal one to the Department of Justice.[55]

While emphasizing that the IRS must at all times use its summons power in good faith, the *LaSalle* Court supported retaining the formal recommendation as the latest time for the valid use of a section 7602 summons on several grounds. In particular, the Court noted that, upon referral to the Department of Justice, the IRS loses the authority to settle by compromising the civil and criminal aspects of a tax fraud case.[56] From then on, the Justice Department has the sole authority to effect such a settlement.[57] In this regard, it is expected that the two agencies will cooperate in the civil case thereby encouraging efficient settlement of the dispute.[58] As the Court pointed out, however, the inherently intertwined nature of the civil and criminal aspects make it ludicrous to expect a "partial information barrier" to exist. Consequently, the restraint on the IRS summons authority, after a final recommendation, encourages cooperation while minimizing the potential for abuse of authority.[59]

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[52] *Id.* at 2365.

[53] 400 U.S. 517 (1971).

[54] *Id.* at 536.

[55] 98 S. Ct. at 2365 n.15, 2368. This part of the holding is important in explaining the Court's language in *Donaldson* which stated that a summons "may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." 400 U.S. 517, 536 (1971). This language prompted an appellate watershed as to which recommendation the Court was referring to, i.e., one within the Service's investigative process, or the final one to the Department of Justice. For opinions following the former approach, *see* United States v. Friedman, 532 F.2d 928 (3d Cir. 1976); United States v. Lafko, 520 F.2d 622 (3d Cir. 1975); United States v. Wall Corp., 475 F.2d 893 (D.C. Cir. 1972). For opinions in accord with the latter approach, *see* United States v. Hodge and Zweig, 548 F.2d 1347 (9th Cir. 1977); United States v. Zack, 521 F.2d 1366 (9th Cir. 1975); United States v. Theodore, 479 F.2d 749 (4th Cir. 1973); United States v. Weingarden, 473 F.2d 454 (6th Cir. 1973); United States v. Billingsley, 469 F.2d 1208 (10th Cir. 1972).

[56] 98 S. Ct. at 2365.

[57] *Id.*

[58] *Id.*

[59] *Id.*

In summary, a recommendation for prosecution to the Department of Justice offers a concise objective standard for determining when a section 7602 summons is issued for an invalid purpose. It is when this objective standard is not available—at any point prior to such recommendation—that the *LaSalle* decision becomes crucial in determining whether the summons power was exercised in good faith, and therefore, is valid. Under the *LaSalle* Court's reasoning, a sole criminal purpose in serving a summons constitutes one major example of bad faith. And to discern sole criminal purpose, one must look to the institutional posture of the IRS.

II. History

Much of the confusion potentially resulting from *LaSalle* has precedent in the prior case law interpeting the proper standard for enforcing a summons issued pursuant to section 7602. Past Supreme Court decisions in this area have vaguely defined the limits on the summons power.[60] This vagueness resulted in numerous conflicting circuit court decisions.[61] The *LaSalle* Court, in recognition of the conflicts in this area,[62] viewed its decision as an effort to impose a degree of clarity on the confusion in the circuits. Consequently, a discussion of the problems leading up to *LaSalle* will provide a background for better understanding the Court's decision.

In the 1971 decision of *Donaldson v. United States,*[63] the Supreme Court attempted to clarify the intended scope of the statutory grant of summons power under section 7602, and the proper standard for use of the power. In that case, the Court discussed dictum from its earlier decision in *Reisman v. Caplin*[64] to the effect that issuance of a summons to obtain evidence for use in a criminal prosecution constituted an improper purpose under section 7602.[65] The *Donaldson* Court, while considering the analysis and the circumstances involved in *Reisman,*[66] indicated that this dictum was applicable to

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[60] *Donaldson,* 400 U.S. 517 (1971); Reisman v. Caplin, 375 U.S. 440 (1964).

[61] See cases cited in note 55 *supra.*

[62] *See* 98 S. Ct. at 2362 and n.6.

[63] See note 18 *supra.*

[64] 375 U.S. 440 (1964).

[65] *Id.* at 449. The passage referred to reads:

> [T]he witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren v. Tucker,* 239 F.2d 767, 772-773 . . . .

[66] Petitioners in *Reisman* were seeking declaratory and injunctive relief to invalidate IRS summonses issued pursuant to § 7602. 375 U.S. at 444. The Court, however, discussed the ability of petitioners to challenge the summonses on proper grounds at an enforcement hearing, using sole criminal purpose as an example of a proper ground. *Id.* at 446-50. Holding the remedy at law—an enforcement hearing—to be adequate, the Court denied the relief sought. *Id.* at 450.

In addition to these circumstances, the *Donaldson* Court noted that the *Reisman* dictum itself, see note 65 *supra,* embraces a citation to Boren v. Tucker, 239 F.2d 767 (9th Cir. 1956), 400 U.S. at 533. *Boren* was an opinion in which the Ninth Circuit carefully distinguished United States v. O'Connor, 118 F. Supp. 248 (D. Mass. 1953), a the issuance of a summons during a pending criminal charge or, at most, during an investigation solely for criminal purposes.[67] The last paragraph of *Donaldson,* however, suggested a different interpretation of section 7602 in stating: "We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."[68] Consequently, after *Donaldson,* it was far from clear whether a summons issued pursuant to section 7602 was invalid only when issued solely for a criminal purpose, as stated in the *Reisman* dictum, or whether the good faith langauge of the last paragraph in *Donaldson* supposed additional considerations for holding a summons invalid.

The vagueness and ambiguity of the holding in *Donaldson* resulted in conflicting decisions among the circuits attempting to apply the *Donaldson* standard.[69] The final paragraph of *Donaldson* apparently set forth a two-pronged standard requiring both good faith *and* the absence of a recommendation for prosecution before a section 7602 summons would be enforceable.[70] Various circuits nevertheless have focused solely on whether a recommendation for prosecution has been made to determine the enforceability of an IRS summons.[71] While such an approach has garnered limited judicial acceptance,[72] most recent cases have considered the good faith language in the last paragraph of *Donaldson* as an additional consideration regarding validity.[73]

This new trend, in focusing on good faith, itself engendered a controversy as to which language constituted holding in *Donaldson* and which was dictum. A number of circuits have held that the last paragraph of the decision—relating to the good faith and prior recommendation requirements—was technically dictum.[74] These courts instead regarded the

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case where the taxpayer was already under indictment. The *Donaldson* Court therefore concluded that the *Reisman* dictum was to be read in light of its citation to *Boren,* and of *Boren*'s own citation to *O'Connor,* which would give such dictum its proper focus in bearing on sole criminal investigations. 400 U.S. at 533.

[67] 400 U.S. at 533.

[68] *Id.* at 536.

[69] The facts in *Donaldson* led to a broad interpretive split in the various circuits. The only issue before the Court was whether Donaldson had sufficient interest to intervene in a proceeding to enforce a § 7602 summons issued to a third party to produce records of Donaldson's employment and compensation for the years under investigation. After affirming the lower court's decision denying intervention, the Court went on to discuss the proper standard for enforcing an administrative summons thereby causing some circuits to regard all or part of the latter sections of the opinion as mere dicta. See the cases at note 74 *infra.*

[70] 400 U.S. at 536.

[71] *See, e.g.,* United States v. National State Bank, 454 F.2d 1249, 1252 (7th Cir. 1972).

[72] *See, e.g.,* United States v. National State Bank, 454 F.2d 1249, 1252 (7th Cir. 1972). *But see,* United States v. Weingarden, 473 F.2d 454, 460 (6th Cir. 1973).

[73] United States v. LaSalle National Bank, 554 F.2d 302, 306 (7th Cir. 1977).

[74] United States v. Lafko, 520 F.2d 622, 625 n.5 (3d Cir. 1975); United States v. McCarthy, 514 F.2d 368, 374 n.7 (3rd Cir. 1975); United States v. Weingarden, 473 F.2d 454, 460 (6th Cir. 1973). *See also* United States v. Friedman, 532 F.2d 928, 932 (3d Cir. 1976).

holding of *Donaldson* as the paragraph quoting the *Reisman* dictum. On this basis, these circuits ruled that the proper standard for determining the validity of a summons must focus on whether the summons was issued to obtain evidence for use in a criminal prosecution. In applying this standard, these courts considered whether the sole purpose of an agent in issuing the summons was criminal in nature.

In contrast, certain circuit courts have regarded the last paragraph of *Donaldson* as constituting the holding in that case.[75] Under this view, courts have held that a summons must be issued prior to a recommendation of prosecution. Additionally, even when issued prior to such a recommendation, these circuits have required that a summons be issued in good faith. In this regard, these courts have viewed an agent's intent to recommend prosecution as reflecting bad faith in issuing a summons, even though his sole purpose was not criminal in nature.[76]

Finally, still another group of circuit courts have declined to follow the established pattern of dichotomizing *Donaldson's* language between holding and dictum by promulgating an additional set of rules for evaluating section 7602 summonses. These rules consist of the Third Circuit's delineation of a list of factors which would allow enforcement,[77] and the Ninth Circuit's interrelation of the good faith inquiry with the sole criminal purpose issue.[78] In deciding the sole criminal purpose issue, the Ninth Circuit ruled that a summons issued solely for a criminal purpose is not issued in good faith, despite the lack of a recommendation for prosecution.[79]

The Seventh Circuit Court of Appeals in *LaSalle* traced much of this interpretive history and concluded that in regard to *Donaldson*, it should "take at face value the words of the authoring Justice and characterize the final paragraph of the opinion for the Court as constituting a holding of *Donaldson*."[80]

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[75] *See, e.g.*, United States v. Wall Corporation, 475 F.2d 893 (D.C. Cir. 1972).

[76] *See, e.g.*, United States v. Wall Corp., 475 F.2d 893, 895 (D.C. Cir. 1972).

[77] In purposely attempting to avoid distinguishing the holding in *Donaldson* from its supposed dictum, the Third Circuit articulated various principles from several relevant cases in holding that possible criminal, in addition to civil, liability will not prevent enforcement if: (1) the Intelligence Division has not yet recommended prosecution, (2) the agent has not already formed a firm purpose to recommend prosecution, (3) the summons is not being used to harass the taxpayer, and (4) the material referred to in the summons has not already been inspected by the Government. United States v. Friedman, 532 F.2d 928, 932 (3d Cir. 1976). This approach noticeably avoids the use of the words "good faith," using instead a list of circumstances where denial of enforcement is proper. This is similar to the approach of United States v. Powell, 379 U.S. 48 (1964). See note 38 *supra*.

[78] The Ninth Circuit attempted to reconcile the conflicting language of *Donaldson* by harmonizing the good faith requirement with the "solely for criminal purposes" consideration. It therefore held that even prior to a recommendation for criminal prosecution, a summons could not be enforced if it was issued in bad faith, which would include using an administrative summons solely for criminal prosecution purposes. United States v. Zack, 521 F.2d 1366, 1368 (9th Cir. 1975). *Accord*, see cases at note 14 *supra*.

[79] United States v. Zack, 521 F.2d 1366, 1368 (9th Cir. 1975).

[80] United States v. LaSalle National Bank, 554 F.2d 302, 308 (7th Cir. 1977). The court regarded the last paragraph as an "alternative holding." *Id.* at 308 n.4.

Defining the issue in *LaSalle* as "whether the Internal Revenue Service may issue a summons solely in aid of a criminal investigation and still meet the standard of good faith as enunciated in *Donaldson*,"[81] the appellate court denied enforcement of the summons. In so doing, the court noted that it found the Ninth Circuit's reconcilation of the various *Donaldson* statements a persuasive delineation of what the Supreme Court has held.[82]

In granting certiorari against this background, the Supreme Court recognized a need for a clarification of *Donaldson*.[83] The Court expressed its task in terms of examining the limits of the good faith use of an Internal Revenue summons issued under section 7602,[84] thereby implying that the "recommendation for prosecution" standard was not the sole consideration in determining the validity of a section 7602 summons. It added that the Service must at all times use the summons power in good faith pursuit of the Congressionally authorized purposes of section 7602.[85] Thus, the Court agreed with the *LaSalle* circuit court and those courts which viewed the final paragraph of *Donaldson* as stating the holding in that case. Similarly, as did the appeals court, the Supreme Court adopted the Ninth Circuit's premise that the good faith issue properly relates to the concept of sole criminal purpose. The issue in the *LaSalle* case itself thus became whether a finding that a special agent is conducting an investigation for the sole purpose of unearthing evidence of criminal conduct necessarily leads to the conclusion that section 7602 summonses issued by the agent were not issued in good faith.[86] By focusing on the institutional posture of the IRS as determining whether such a sole criminal purpose exists, the Court answered in the negative.

III. Analysis of the Decision

While the first sentence of *LaSalle* implies an objective of explaining *Donaldson* and laying to rest the conflicting outgrowths of that case,[87] it is questionable whether tranquility will descend over this area of the law. Indeed, the *LaSalle* Court's approach carries the potential for creating additional problems in this area. By inadequately defining sole criminal purpose, and determining its existence on the basis of institutional posture, the *LaSalle* decision may engender as much vagueness as did the *Donaldson* decision. In addition, by identifying the objective recommendation for prosecution aspect of its

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[81] *Id.* at 308-09.

[82] *Id.* at 309.

[83] *See* 98 S. Ct. 2357, 2359, 2365 n.15. See also note 87 *infra.*

[84] *Id.* at 2363.

[85] *Id.* at 2368.

[86] *Id.* at 2363. This did not evolve into the identical issue ruled on below. At the trial and appellate levels, the question was whether the "criminal purpose" issue was relevant to the "good faith" inquiry. The Supreme Court, however, ruled on the definition of "criminal purpose," i.e., whether or not it should be defined in regard to the agent's motive or the institutional motive of the IRS, taking the relevance as given.

[87] The first sentence reads, "This case is a supplement to our decision in *Donaldson v. United States*, 400 U.S. 517 (1971)." 98 S. Ct. at 2359.

standard with the formal IRS recommendation to the Justice Department, the *LaSalle* Court may have created a standard which will fail to guard the very interest the Court labored to protect—the grand jury's role in the prosecution of criminal conduct. To further develop these consequences, an in-depth discussion of the mechanics and the problems of the *LaSalle* Court's standard will be undertaken.

A. The Spectral Standard Theory

In *LaSalle,* the Supreme Court attempted to define and distinguish the good faith, sole criminal purpose, and recommendation for prosecution elements of a tax investigation as they relate to the enforceability of section 7602 summonses. Adding substances to these terms, the Court set forth a two-pronged test for IRS summons enforcement.[88] As a result, in determining whether a summons is valid courts must concern themselves with two basic questions. First, it must be determined if the summons was issued prior to a formal recommendation by the IRS to the Justice Department that a criminal prosecution be commenced. A negative response to this question would invalidate the summons. If, however, the summons were issued prior to such a recommendation, it must then be determined if the IRS was acting at all times in good faith pursuit of a congressionally authorized purpose under section 7602.

It is submitted that the two-prong standard which emerged from the Court's decision operates as a single spectral standard. The Court states that the use of section 7602 must be at all times in good faith.[89] This good faith requirement therefore can be read as encompassing the recommendation for prosecution element of the standard. Consequently, the single standard for determining the validity of an IRS summons is good faith, evidence of which includes whether a recommendation for prosecution was made prior to issuing the summons. To conceptualize this analysis a spectrum is useful. On the extreme right of the spectrum is an irrebuttable presumption of bad faith, created at the point of a case's referral to the Justice Department for criminal prosecution. Prior to that point, a presumption of IRS good faith exists, concerning the issuance of a summons, which a taxpayer can rebut by proving the absence of a valid civil purpose for using section 7602. However, with the main concern always focused on the intent of the IRS, and where such intent lies on this spectrum, success in challenging an IRS summons will be exceptionally difficult to achieve for the reasons discussed in the following sections.

B. Problems of Vagueness

1. Sole Criminal Purpose

The vagueness of the sole criminal purpose concept may make the application of the Court's standard exceedingly difficult at best. The conclusion

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[88] *Id.* at 2368.
[89] *Id.*

that sole criminal purpose is a classic example of bad faith is inherently problematic since the Court failed to clearly define the indicia of such a purpose. Additionally, in view of some of the Court's own statements,[90] it may be irrelevant whether institutional posture or agent motive is used to determine the existence of a sole criminal purpose.

To understand the problem, the conflict between the concepts of possible civil liability and sole criminal purpose must be satisfactorily harmonized. Unless this can be achieved, the application of the *LaSalle* standard will not only be exceedingly difficult, but impossible to effect for if an agent's investigation always holds a possibility of civil liability, it would defy logic to discern a sole criminal purpose. In this regard, it should be noted that the *LaSalle* Court, in discussing the sole criminal purpose aspect of the standard, held that to show such a purpose a taxpayer must prove the absence of a valid civil tax determination or collection purpose by the IRS.[91] The Court observed that the government does not sacrifice its interest in unpaid taxes merely because a criminal investigation is begun.[92] Additionally, conviction on a criminal charge automatically subjects a taxpayer to civil liability.[93] If an investigation fails to reveal an intent to defraud, but it is shown that an underpayment resulted from a negligent or intentional disregard of the tax rules, the Code provides for a civil monetary penalty.[94] Therefore, any IRS investigation culminating in a successful Government suit, results in civil liability, while some investigations reveal unlawful conduct severe enough to warrant criminal liability in addition to civil liability.

Since any successful investigation may lead to civil liability, it will be difficult—if not impossible—to discover an investigation being conducted with a sole criminal purpose. The Government always retains the purpose of collecting the civil penalty. Further, to show a sole criminal purpose, a taxpayer must prove the absence of a valid civil determination or collection purpose by the Service which, as the Court itself proclaimed, is a heavy burden.[95] The Court's failure to provide an insight into evidence relevant in disproving a valid civil purpose has the additional potential for creating serious implementation problems. Thus, while a sole purpose renders a section 7602 summons invalid under LaSalle, the Court, in its vague treatment of the issue may have left proof of such a purpose beyond reach.

2. Institutional Posture

Assuming that the conflicting concepts of possible civil liability and sole criminal purpose can be satisfactorily harmonized, thereby making it possible

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[90] *See, e.g., Id.* at 2367 where the Court, in discussing the burden of proof it has placed on a challenging party, calls it "a heavy one" and goes on to say, "[b]ecause criminal and civil fraud liabilities are coterminous, the Service rarely will be found to have acted in bad faith by pursuing the former."

[91] *Id.* See note 29 *supra.*

[92] *Id.* at 2365.

[93] I.R.C. § 6653(b).

[94] I.R.C. § 6653(a).

[95] 98 S. Ct. at 2367. See note 90 *supra.*

to discern a sole criminal purpose, the decision of the Court to focus on the Service's institutional posture in discerning such a purpose raises additional problems. Although ascertaining the motive of a single agent would appear easier than ascertaining that of the IRS as an institution, the *LaSalle* Court maintained at an agent's personal intent is inadequate evidence for determining sole criminal purpose. In the Court's view, the use of such evidence "would delay summons enforcement proceedings while parties clash over, and judges grapple with, the thought processes of each investigator."[96]

On this basis the Court considered it undesirable to create a standard which would require proving an individual agent's intent. This conclusion, however, raises two apparent inconsistencies in the Court's apprehension that thought-process analysis would delay summons enforcement proceedings. First, the Court admits that there will be times when an agent's motive is relevant to the question of the validity of a summons.[97] For example, under the good faith standards enunciated in *United States v. Powell,*[98] such motive may be at issue in determining if a summons was served to harass a taxpayer. Consequently, in any enforcement proceeding where the taxpayer asserts a violation of the good faith requirements of *Powell* the mindreading of an agent will still be necessary.

The second inconsistency in the Court's concern with evaluating an individual agent's motive is reflected in the very standard adopted in place of an agent's motive. Instead of ascertaining and proving the intent of an agent, a taxpayer must now ascertain and prove the intent of the IRS as an institution. The Court's failure to indicate what sort of evidence is required in proving institutional intent may well result in problems in implementing this standard thereby delaying summons enforcement proceedings—the result which the Court sought to avoid. And, contrary to the Court's desire to clarify, this failure may create the same diversity among the circuits as did the vague language of *Donaldson.*

In one decision which has dealt with the Service's institutional intent since *LaSalle,* the United States Court of Appeals for the Second Circuit added cause for concern regarding this standard. In *United States v. Marine Midland Bank of New York,*[99] the Second Circuit held that both the point to which a recommendation for prosecution has progressed through the Service's decision-making levels, and the extent to which civil collection efforts are continuing at the time of a challenge to a summons are proper evidence for determining institutional posture. Several analytical difficulties may arise under this approach. If such evidence may be used to determine its posture, the Service on the one hand could slow the speed with which a recommendation passes through its machinery, while, on the other hand, maintaining a facade of civil collection in order to avoid the quashing of a summons.

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[96] *Id.*
[97] *Id.* at 2367 n.17.
[98] See note 38 *supra.*
[99] 585 F.2d 36 (2d Cir. 1978).

The probability of such occurrences may have been increased by the Second Circuit's conclusion that the IRS is in the better position to provide the information as to its own institutional posture.[100] The court stated that enforcement delays and litigation could best be avoided by the Service's prompt and full disclosure of both the point to which prosecution recommendations have progressed, as well as the extent to which civil collection efforts are still being pursued.[101] However, the court stated that an IRS affidavit would suffice to disclose this information and that no full-dress discovery or trial would be necessary.[102] Thus, the Second Circuit, as did the Supreme Court, may have left the proof of a sole criminal purpose beyond reach.

C. Failure to Protect Stated Policy Considerations

The standard articulated by the *LaSalle* Court and some of the statements surrounding its expression indicate that the Court may have lost sight of the policy interests it claimed it was attempting to protect.[103] In declaring that the institutional posture of the IRS, and not the motive of an agent, controls in determining sole criminal purpose, and in identifying an objective enforcement standard with the formal recommendation of prosecution to the Department of Justice, the Court has failed to eliminate the potential for infringing on the role of the grand jury by expanding the criminal discovery powers of the Justice Department. Indeed, both elements of the *LaSalle* standard are ineffective in curtailing the summons power before a large mass of criminal evidence has been accumulated. The vagueness of the sole criminal purpose standard may infringe on the grand jury's role since the inability of taxpayers to introduce sufficient evidence to show such a purpose—by proving the absence of a valid civil purpose—will cause fewer summonses to be quashed. The recommendation for prosecution aspect of the standard may prove equally unsatisfactory. Although the act of recommending prosecution to the Department of Justice provides a clear, concise, objective standard for determining if an IRS summons is invalid, the triggering of this standard is very late in the investigative chain.[104] This late triggering, in allowing the accumulation of excessive criminal evidence, maintains the potential for infringing on the grand jury's role thereby expanding the criminal discovery powers of the Department of Justice.

In stating its reasoning, the Court explained that the intent of a single agent—both in determining sole criminal purpose or in quashing a summons when he recommends prosecution to his superiors—should not control the

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[100] *Id.* at 38.
[101] *Id.* at 38-39.
[102] *Id.* at 39.
[103] *See* 98 S. Ct. at 2366.
Those policy interests are reflected in the Court's statement that § 7602 cannot be read so as to broaden the "Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as the principal tool of criminal accusation." *Id.* at 2365.
[104] See note 103 *supra*.

validity of a summons since a recommendation must travel through several levels within the institutional structure of the IRS. Since two such levels must agree to recommend prosecution before the Department of Justice is notified, the criminal tangent can be dropped at any time.[105] The Court apparently relied on this procedure as a safeguard on the summons power. Such reliance, however, is misplaced. Since an agent must convince two higher levels of decision makers that his decision to recommend criminal prosecution is justified, he is likely to amass as much evidence in support of that opinion as is possible. All such evidence is subsequently turned over to the Department of Justice upon a recommendation of prosecution. Consequently, this element of the standard may create a situation which allows an accumulation of evidence by the Service to a degree inconsistent with the policy interests which the Court stated it was trying to protect—preventing an unwarranted expansion of the criminal discovery powers.

The Court explicitly recognized the potential danger created by these elements of its standard by stating, "[w]e shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution."[106] These cautionary words of the Court fall short of their goal, however, since the Service will not have to delay recommendation in order to gather more evidence. The agent already will have had ample opportunity to accumulate evidence sufficient to convince two higher levels of authority to recommend prosecution. This opportunity is a direct result of the imposition of the objective standard so late in an investigation, while prior to that point, the taxpayer faces the almost impossible burden of proving institutional intent. As a result, the validity of summonses issued pursuant to section 7602 is virtually ensured until a final recommendation for prosecution is made to the Justice Department. The Court expressly acknowledged "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" to his superiors.[107] Nonetheless, it refused to impose a restriction on the use of the summons power at this earlier point in the investigative process.

Several potentially adverse results thus are apparent in the *LaSalle* Court's opinion. The use of a sole criminal purpose test of good faith and the focus on institutional posture create problems of vagueness which make it more difficult to successfully quash a summons thereby endangering the grand

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[105] See note 49 *supra*. In discussing this issue the Court says, "[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." 98 S. Ct. at 2367. This sentence seems to make little sense since abandoning the criminal prosecution *is* a decision to instead assert a civil penalty—which, as was discussed, remains present throughout any investigation. The sentence should list the choices as, abandoning the entire investigation, abandoning the criminal prosecution, or pursuing both goals.

[106] 98 S. Ct. at 2367-68.

[107] *Id.* at 2365-66 n.15.

jury's role. The use of the formal recommendation to the Department of Justice as the point for invalidating a summons also endangers the grand jury's role. This result derives from the greatly increased proof burdens on taxpayers seeking to quash section 7602 summonses. Absent a formal recommendation for prosecution, such taxpayers must show the Service's sole criminal purpose by proving the absence of a valid civil purpose. Yet one court has viewed an affidavit attesting to a civil purpose as adequate evidence on this issue—an affidavit prepared by the IRS. Insofar as these proof problems prove insurmountable in many cases, taxpayers will fail in quashing many summonses. Such failures will in turn allow the Service to accumulate evidence potentially available in criminal suits in derogation of the grand jury's role in the criminal sphere.

These criticisms of the Court's primary and secondary reasons for adopting its standard lead to the prediction that the *LaSalle* decision will cause confusion among the circuits. As a result of the Supreme Court's silence on the issue, the courts are free to decide what evidence will be required to prove the absence of a valid civil collection purpose on the part of the IRS. The response of the Second Circuit—requiring only an IRS affidavit—illustrates one potentially harmful result. Other circuits may go too far in the other direction by requiring the IRS to produce excessive amounts of evidence of a civil purpose. In any case, *LaSalle* is likely to engender as much conflict as the *Donaldson* decision, thereby creating new uncertainties in the enforcement of section 7602 summonses.

CONCLUSION

In an attempt to recognize and settle the problems engendered by the 1971 case of *Donaldson v. United States,* and thereby to set forth a clear usable standard for ruling on the validity of section 7602 summonses, the Supreme Court decided *United States v. LaSalle National Bank.* The Court clarified the issue raised by *Donaldson* by holding that the summons power under section 7602 must be used in good faith and prior to a recommendation for prosecution to the Department of Justice. In so doing, the *LaSalle* Court narrowed the protections afforded taxpayers for quashing IRS summonses under the Code. No longer may the personal motive of a special agent in building a criminal case be considered in assessing whether good faith was present in issuing a summons. Instead, the institutional posture of the IRS must be evaluated in deciding if the taxpayer has carried his burden of proving the absence of a valid civil collection purpose. It is uncontested that this task is exceedingly difficult, if not impossible. The Court could have tempered this result by providing an insight into relevant evidence rather than leaving the matter to the circuit courts. Furthermore, following *LaSalle,* a recommendation for prosecution at any point in the Service's multi-level decision making process will not render a summons invalid. Now, a taxpayer must wait until a formal IRS recommendation for prosecution is made to the Department of Justice before successfully challenging the issuance of a summons. The delay inherent in this procedure may result in the Government's acquiring much criminal evidence via a civil summons.

It will take time to discern the true results of *LaSalle.* Inevitably, there will be situations where, although a formal recommendation for prosecution has not yet been made, the Service has in fact abandoned a valid civil purpose. If, when these situations arise, however, it is not readily possible to acquire adequate evidence of their existence, the good faith presumption on the part of the IRS prior to a recommendation for prosecution will become irrebuttable as a practical matter. Thus, the effect of *LaSalle* is to resolve the dispute concerning summons enforcibility by tipping the balance in favor of the IRS. As a result, it remains to be seen whether the problems apparent in this area of the law have been settled or merely replaced.

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