Catholic University Law Review

Volume 14 | Issue 1 Article 5

1965

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Catholic University Law Review

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Recommended Citation

Catholic University Law Review, *Summons of Taxpayers' Records: Conflicting Standards of Proof for Judicial Enforcement: The Solution of Reisman v. Caplin*, 14 Cath. U. L. Rev. 99 (1965).
Available at: https://scholarship.law.edu/lawreview/vol14/iss1/5

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Comment/Summons of Taxpayers' Records: Conflicting Standards of Proof For Judicial Enforcement: *The Solution of Reisman v. Caplin.*

TAXPAYER PAID HIS TAXES for 1958 and 1959. The taxes had received one examination by Internal Revenue. In 1963 Internal Revenue, by letter[1] and summons,[2] directed taxpayer to produce his books and records relating to the years 1958 and 1959, because it deemed it necessary to make a reinvestigation in order to verify properly taxpayer's returns for those years. Meanwhile, the statute of limitations[3] for assessment and collection of taxes for those years had expired, except if fraud or willful attempt to evade was involved. Taxpayer informed Internal Revenue that, in view of the fact that the limitation statute had run, the reexamination request was unreasonable, and that unless taxpayer was given some indication or showing of fraud or some indication of the allegation or justification for opening such closed years, he would not comply with the order. Internal Revenue then filed a petition[4] in the District Court for enforcement of its summons.

The fact pattern just presented is typical of cases referred to in this comment. The basic elements usually involved in the pattern are: a) statutory authorization for investigation of tax returns, b) a letter or summons by Internal Revenue directing taxpayer or third parties either to appear or to submit records, c) a refusal by taxpayer, usually based on a statute of limitations, d) a request by taxpayer for facts or a showing of probable cause indicating that fraud was involved, e) a refusal of taxpayer's request, and f) either a petition by Internal Revenue to the District Court to enforce its summons, or a petition by taxpayer to enjoin production of a third party's records which relate to taxpayer's returns. This comment will consider the standard of proof which courts should apply in deciding whether to enforce the summons.

[1] INT. REV. CODE of 1954, 26 U.S.C. § 7601.
[2] INT. REV. CODE of 1954, 26 U.S.C. § 7602.
[3] INT. REV. CODE of 1954, 26 U.S.C. § 6501.
[4] INT. REV. CODE of 1954, 26 U.S.C. § 7604 (b).

The conflicting decisions among the Circuit Courts as to whether suspicion alone is or is not sufficient to warrant enforcement of the summons will be presented and analyzed. As the split now stands, only the Supreme Court can define what the standard should be. *Reisman v. Caplin*[5] will be offered as the possible solution to the problem. Two of the cases presented (one on each side of the split) are presently before the Supreme Court, were argued in mid-October, and are awaiting decision;[6] this comment intends no further reference to these two cases other than to present them as cases representing opposing views—it makes no suggestion or referenec to their particular dispositions. The parenthetical "should the court enforce" refers only to a possible disposition by a District Court upon a petition for enforcement or injunction.

In a case where the statute of limitations has barred Internal Revenue from reopening closed years, except for fraud or willful attempt to evade, should the court enforce the summons, or should it require Internal Revenue to show reasonable belief or probable cause that fraud has been committed? Involved in the question is whether Internal Revenue has the right to examine closed years on suspicion, or whether taxpayer has the right to demand that a reasonable justification support Internal Revenue's request.

The District Court in the *Powell* case ultimately decided upon a compromise order which expressed dissatisfaction with Internal Revenue's refusal to present testimony, and agreement with taxpayer's position, but which, nevertheless, directed taxpayer to make his books available for a one hour inspection to be held at a specified time and date. Taxpayer appealed.

The Third Circuit Court of Appeals reversed the compromise order, holding that section 7604 (b), under which Internal Revenue brought its petition for enforcement of its summons, requires the production of satisfactory proof and a hearing of the case as a basis for granting the requested enforcement.[7] In addition, the court stated that, since section 7605 (b) of the Internal Revenue Code[8] prohibits unnecessary examinations, and, since the limitation statute barred the assessment, "logically, therefore, a reexamination of his records must be unnecessary within the meaning of section 7605 (b) unless something has been discovered by the Secretary's delegate which might cause a reasonable man to suspect that there has been fraud in the return for the otherwise closed years."[9] The Third Circuit's decision dramatized the split among the circuits on the issue of enforcing summonses which summarily and without reason demand taxpayers' records for years closed by normal

[5] 375 U.S. 440 (1964).

[6] United States v. Powell, October Term, 1964, Docket No. 54.
Ryan v. United States, October Term, 1964, Docket No. 12.

[7] United States v. Powell, 325 F.2d 914 (3rd Cir. 1963).

[8] INT. REV. CODE of 1954, 26 U.S.C. § 7605 (b).

[9] *Supra* note 7.

operation of a statute of limitations. It put squarely in opposition the Second Circuit's decision in *Foster v. United States*,[10] wherein that court held that a mere allegation of fact in an affidavit submitted by Internal Revenue stating that the records were necessary to authenticate taxpayer's claim was sufficient to justify an order directing a bank to produce records of one of its depositors, even though a portion of the period described by the records had been closed by the statute of limitations.

Because of the conflict between the circuits the Supreme Court granted certiorari,[11] and the *Powell* case, along with *Ryan v. United States*,[12] were docketed for the October 1964 term.[13]

I
SPLIT AMONG THE CIRCUITS

The split among the circuits over the quantum of proof which Internal Revenue must present before a District Court will enforce its summons directing appearance or production of certain records may be summarized as follows. Supporting the thinking of the Third Circuit in *Powell* is the opinion of the First Circuit in *O'Connor v. O'Connell*.[14] In *O'Connor*, Internal Revenue summoned taxpayer under 7602 (which was the authority for the summons in *Powell* and *Ryan*) to appear. When the particular years 1943 to 1947 came up for discussion, taxpayer refused to testify, arguing that there was no claim that he had failed to file for those years, and that, absent a showing of fraud, the statute of limitations barred the assessment of taxes for those years. Since records for at least one of the years had been destroyed, Internal Revenue's argument for deficiency was calculated on the tax actually paid for the years in question. Taxpayer replied that proof of deficiency was not proof of fraud. Taxpayer took the position that until Internal Revenue submitted evidence that would show (or even tend to show) fraud for those years, he would not obey the summons. Internal Revenue argued that it was not required to make such a showing. The District Court agreed with Internal Revenue and granted its petition to enforce the summons on the basis that the court "be satisfied that the agent from his investigation of matters available to him had grounds to conclude that there was reasonable suspicion that the taxpayer had made a false or fraudulent return."[15] The First Circuit reversed, holding that when Internal Revenue seeks court enforcement of its summons requiring testimony as to a closed year it "should be required to establish to the court's satisfaction

[10] 265 F.2d 183 (2nd Cir. 1959).
[11] 377 U. S. 929 (1964).
[12] United States v. Ryan, 320 F.2d 500 (6th Cir. 1963).
[13] *Supra* note 6.
[14] 253 F.2d 365 (1st Cir. 1958).
[15] *Id.* at 368.

that there is probable cause for an investigation into such a year."[16] In rejecting the *suspicion* standard allowed by the lower court for one of *probable cause* the court reasoned thus: while 7602 authorizes the issuance of summons, and while 7604 (b) provides for enforcement of such summons in the local district court, section 7605 (b) prohibits any unnecessary examination or investigation. An attempt to reopen tax years after the passage of a considerable number of years, when supporting testimony might then be unavailable to taxpayer, creates a burden on the taxpayer—*an unnecessary burden if no support other than reasonable suspicion is given for the investigation.* Congress, the court stated, in enacting 7605 (b) sought to curb "excessive administration zeal" by protecting the taxpayer from unnecessary examination.[17] Sections 7602 and 7604 (b) cannot, therefore, be read apart from 7605 (b), and necessity based upon suspicion may not be substituted for necessity based upon a showing of probable cause; otherwise in Internal Revenue's view the necessity for an investigation would for all practical purposes be left to administrative determination (defeating thereby the legislative intent behind the 7604 (b) petition statute and the "unnecessary" requirement of 7605 (b)), and the court's function under 7604 (b) would be reduced to stamping its approval to administrative action.

Supporting the Third Circuit in *Powell* and the First Circuit in *O'Connor* are the Ninth Circuit opinions in *Martin v. Chandris Securities*[18] and *DeMasters v. Arend.*[19] Chandris Co. was a family venture. At issue were alleged deficiencies in the wife's returns. In 1939 a summons was served on the company under the predecessor[20] of 7602 for production of the third person company's records for the years 1916 to 1930. The years were barred by the limitation statute. Chandris Co. refused to obey. Internal Revenue petitioned for enforcement of its summons under the predecessor[21] of 7604 (b). Its petition alleged only that the wife's 1930 return was under investigation, and that Chandris Co. had custody of certain records bearing upon the wife's 1930 return. By attached affidavit Internal Revenue stated that it had a "strong suspicion"[22] that fraud had been committed and that the books were necessary to determine whether the wife did commit fraud. The District Court eventually denied Internal Revenue's petition on the grounds that, as the limitation period had expired, assessment was barred unless proof or showing of fraud was made, and that the examination of such records under the predecessor[23]

[16] O'Connor v. O'Connell, 253 F.2d 365 at 370 (1st Cir. 1958).
[17] *Id.* at 369.
[18] 128 F.2d 731 (9th Cir. 1942).
[19] 313 F.2d 79 (9th Cir. 1963).
[20] Internal Revenue Act of 1928, 26 U.S.C. § 3615 (a).
[21] Internal Revenue Act of 1928, 26 U.S.C. § 3633.
[22] *Supra* note 18, at 734.
[23] Internal Revenue Act of 1928, 26 U.S.C. § 3631.

of 7605 (b) was unnecessary. The Ninth Circuit affirmed, adding to the District Court's grounds the following interesting reasoning: since the Revenue Act of 1928 contained no provision specifying the procedure to be followed in invoking the jurisdiction of the District Court, the Federal Rules of Civil Procedure would apply. The petition would be treated as a complaint which under Rule 8 (a) had to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[24] Therefore, as the statute had barred opening the years involved, except for fraud, and as the "complaint" had failed to state any claim for relief *because it failed to state any facts* showing that the investigation was not unnecessary, the petition should not be enforced. The court stated that as the case was covered by statutory requirements Internal Revenue must act within their terms; *i.e.,* as the only exemption to the limitation statute was one for fraudulent return with intent to evade, Internal Revenue, in order to gain the statutory exemption, must show a reasonable *basis* for suspicion (which the First Circuit in *O'Connor* equated with probable cause[25]) rather than allege strong suspicion. This followed because "reasonable basis" or "probable cause" would satisfy the statutory requirement of not being unnecessary, whereas "strong suspicion" would not. The statutory requirement of being necessary, the court believed, was a limitation on the investigative power of Internal Revenue. It is important to note the connection the First Circuit drew in *O'Connor,* and the Third Circuit recognized in *Powell,* between the "unnecessary" provision of 7605 (b) and the evidentiary standard required for enforcement of an administrative summons under 7604 (b): for an investigation to be *necessary,* as the statute requires when the year is barred by lapse of time, the evidence presented upon petition for enforcemnt must be such as will show probable cause. This is the same connection the court in *Chandris* in 1942 drew between the requirements of the predecessor statutes, sections 3631 and 3633, respectively. In *Chandris* the court further noted Internal Revenue's contention "that the only showing required . . . is a 'showing of probable cause, sometimes called reasonable ground for suspicion of fraud'."[26] In light of this, and because the requirements of 7604 (b) and 7605 (b) are the same as those of their predecessors 3633 and 3631, Internal Revenue's contention today should be the same, and not a contention based merely on the relevancy or materiality of the records to the proposed investigation.

In 1963 in *DeMasters v. Arend, supra,* the Ninth Circuit held to the same effect. Internal Revenue's basis for investigating was a calculated deficiency finding resulting from computations from various sources which indicated an increase in taxpayer's net worth. A summons was issued to taxpayer's

[24] FED. R. CIV. P. 8 (a).
[25] *Supra* note 16.
[26] *Supra* note 18, at 735.

bank to produce records pertaining to taxpayer's transactions with the bank during some of the years in questions. Taxpayer obtained a permanent injunction from the District Court on the ground that Internal Revenue had failed to prove that there were "any reasonable grounds or other probable cause to find or suspect that any fraud existed. . . ."[27] The Ninth Circuit reversed. In that opinion, which does not appear to carry the force or clarity of the same Circuit's reasoning in *Chandris,* the court found that although it was shown that the limitation bar required Internal Revenue "to go forward with a justification of their inquiry . . . this they did . . ."[28]

A weak point in *DeMasters* leading to confusion among the circuits may be detected. The court alludes to the principle that the investigative power, being inquisitorial in nature, does not depend, even when the years are closed, upon a showing of probable cause to believe that a violation had occurred.[29] At the stage at which the court received the *DeMasters* case there had been only an investigation, and not a petition for enforcement under 7604 (b). Therefore, even in the absence of a showing of probable cause, no objection to a mere investigation of closed years would be allowed (if probable cause applies only to a 7604 (b) petition and not to a 7601 investigation or a 7602 summons. Nevertheless the court did apply a rational judgment standard, in accordance with *Chandris* and *O'Connor,* when only the validity of the inquiry and not the right to a petition for enforcement was in question. That Internal Revenue's decision to investigate was reached as a matter of rational judgment was related to the unnecessary requirement of 7605 (b).

The courts have never clearly defined the requirements under the applicable Code provisions: what is unnecessary, probable cause, reasonable ground or basis for suspicion, whether there is a distinction in the proof burden under 7602, 7604 (b) or 7605, and whether the burden under the 7605 "unnecessary" requirement applies to a summons or to an enforcement petition. This lack of definition contributes to the confusion seen in *DeMasters.* There the court applied a "rational judgment" test in questioning the validity of an investigation (by finding that Internal Revenue did in fact act on rational judgment); in the same opinion it stated that it is questionable whether there is any limitation applied to the investigative power. Confusion exists on both sides of the split, particularly in the proof burden applicable to the various statutory provisions; *Reisman* will help dispel the confusion.

Within the Second Circuit, the District Court for the Eastern District of

[27] *Supra* note 19, at 84.
[28] *Id.* at 91.
[29] *Id.* at 88.

New York, in *In re Brooklyn Pawnbrokers, Inc.,*[30] after stating the general rule that courts deny the government examination rights in connection with tax years closed by the statute of limitations except in fraud cases, asked the basic question: what justifies the fraud exception? Its answer was that although the government should not be required to prove actual fraud, it should "set forth facts which lead it to believe that there may have been fraud"[31] and which will allow the court to determine whether the suspicion is sufficiently based in fact to justify the examination. In holding against the examination of closed years, the court said "to permit the government to examine . . . upon a mere conclusory allegation of fraud is to deprive the taxpayer of that freedom from unreasonable harassment which he has a right to expect under a democratic form of government."[32] The court felt it would be no undue burden to require the government to set forth facts leading it to suspect fraud.

We have seen that the First, Third and Ninth Circuits, in *O'Connor, Powell,* and *Chandris,* respectively, have expressly required a showing of probable cause in order to secure court enforcement of Internal Revenue's summons. For purposes of this comment, taxpayer's position is sufficiently well illustrated by these cases.

The argument on the other side of the split is simply that Internal Revenue is not required to establish that probable cause exists. The following cases present the argument. In *United States v. Ryan, supra,* the usual fact pattern appears. The allegations by Internal Revenue were that "reasonable grounds exist for a strong suspicion"[33] and that the records are "relevant and material"[34] to the question of tax liability. Taxpayer argued that probable cause or a reasonable basis for suspicion must be *established* to the satisfaction of the court. The Sixth Circuit affirmed the enforcement of the summons. It stated that the statutory provisions place no limitation upon Internal Revenue's right to investigate, except that the examination not be *unnecessary* in accordance with 7605 (b).

Although the case reached the court by a petition for judicial action under 7604 (b), the court appears to have treated it as one involving only an investigation. In other words, when the petition might depend upon a showing of probable cause, the court applied a "relevant or material" meaning to the "unnecessary" limitation, the true essence of which, according to the opposing view, contains the requirement of a showing of probable cause. It would seem that the application of the "unnecessary" requirement of

[30] 39 F. Supp. 304 (E.D.N.Y. 1941).
[31] *Id.* at 304, 305.
[32] *Id.* at 305.
[33] *Supra* note 13, at 501.
[34] *Ibid.*

7605 (b) without the realization that it might carry an inherently heavy standard lessens the worth of the statute and adds to the confusion earlier referred to, as to whether there is or should be a valid distinction between investigations and enforcement proceedings.

It is submitted that in light of *Reisman* there need be no distinction between, and little confusion over, standards of proof necessary in enforcement proceedings.

Ryan was brought on a petition: should a "relevant or material" standard satisfy the court to allow it to grant the petition when it might not even satisfy the "unnecessary" requirement of 7605 (b)? "Relevant or material" is the phrase used in the 7602 summons provision. Standing alone its meaning is rather clear; *i.e.*, that Internal Revenue is authorized to examine any books which may lend information to its proposed investigation. However, when 7605 (b) requires that the investigation be necessary, should a standard other than "relevant or material" be applied? Although the records may be relevant or material to the inquiry, does it follow that "relevant or material" becomes the standard to support a petition to enforce a summons? Under the rationale of *Chandris*, which applied adversary standards of procedure under the Federal Rules, *Ryan* would have been decided differently; it is submitted that *Reisman* and *Chandris* are in accord with respect to the nature of a 7604 (b) proceeding. *Ryan* did state that its affirmance was grounded on the fact that the District Court's conclusion was reached by weighing the testimony of Internal Revenue; the weakness of the conclusion seems to lie in the application of "relevant or material" to the only limitation on Internal Revenue's right to investigate.

On its face, the Second Circuit's decision in *Foster v. United States*[35] is the strongest case for the proposition that allegations of fact, without more, are sufficient to support a 7604 (b) petition for enforcement. The fact pattern applies, except that the summons is directed, as in *Chandris*, to a third party. The decision is based on the following inductive reasoning: a) the allegations of Internal Revenue were uncontroverted, b) the records were relevant or material to the investigation, thus c) an affirmative showing of probable cause *for the administrative inquiry* was not required. The court stated that "the same principles and criteria are applicable to the enforcement of Internal Revenue subpoenas."[36] Thus, it applied the "relevant or material" standard of point b) of its reasoning to investigations and summons enforcement proceedings alike—as was done in *Ryan*, except in *Ryan* such application was not the sole basis for the court's decision. Using the reasoning of the *Foster* statement above, it would follow that if the standard eventually set for enforcement proceedings was one of probable cause, that standard should

[35] *Supra* note 11.
[36] *Id.* at 186.

apply also to the right to investigate. This is not argued by any case, and would be obviated by the reasoning in *Reisman*. However, without *Reisman*, a valid argument could be made that, if the standard set for 7604 (b) petitions was one of probable cause, it would cut across petition proceedings and investigations alike by means of the 6501 "limitation" provision and the 7605 (b) "unnecessary" requirement. *Foster* disposed of the "time limitation" argument by stating that Internal Revenue, as a condition under 7602 and 7604 (b), "should not be required to prove grounds for belief that the liability was not time-barred 'prior to the examination of the only records which provide the ultimate proof'."[37] Were this so, 6501 would be no protection to the taxpayer, as mere suspicion could negate the bar Congress provided. Further, it would render almost barren the protection Congress provided in the "unnecessary" requirement of 7605 (b), because relevancy or materiality can easily be shown.

The general question raised, then, by *Ryan* and *Foster* is: do statutory provisions on the books place a limitation on Internal Revenue's right to investigate? Such is the argument and decisional law showing the split. Confusion has resulted from a lack of definition of the requirements of the Code; it has perpetuated itself through misapplication of evidentiary standards to an Internal Revenue investigation. In the following manner, it is submitted, *Reisman* bares the conflict and sets at rest the irritating points of difference noted above in the decisions.

II
Reisman v. Caplin

When the *Reisman* case came to the Supreme Court the only action taken by Internal Revenue had been the issuance of a 7602 summons to an accounting firm to produce records relating to taxpayers' return. The statute of limitations was not involved. Reisman was taxpayers' attorney who had hired the accounting firm. He petitioned the District Court for declaratory and injunctive relief, claiming that the enforced production of the accounting firm's records was an unlawful appropriation of his work product and trial preparation, as well as an unreasonable seizure requiring taxpayers to incriminate themselves and depriving them of effective assistance of counsel. The District Court denied the petition on the grounds that Reisman had no standing to sue, that the records called for were not his work product, that he failed to state a cause of action, and that the records did not fall within the attorney-client privilege. The Court of Appeals for the District of Columbia affirmed, but on the ground of sovereign immunity, that the suit was one against the United States to which it had not consented.[38] The

[37] *Id.* at 187.
[38] Reisman v. Caplin, 317 F.2d 123 (D.C. Cir. 1963).

Supreme Court affirmed the decision, but on these procedural grounds: that as there had been no petition for judicial enforcement of the summons, Reisman could not test the summons by a preliminary injunction and a motion to set aside the summons. In effect, the Court held that such practice, though heretofore accepted in some circuits, was a premature interference in an administrative proceeding, and that the place to judicially test the summons was in a court petitioned to enforce it. This is not to say that a taxpayer cannot attack the summons. He may challenge it before Internal Revenue, on any grounds (including the constitutionality of the summons) for the Court remarked that it had "never passed upon the rights of a party summoned . . . under 7602."[39] But, he may not do so in an injunction suit before a District Court prior to such time as Internal Revenue files a 7604 (b) enforcement petition. As this stage had not yet come to pass, the Court held that Reisman had an adequate remedy at law as provided by the Code, that he should proceed according to the Code, and that the complaint should be dismissed for want of equity.

This comment is not primarily concerned with the procedural aspects of *Reisman*.[40] Nor will it brief the point of attorney-client privilege, nor the constitutional point of unreasonable seizure. The significance of *Reisman* is the conclusory principle that Internal Revenue upon an enforcement petition must show probable cause that fraud exists before it can obtain a District Court's approval. By using the exhaustion of remedies doctrine, the Court left only one stage at which the summons may be judicially attacked. This stage would be "an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness."[41] Only the District Court can direct compliance with the summons, or issue a writ of attachment for contempt; Internal Revenue "has no power of enforcement or right to levy any sanctions."[42] If the summons is challenged, Internal Revenue must defend in order to prevail; *i.e.*, in accordance with Rule 8 (a) of the Federal Rules, Internal Revenue must present "a short and plain statement of the claim *showing* that the pleader is entitled to relief."[43] (emphasis added). Furthermore, under well established rules, fraud must be pleaded specifically; a plea, or a plea in bar, must state ultimate facts—an allegation is ineffective in raising the issues.[44] The logical conclusion is that in separating the functions of the administrative proceeding from the judicial

[39] Reisman v. Caplin, 375 U.S. 440, 445 (1964).
[40] For a discussion of the procedural effect of *Reisman*, see 52 Illinois Bar Journal 874 (1964).
[41] *Supra* note 49, at 446. This same thought was advanced by the court in *Martin v. Chandris*, *supra* note 26.
[42] *Id.* at 466.
[43] *Supra* note 32.
[44] 24 Am. Jur. *Fraud and Deceit* 243 *et seq.* (1939).

process the Court did not ascribe the standards allowable in the former as permissible in the latter. Within the Court's decision is the meaning that the "satisfactory proof" requirement of 7604 (b) demands more than suspicion or allegation of fraud.

CONCLUSION

Reisman says many things in few words; it subjects to questioning the constitutional rights of taxpayers summoned by Internal Revenue. For our purposes, the fact that *Reisman* requires the taxpayer (and Internal Revenue) to work within the procedural framework of the Code eliminates the confusion over the standard of proof Internal Revenue must meet, and links together the requirements of the "petition" clause, 7604 (b), and the "unnecessary" clause, 7605 (b), for if there is only one stage at which the summons may be judicially challenged, at that stage the petition must be *shown* not to be unnecessary. If this be so, that the one standard be that of probable cause, the principle of *Reisman,* which could not be applied to its own case because barred by the exhaustion of remedies doctrine, will prevent unnecessary litigation[45] by providing a clear view of opposing rights and duties under a summons. A possible remaining question is answered by pointing out that if Internal Revenue does not file a 7604 (b) petition, a taxpayer suffers no harm by contempt possibility because only the court can issue an attachment; if Internal Revenue does petition under 7604 (b) a taxpayer need only show that his challenge of the summons was made in good faith, in order to avoid being charged with contempt.*

* Since the writing of this comment, *Powell* and *Ryan* have been decided. (33 U.S.L. WEEK 4026, November 24, 1964). The Court held that IRS "need make no showing of probable cause. . . ." It stated that the "unnecessary" requirement of 7605 (b) should not be equated with probable cause. Its underlying reasoning is that since 7602 authorizes IRS to investigate any tax liability, any equation of necessity with probable cause "might seriously hamper . . . in carrying out investigations" thought to be warranted, thus forcing litigation of the very subject to be investigated. In so deciding, the Court limits *Reisman* "to cover persons who were summoned and wholly made default or contumaciously refused to comply." (leaving the questioning taxpayer, it seems, on the horns of a dilemna: either he defaults and contumaciously refuses to comply in order to risk the possibility of judicial prohibition of the summons, or he complies with the summons and secures the redoubtable privilege of filing an after-the fact objection in the District Court).

[45] *E.g.,* DeMasters v. Arend, *supra* note 27—an injunctive proceeding where no petition for enforcement had been filed.