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## Administrative Law - Taxpayer's Intervention in Third-Party Summons Proceeding. *Donaldson v. United States*, 91 S. Ct. 534 (1971)

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## CURRENT DECISIONS

**Administrative Law—TAXPAYER'S INTERVENTION IN THIRD-PARTY SUMMONS PROCEEDING.** *Donaldson v. United States*, 91 S. Ct. 534 (1971)

The petitioner's income tax returns for the years 1964-67 were under investigation by the Internal Revenue Service. The Service, proceeding under section 7602 of the Internal Revenue Code,<sup>1</sup> issued a summons to the petitioner's former employer<sup>2</sup> compelling disclosure of all records pertinent to the petitioner's employment in an effort to ascertain the correct income tax liability of the petitioner. Claiming that the summons had been issued in bad faith, the petitioner sought to intervene in order to raise his objection in the district court proceeding to enforce the summons.

After issuing a temporary order restraining the employer's compliance with the summons, the district court rejected the petitioner's contention that the summons had been issued in aid of a criminal investigation, and denied the motion to intervene.<sup>3</sup> The Court of Appeals for the Fifth Circuit affirmed.<sup>4</sup> The Supreme Court held the petitioner's interest insufficient to compel the granting of his motion to intervene, and affirmed the court of appeals.<sup>5</sup>

The Internal Revenue Code imposes upon the Secretary of the Treasury the duty to canvass and inquire relative to the income tax liability of any person.<sup>6</sup> In performing this duty, the Secretary is authorized "to summon the person liable for tax or any person having possession"<sup>7</sup>

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1. INT. REV. CODE of 1954, § 7602, which provides:

For the purpose of ascertaining the correctness of any return the Secretary or his delegate is authorized—

(2) To summon the person liable for tax or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax

2. The employer, Acme Circus Operating Company, Inc., and its accountant, Joseph J. Mercurio, were summoned. They did not object to the summons and were not parties to the appeal. *Donaldson v. United States*, 91 S. Ct. 534, 538 n. 5 (1971).

3. The decision was made on order without opinion, and is unreported.

4. *United States v. Mercurio*, 418 F.2d 1213 (5th Cir. 1969)

5. *Donaldson v. United States*, 91 S. Ct. 534, 539 (1971).

6. INT. REV. CODE of 1954, § 7601.

7. INT. REV. CODE of 1954, § 7602(2).

of material relevant to the inquiry. The constitutionality of the third-party summons has been upheld against fourth amendment challenge.<sup>8</sup>

Protection for any person whose tax liability is under scrutiny by way of third-party summons is afforded by sections 7402(b)<sup>9</sup> and 7604(a)<sup>10</sup> of the Internal Revenue Code, which grant to the district courts jurisdiction to compel compliance with the summons. Under these sections, a summons enforcement action is "an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witnesses."<sup>11</sup>

The procedural device available to the taxpayer in asserting his objection to the third-party summons is intervention in the enforcement proceeding.<sup>12</sup> Intervention of right is available to one who has an interest relating to the subject matter of the action when the action may impede his ability to protect that interest and when the interest is not adequately represented by the parties at bar.<sup>13</sup> In *Reisman v. Caplin*,<sup>14</sup> the Court acknowledged the applicability of intervention procedure to enforcement proceedings pursuant to a section 7602 summons.<sup>15</sup>

Several lower courts read the *Reisman* acknowledgement as an approval of unrestricted intervention by the taxpayer.<sup>16</sup> Illustrative of this viewpoint is the observation of the Seventh Circuit that "had the Court intended simply to hold that the particular interests of the taxpayers in-

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8. *First National Bank of Mobile v. United States*, 267 U.S. 576 (1925).

9. INT. REV. CODE of 1954, § 7402(b).

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

10. *Id.* § 7604(a).

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

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

12. FED. R. CIV. P. 24.

13. FED. R. CIV. P. 24(a).

14. 375 U.S. 440 (1964).

15. *Id.* at 445.

16. *United States v. Benford*, 406 F.2d 1192 (7th Cir. 1969); *United States v. Bank of Commerce*, 405 F.2d 931 (3rd Cir. 1969); *Justice v. United States*, 365 F.2d 312 (6th Cir. 1966).

volved in those cases were sufficient bases for intervention, the opinion would doubtless have made that evident."<sup>17</sup>

The *Donaldson* fact situation forced the Court to modify the broad sweep of its language in *Reisman*.<sup>18</sup> *Donaldson* concludes that the intervention contemplated by *Reisman* is permissive only, and that *Reisman* cannot be read as sanctioning mandatory intervention in all cases.<sup>19</sup> The Court further rejects any inference that a mere interest in potential tax liability can support a claim for intervention of right, since the only interest which would allow intervention of right is a "significantly protectable" interest.<sup>20</sup> Under this definition, an interest in potential tax liability is insufficient since evidence related to that liability would not be subject to suppression if obtained by other routine means.

To complete its qualification of *Reisman*, the *Donaldson* Court crystallizes the point at which intervention becomes available to a taxpayer who claims an interest in the summons proceeding founded in potential criminal liability. Citing with approval cases which have allowed the use of the section 7602 summons in investigations likely to lead to criminal as well as civil liability,<sup>21</sup> the Court rejects the contention that the introduction of special agents establishes a right to intervene.<sup>22</sup> Rather, it is when the *sole* purpose of the inquiry is to obtain evidence for use in a criminal prosecution that the taxpayer must be allowed to intervene in a summons proceeding. In the Court's view, the investigation attains this purpose only after a recommendation for prosecution has been made, and subsequent to that recommendation the section 7602 summons may not be issued.<sup>23</sup>

In resolving a conflict among the circuits, the *Donaldson* Court has offered to the Internal Revenue Service a wide berth for the exercise of the investigatory function. The decision may well be subject to abuse, for by withholding recommendations for prosecution in cases like *Donaldson*, the Service places upon the taxpayer the burden of proving bad faith before intervention will be allowed. Given the competing interests of the Service in ascertaining a civil tax liability and the taxpayer

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17. *United States v. Benford*, 406 F.2d 1192, 1194 (7th Cir. 1969). Under this interpretation, *Reisman* became a sub silentio approval of broad and unrestricted rights of intervention.

18. 91 S. Ct. at 541-42.

19. *Id.* at 542.

20. *Id.*

21. See cases cited in 91 S. Ct. at 543 n.13.

22. 91 S. Ct. at 545.

23. *Id.*

as a potential criminal defendant, the Court has come out in favor of the government. The decision places a large measure of trust in the Service's ability to conduct investigations in an even-handed manner. Should that trust prove ill-placed in practice, the Court will be forced to reverse itself again.

ROBERT C. KOCH

**Antitrust Law—STATE-REGULATED INDUSTRIES.** *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971)

Plaintiff and defendant are competing public utilities. As part of a promotional campaign, defendant agreed to allow credit against underground wiring installation fees, based on anticipated power consumption, with the result that all-electric homes would be served with underground distribution free of installation charges.<sup>1</sup> Plaintiff initiated suit in the United States District Court for the Eastern District of Virginia, claiming that defendant's practice constituted an illegal tie-in sale under section one of the Sherman Act.<sup>2</sup> From a decision for the plaintiff, defendant appealed.

The Court of Appeals for the Fourth Circuit reversed on two grounds: 1) that defendant's promotional activities as permitted by the State Corporation Commission amounted to state action exempt from federal antitrust regulation,<sup>3</sup> and 2) that in any event the practice did not constitute a tie-in sale.<sup>4</sup>

The immunity of state action from antitrust control stems from the Supreme Court's observation in *Parker v. Brown*<sup>5</sup> that "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state."<sup>6</sup> It was primarily on the authority of *Parker* that the court of appeals here found VEPCO's activities to be exempt from antitrust control.<sup>7</sup> However, the two cases arose from substantially diverse fact

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1. *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248, 250 (4th Cir. 1971).

2. 15 U.S.C. § 1 (1964).

3. 438 F.2d at 252.

4. *Id.* at 254.

5. 317 U.S. 341 (1942).

6. *Id.* at 351.

7. We think VEPCO's promotional practices were at all times within the ambit of regulation and under the control of SCC, and we hold these