

291 F.2d 487, *, 1961 U.S. App. LEXIS 4133, **;
61-2 U.S. Tax Cas. (CCH) P9530; 8 A.F.T.R.2d (RIA) 5062

LEXSEE 291 F.2D 487

Application of Edward E. COLTON and Lillian Kaltman, Appellants, To Quash a Summons to Appear to Testify and to Produce Books, etc., relating to the Tax Liability of Herbert Matter and Mercedes Matter. Internal Revenue Service of the United States Treasury Department, Appellee

Docket 26939

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

291 F.2d 487; 1961 U.S. App. LEXIS 4133; 61-2 U.S. Tax Cas. (CCH) P9530; 8 A.F.T.R.2d (RIA) 5062

June 5, 1961, Argued
June 21, 1961, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant attorneys challenged an order from the District Court for the Southern District of New York, which denied their motions in an administrative summons dispute with appellee Internal Revenue Service of the United States under 26 U.S.C.S. § 7602(2). Appellee sought to dismiss the appeal for lack of appellate jurisdiction under 26 U.S.C.S. § 7404(a) and 28 U.S.C.S. § 1291, mootness, and lack of jurisdiction.

OVERVIEW: Appellant attorneys obtained a district court order requiring appellee Internal Revenue Service to show cause why two summons, which were issued under 26 U.S.C.S. § 7602(2) and required appellants to appear before a special agent to give testimony and produce documents relating to the preparation and the filing of federal income tax returns for or on the behalf of their clients, should not be quashed or modified. The district court denied the motion to quash or modify and vacated the stay previously issued. Appellants sought review, and appellee sought to dismiss the appeal for lack of appellate jurisdiction and mootness. Appellee also challenged the jurisdiction of the district court. **The court denied appellee's motion to dismiss the appeal and held that both it and the district court had jurisdiction over the matter.** The court held that the order under 26 U.S.C.S. § 7404(a), directing appellants to testify, was final and **appealable under 28 U.S.C.S. § 1291.** The court also held that appellee could not render the case moot simply by substituting a new summons for an old

one, and therefore appellee's mootness argument had no merit.

OUTCOME: The court denied appellee Internal Revenue Service's motion to dismiss the appeal brought by appellant attorneys of the district court's judgment denying appellants' motion to quash or vacate an administrative summons in a federal tax dispute. The district court had jurisdiction to determine the motion to quash the summons, and the court had jurisdiction to review the district court's decision to deny such motion.

CORE TERMS: summon, certiorari denied, disobedience, contempt, appealable, subpoena, motion to quash, attorney-client, memorandum, summoned, modify, Interstate Commerce Act, appellate jurisdiction, motion to modify, criminal penalty, special agent, non-compliance, potentialities, entertained, directing, delegate, neglects, resort, vacate, punish, resides, moot

LexisNexis(R) Headnotes

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Administrative Summons (IRC secs. 6038A, 6038C, 6331, 6503, 7210, 7402, 7602-7605, 7609-7611)

[HN1] 26 U.S.C.S. § 7602(2) authorizes the Secretary of the Treasury or his delegate to summon either the person liable for tax or anyone else to appear 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 any pending inquiry as to non-compliance with the tax

laws. 26 U.S.C.S. § 7603 tells how such a summons shall be served. 26 U.S.C.S. § 7604(a) endows the United States district court for the district in which any person summoned resides or is found with jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Administrative Summons (IRC secs. 6038A, 6038C, 6331, 6503, 7210, 7402, 7602-7605, 7609-7611)

[HN2] 26 U.S.C.S. 7604(b) provides that when any person so summoned neglects or refuses to obey such summons, or to produce such books, papers, records, or other data, or to give testimony, as required, the Secretary of the Treasury or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for contempt; after hearing, the judge or the commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the summons and to punish such person for his default or disobedience.

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Administrative Summons (IRC secs. 6038A, 6038C, 6331, 6503, 7210, 7402, 7602-7605, 7609-7611)

[HN3] 26 U.S.C.S. § 7210 provides that any person who, being duly summoned as required under 26 U.S.C.S. § § 7602, 7603, 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than \$ 1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Administrative Summons (IRC secs. 6038A, 6038C, 6331, 6503, 7210, 7402, 7602-7605, 7609-7611)

Governments > Legislation > Interpretation

[HN4] Resort by the government to the district court under 26 U.S.C.S. § 7604(a), is permissive only; this is in no way a condition to any other action. It is not entirely clear whether, under 26 U.S.C.S. § 7604(b), the judge or the commissioner might, if he so chose, punish for contempt without giving the witness an opportunity to answer or the proceeding is only one to obtain the assistance of the court in forcing (the witness) to give the desired information to the Internal Revenue Service by the device of having the court issue an order to that effect, disobedience of which would be a contempt

punishable by the court. In any event it is plain that the criminal penalty of 26 U.S.C.S. § 7210 is not contingent upon prior action under either 26 U.S.C.S. § 7604(a) or 26 U.S.C.S. § 7604(b); that is what the words say and the court so applies them.

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Administrative Summons (IRC secs. 6038A, 6038C, 6331, 6503, 7210, 7402, 7602-7605, 7609-7611)

[HN5] Neither the Internal Revenue Code nor any other statute contains specific provision for a motion by a person receiving a summons under 26 U.S.C.S. § 7602 to vacate or modify it.

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Administrative Summons (IRC secs. 6038A, 6038C, 6331, 6503, 7210, 7402, 7602-7605, 7609-7611)

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Criminal Procedure & Penalties (IRC secs. 7201-7217, 7231-7232, 7261-7262, 7268-7273, 7375)

[HN6] At least the criminal penalty of 26 U.S.C.S. § 7210 is incurred by disobedience, and it is not altogether plain that a contempt citation under § 7604(b) may not be.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491)

[HN7] An order under 26 U.S.C.S. § 7404(a), directing a person to testify, is final and appealable under 28 U.S.C.S. § 1291.

Civil Procedure > Dismissal of Actions > Involuntary Dismissal

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Administrative Summons (IRC secs. 6038A, 6038C, 6331, 6503, 7210, 7402, 7602-7605, 7609-7611)

[HN8] The purpose of a motion to modify or vacate the summons is to obtain an advance judicial determination of the validity of the summons and thereby obviate the unpleasant consequences which 26 U.S.C.S. § 7210 and perhaps 26 U.S.C.S. § 7604(b) visit upon disobedience. What is called the denial of a motion is, therefore, in effect the dismissal of a complaint.

Civil Procedure > Justiciability > Mootness

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Administrative Summons (IRC secs. 6038A, 6038C, 6331, 6503, 7210, 7402, 7602-7605, 7609-7611)

[HN9] The government cannot render a case moot simply by substituting a new summons for an old one.

COUNSEL:

Corcoran, Kostelanetz, Gladstone & Lowell, New York City, for appellants, Boris Kostelanetz and Jules Ritholz, New York City, George G. Gallantz, New York City, of counsel.

Robert M. Morgenthau, U.S. Atty. for Southern Dist. of New York, New York City, [**2] for appellee, Morton L. Ginsberg, Asst. U.S. Atty., New York City, of counsel.

JUDGES:

Before LUMBARD, Chief Judge, and GOODRICH* and FRIENDLY, Circuit judges.

OPINIONBY:

FRIENDLY

OPINION:

[*488]

Edward E. Colton and Lillian Kaltman, members of the bar of the State of New York, obtained an order, in the District Court for the Southern District of New York, requiring the Internal Revenue Service to show cause why two summons dated July 29, 1960, requiring them to appear before a special agent to give testimony and produce 'Retained copies of income tax returns, workpapers, correspondence file, memoranda and all other data relating to the preparation and the filing of Federal Income Tax Returns for or on the behalf of their clients, Herbert and Mercedes Matter, from 1951 through 1958, should not be quashed or modified. There were several adjournments, during which movants appeared before the special agent without prejudice to their pending motion, and gave such testimony, relatively small in scope, as they considered not to violate the attorney-client privilege. On February 28, 1961, Judge Dawson denied the motion to quash or modify and vacated the stay previously issued. Colton [**3] was then served with another summons. On March 24, 1961, he appeared before the agent and again raised the attorney-client privilege. At the same time, an appeal from Judge Dawson's order of denial was taken to this Court. The Internal Revenue Service moves to dismiss the appeal for lack of appellate jurisdiction and mootness; it also challenges the jurisdiction of the District Court.

[HN1] [*489] Section 7602(2) of the Internal Revenue Code of 1954 authorizes the Secretary of the Treasury or his delegate to summon either the person liable for tax or anyone else to appear 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 any pending inquiry as to non-compliance with the tax laws. Section 7603, 26 U.S.C.A. § 7603, tells how such a summons shall be served. Section 7604(a), 26 U.S.C.A. § 7604(a), endows the United States district court for the district in which any person summoned resides or is found with 'jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, [**4] records, or other data.' [HN2] Section 7604(b) provides that when any person so summoned 'neglects or refuses to obey such summons, or to produce such books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for contempt'; after hearing, the judge or the commissioner 'shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to * * * the summons and to punish such person for his default or disobedience.' Finally, [HN3] Section 7210, 26 U.S.C.A. § 7210, provides that any person who, being duly summoned 'as required under sections * * * 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than \$ 1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.'

These statutes appear to be much more drastic than the usual [**5] provisions as to subpoenas by administrative agencies. As we read them, [HN4] resort by the Government to the district court under § 7604(a), 26 U.S.C.A. § 7604(a), is permissive only; this is in no way a condition to any other action. It is not entirely clear whether, under § 7604(b), the judge or the commissioner might, if he so chose, punish for contempt without giving the witness an opportunity to answer or, as was intimated in *Brody v. United States*, 1 Cir., 1957, 243 F.2d 378, 381, certiorari denied 1957, 354 U.S. 923, 77 S.Ct. 1384, 1 L.Ed.2d 1438, the proceeding is only one 'to obtain the assistance of the court in forcing (the witness) to give the desired information to the Internal Revenue Service by the device of having the court issue an order to that effect, disobedience of which would be a contempt punishable by the court.' In any event it is plain that the criminal penalty of § 7210 is not contingent upon prior action under either § 7604(a) or § 7604(b);

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that is what the words say and we so applied them in *United States v. Becker*, 2 Cir., 1958, 259 F.2d 869, certiorari denied 1959, 258 U.S. 929, 79 S.Ct. 317, 3 L.Ed.2d 303, [**6] as the record in that case shows, see also Chief Judge Magruder's statement in *Brody v. United States*, *supra*.

[HN5] Neither the Internal Revenue Code nor any other statute contains specific provision for a motion by a person receiving a summons under § 7602, 26 U.S.C.A. § 7602, to vacate or modify it. Petitioners have cited a number of instances where motions to that end have been entertained in this Circuit, apparently without objection from the Government, some of which have reached this Court: *International Commodities Corp. v. Internal Revenue Service*, 2 Cir., 1955, 224 F.2d 882; *First National City Bank of New York v. Internal Revenue Service*, 2 Cir., 1959, 271 F.2d 616, certiorari denied 1960, 361 U.S. 948, 80 S.Ct. 402, 4 L.Ed.2d 381; *Application of Daniels*, D.C.S.D.N.Y.1956, 140 F.Supp. 322; *Application of Burr*, D.C.S.D.N.Y.1959, 171 F.Supp. 448. Despite this the Service now says that the District Court lacks jurisdiction over such a motion, which the Service claims to be a suit against the Government without its consent; appellants, sustaining jurisdiction under 28 U.S.C. [**490] § 1340, [**7] and relying on *Arend v. DeMasters*, D.C.D.Or.1960, 181 F.Supp. 761, suggest we postpone determination of that issue to the argument of the appeal. We think the question so closely related to that of our appellate jurisdiction that we had best decide it now.

If the statutory scheme were like that for enforcement of subpoenas of such agencies as the Interstate Commerce Commission, 49 U.S.C.A. § 12, or the Civil Aeronautics Board, 49 U.S.C.A. § 1484, there would be merit in the Government's position that courts ought not intervene at so early a stage; since disobedience to a subpoena under those statutes has no penal consequences until a judge has ordered its enforcement, there is no occasion for any preliminary resort to the courts. Here, however, [HN6] at least the criminal penalty of § 7210 is incurred by disobedience, and it is not altogether plain that a contempt citation under § 7604(b) may not be. Under such circumstances the principle of *Ex parte Young*, 1908, 209 U.S. 123, 147, 28 S.Ct. 441, 52 L.Ed. 714 and *Oklahoma Operating Co. v. Love*, 1920, 252 U.S. 331, 336-337, 40 S.Ct. 338, 64 L.Ed. 596, [**8] comes into play; we see no reason why that principle should not be applicable to a summons, disobedience of which carries criminal penalties. We note that the dismissal of the bill in *F.T.C. v. Claire Furnace Co.*, 1927, 274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978, was for supposed lack of equity rather than because of sovereign immunity, and that the Supreme Court, more recently, has expressly declined to rule that

reporting orders under § 6 of the Federal Trade Commission Act, 15 U.S.C.A. § 46, are 'exempt from judicial examination,' *United States v. Morton Salt Co.*, 1950, 338 U.S. 632, 654, 70 S.Ct. 357, 370, 94 L.Ed. 401, although no method for such examination save a suit against government officers would seem available. See *United States v. St. Regis Paper Co.*, 2 Cir., 1960, 285 F.2d 607, 615-616, certiorari granted 1961, 365 U.S. 857, 81 S.Ct. 825, 5 L.Ed.2d 822. We are not unmindful of the potentialities of delay inherent in such an extra round -- potentialities sufficiently serious without one, as illustrated, for example, by *Penfield Co. of Cal. v. S.E.C.*, 1947, 330 U.S. 585, 67 S.Ct. 918, 91 L.Ed. 1117; [**9] but the Government seems to be a victim of its own Draconianism. We hold the District Court had jurisdiction of the motion and thus reach the question of our appellate jurisdiction to review its denial.

In support of its contention that the order denying the motion to quash or modify the summons was interlocutory and not appealable, appellee places primary reliance on *Cobbledick v. United States*, 1940, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783, which held that an order denying a motion to quash a subpoena duces tecum to appear before a grand jury was not a final judgment within the predecessor of 28 U.S.C. § 1291. However, the Supreme Court there reaffirmed *I.C.C. v. Brimson*, 1894, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047, *Harriman v. I.C.C.*, 1908, 211 U.S. 407, 29 S.Ct. 115, 53 L.Ed. 253, and *Ellis v. I.C.C.*, 1911, 237 U.S. 434, 35 S.Ct. 645, 59 L.Ed. 1036, upholding the appealability of orders of district courts directing witnesses to answer in proceedings to compel testimony under § 12 of the Interstate Commerce Act, n1 and distinguished those decisions both from the case before it and from [**10] *Alexander v. United States*, 1908, 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686, which had held that an order requiring a witness, not a party, to appear in a pending action was not final and appealable, on the ground, 309 U.S. at page 330, 60 S.Ct. at page 543, that 'The doctrine of finality is a phase of the distribution of authority within the judicial hierarchy. But a proceeding like that under § 12 of the Interstate Commerce Act may be deemed self-contained, so far as the judiciary is concerned -- as much so as an independent suit in equity in which appeal will lie from an injunction without the necessity of waiting for disobedience.'

[**491] Applying that distinction, we have held that [HN7] an order under § 7404(a), 26 U.S.C.A. § 7404(a), directing a person to testify is final and appealable, under 28 U.S.C. § 1291, *In re Albert Lindley Lee Memorial Hospital*, 2 Cir., 1953, 209 F.2d 122, certiorari denied sub nom. *Cincotta v. United States*, 1954, 347 U.S. 960, 74 S.Ct. 709, 98 L.Ed. 1104, following *Falsone v. United States*, 5 Cir., 1953, 205

F.2d 734, certiorari [**11] denied 1953, 346 U.S. 864, 74 S.Ct. 103, 98 L.Ed. 375, accord, *O'Connor v. O'Connell*, 1 Cir., 1958, 253 F.2d 365, thereby necessarily joining the Fifth Circuit in its expressed disagreement with *Jarecki v. Whetstone*, 7 Cir., 1951, 192 F.2d 121, which the Government nevertheless urges upon us here. See *First National Bank of Mobile, Ala. v. United States*, 1925, 267 U.S. 576, 45 S.Ct. 231, 69 L.Ed. 796. However, that does not completely settle that an order denying relief in a proceeding instituted by the witness is similarly final and appealable. We held that it was in *International Commodities Corp. v. Internal Revenue Service*, 2 Cir., 1955, 224 F.2d 882. Cf. *Goldfine v. Pastore*, 1 Cir., 1958, 261 F.2d 519. Also in *In re National Public Utility Investing Corp.*, 2 Cir., 1935, 79 F.2d 302; *United States v. United Distillers Products Corp.*, 2 Cir., 1946, 156 F.2d 872; *Norda Essential Oil & Chemical Co. v. United States*, 2 Cir., 1956, 230 F.2d 764, certiorari denied 1956, 351 U.S. 964, 76 S.Ct. 1028, 100 L.Ed. 1484; and *Application of United States*, 2 Cir., 1957, 246 F.2d 762, [**12] certiorari denied *Carroll v. United States*, 1957, 355 U.S. 857, 78 S.Ct. 85, 2 L.Ed.2d 64, we entertained appeals from denials of motions to vacate orders which the Government had obtained ex parte under § 7604(a). In *First National City Bank of New York v. Internal Revenue Service*, 2 Cir., 1959, 271 F.2d 616, certiorari denied 1960, 361 U.S. 948, 80 S.Ct. 402, 4 L.Ed.2d 381, we took jurisdiction over an appeal by the Service from an order granting a witness' motion to modify a summons in such a proceeding. The Government now contends, however, that a subsequent unreported memorandum decision, dated March 31, 1960, in that same proceeding, dismissing an appeal by the bank, is contrary to the *International Commodities* decision and must be deemed to have overruled it.

We think the *International Commodities* decision was right and should be followed. [HN8] The purpose of a motion to modify or vacate the summons is to obtain an advance judicial determination of the validity of the summons and thereby obviate the unpleasant consequences which § 7210 and perhaps § 7604(b) visit upon disobedience. What is called the denial of a motion is, therefore, [**13] in effect the dismissal of a complaint. Cf. *Perlman v. United States*, 1918, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950; *Essgee Co. of China v. United States*, 1923, 262 U.S. 151, 43 S.Ct. 514, 67 L.Ed. 917; *Go-Bart Importing Co. v. United States*, 1931, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; *Russo v. United*

States, 2 Cir., 1957, 241 F.2d 285, certiorari denied 1957, 355 U.S. 816, 78 S.Ct. 18, 2 L.Ed. 33, and contrast *Cogen v. United States*, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275. The memorandum decision in the later *First National City Bank* case, relied on by the Government, is entirely reconcilable with this view. The appeal there was from the denial of a second motion to vacate the summons, made by the bank after remand, wherein it proposed to supply the deficiencies in its proof of violation of Panamanian law which had led this Court, on the first appeal, to reverse the District Court's modification of the summons 'with a direction to reinstate the subpoena as it originally issued and in the event of non-compliance to explore in contempt proceedings under 26 U.S.C. § 7604 [**14] the ability of the Bank to comply without subjecting its personnel to criminal sanctions under Panamanian law,' 271 F.2d at page 620. The District Court held the attempted second bite at the cherry by a further motion to be inconsistent with our mandate. We read the memorandum decision's statement that 'there has not as yet been a final order below from which an appeal may be taken' [*492] as meaning that under the particular circumstances of that case there would be no appealable order until the path marked out by this Court's mandate had been followed to the end; we do not believe the panel meant to overrule, without discussion, the Court's explicit decision in *International Commodities*, which had not even been cited to it.

There is no merit to the Government's claim that the appeal is moot, at least as to appellant Colton. There has been no disclaimer by the Service of its intention to require Colton to appear and produce books and records which he considers himself forbidden to do by the attorney-client privilege. [HN9] The Government cannot render a case of this sort moot simply by substituting a new summons for an old one. *Yarnell v. Hillsborough Packing Co.*, 5 Cir., 1934, 70 F.2d 435, 438, 92 A.L.R. 1475. [**15]

Motion to dismiss appeal denied.

* Of the Third Circuit, sitting by designation.

n1. The *Harriman* case included a cross-appeal by the Commission from a denial of an order as to two questions.

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