



## Ivins Attorney Pat Smith Quoted in Tax Notes re: QinetiQ Decision

### PRACTICE AREAS

Tax Accounting

Tax Controversies

### *Tax Notes*

January 9, 2017

Ivins attorney Pat Smith was quoted in two Tax Notes articles, one on proposed regulatory reform legislation that would, among other things, overrule the Supreme Court's *Chevron* decision, and the second on the Fourth Circuit decision in *QinetiQ*, dealing with the application of the Administrative Procedure Act in Tax Court review of IRS deficiency notices.

### **Bill Seeks to End *Chevron* Deference, Shake Up Administrative Law**

"Unquestionably, it would be a huge deal," Patrick J. Smith of Ivins, Phillips & Barker Chtd. Said of the potential change.

Smith noted that the lack of an effective date in Title II would likely make it applicable to any challenges pending on the date of enactment. He added that he expects the incoming administration to stop defending regs that are currently being challenged.

"Given the outcome of the election, there will be a lot fewer challenges to regulations generally, including tax regulations, in the next four years than would have been the case if the election came out the other way. The Trump administration will simply withdraw the regs and they will simply not be issuing any new regs that business will be inclined to challenge," Smith said. He added that the longer-term effects of H.R. 5's enactment on future administrations could be greater, given the general difficulties in changing the law.

Smith argued that the new least-costly provision could have an impact on some tax rules, particularly as it relates to compliance costs. "But [it could affect] more broadly areas where the relevant statutory provision



## | 2 | Ivins Attorney Pat Smith Quoted in Tax Notes re: QinetiQ Decision

provides a relatively broad grant of regulatory authority," Smith said.

With a higher, \$1 billion threshold, it is difficult to foresee many tax regulations being subject to a "high-impact" designation that would delay the effective date, when many regs already fail to meet the lower "major" designation, Smith argued. He added, however, that it was "certainly imaginable" that it could apply to a "particularly extreme tax rule." Smith also said that he did not envision the 60-day period to timely file a challenge to stay the effective date of regs until resolution as an obstacle to potential litigants.

"Obviously the Anti-Injunction Act [AIA] comes into play here, but even if the AIA were held to bar pre-enforcement challenges to tax regulations, despite *Direct Marketing*, the 60-day rule only requires that some person seek judicial review within the 60-day period. I would think this seek-judicial-review requirement would be satisfied even if the suit were dismissed based on the AIA," Smith said.

Smith argued that the potential breadth of what could be considered a novel legal or policy issue might sweep up more tax regs into the ANPRM requirement than was previously the case.

### **Deficiency Notices Don't Need a Reasoned Explanation, Court Says**

"This is the outcome I expected and I certainly agree that the decision is correct," said Patrick J. Smith of Ivins, Phillips & Barker Chtd. He said the court's reasoning was a little surprising because it never mentioned the principle established in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), that an agency is not permitted to defend its action in court using a different rationale from the one it used to make the decision.

"Another point I thought was comforting was they repeatedly made clear that they are talking about the Tax Court's review of the merits of a deficiency notice as opposed to having any more general applicability to Tax Court proceedings," Smith said. The Fourth Circuit clearly did not say that the APA never applies in the Tax Court, he said.