Pat Smith Quoted in Wall Street Journal and Tax Notes Articles

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Wall Street Journal and Tax Notes

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Ivins attorney Pat Smith was quoted today in stories in the Wall Street Journal and Tax Notes regarding the challenge filed in Texas district court to the multiple acquisition rule regulations issued under section 7874 in April.

Business Groups Sue U.S. Government Over Tax-Inversion Rules. Wall Street Journal.

> The case was likely filed in Texas for two reasons, said Patrick Smith, a lawyer at Ivins, Phillips & Barker in Washington. A 2015 precedent in the District of Columbia Circuit Court of Appeals made it harder to bring challenges to stop tax regulations before they are applied to specific taxpayers. Additionally, Texas is in the Fifth U.S. Circuit Court of Appeals, which has shown a willingness to invalidate regulations and other administrative actions.
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> Even if the government loses in the Fifth Circuit, the conflict with the D.C. Circuit precedent would give the administration an opening to take the case to the Supreme Court, said Mr. Smith, who isn't involved in the case. The government will also likely challenge the plaintiffs' standing to sue.
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> "On the merits, the challengers have a very strong case," Mr. Smith said. "Don't expect any decision on the merits for quite some time."

U.S. Chamber of Commerce Files Suit Challenging Inversion Regs. Tax Notes.

Assuming the plaintiffs could reach the merits -- by no means a given -- Patrick J. Smith of Ivins, Phillips & Barker Chtd. thought that they had a compelling case.

"The statutory provision itself has rules that are based on the existence of a plan. The multiple acquisition rule is not based on the existence of the plan. It's a strong argument," Smith said, also citing the rules under section 7874(c)(3), which hold that if a foreign corporation acquires directly or indirectly substantially all of the properties of a domestic corporation or partnership during the four-year period beginning on the date that is two years before the ownership requirements of subsection (a)(2)(B)(ii) are met, such actions shall be treated as being under a plan. Together, the two rules imply that a series of transactions not part of a plan are beyond the authority of Treasury to regulate, he added.

Altera Corp. v. Commissioner, 145 T.C. No. 3 (2015), also showed that the traditional view of the IRS that notice and comment procedures don't apply to regs was wrong, a holding that weighs in the plaintiffs' favor, Smith argued. In *Altera*, the Tax Court held that a 2003 final Treasury rule requiring participants in qualified cost-sharing arrangements to share stock-based compensation costs to achieve an arm's-length result is arbitrary and capricious and therefore invalid. The case is being appealed to the Ninth Circuit.

Filing the suit in the U.S. District Court for the Western District of Texas was no accident, according to Smith, even though traditionally suits challenging agency regulations have been filed in the District of Columbia.

The D.C. Circuit held in *Florida Bankers Association v. Treasury*, No. 14-5036 (D.C. Cir. 2015), that a suit by two bankers associations challenging a regulation that imposed a penalty on banks that fail to report to the IRS interest paid to specific foreign account holders is barred by the Anti-Injunction Act (AIA). The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

"Because of *Florida Bankers*, any suit that's brought challenging IRS regulations . . . is not going to be brought in D.C., as long as that case is on the books," Smith said. He added that Texas presented a more agreeable jurisdiction for the plaintiffs because of the Fifth Circuit's recent decision in *Texas v. United States*, No. 15-40238 (5th Cir. 2015), which was upheld on a 4-4 split at the Supreme Court, affirming a Texas district court's decision to issue a preliminary injunction against an executive action that would have granted deferred action to illegal immigrants. Texas's stature as a popular place to challenge regs would not be limited to the immigration context, Smith said.

Despite the location of the filing, Smith predicted significant procedural hurdles that the plaintiffs would have to clear before the court can consider the merits of the case. He said he expects the government to file a motion to dismiss based on the AIA and a lack of standing among the chamber's members and that it will argue that the interests between the members and the regs are too speculative and remote.

"Obviously the parties that were harmed by these regulations were Pfizer and Allergan," Smith said. "But past harm is not a basis for standing. And I think it's going to be a very interesting issue to see the arguments as to why the members have standing." He added, "It will be a while before the court gets to the merits."

Additional Tax Notes stories

Pat was also quoted today in another Tax Notes story about the decision of the D.C. district court yesterday in *AICPA v. IRS* regarding a challenge to the IRS Annual Filing Season Program, **Competitive Standing Insufficient for AICPA to Maintain Suit**.

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said that the AICPA's position faltered because of the voluntary nature of the annual filing season program, even though the AICPA disputed the voluntariness of the program in its summary judgment briefs. He said that it would be hard to reconcile the zone-of-interests analysis in this case with the analysis in *Loving* -- in which the circuit court found that the IRS overreached -- without the voluntary nature of the annual filing season removing the interest of those regulated. "It's hard to see that a voluntary program regulates anyone," he said, adding, "It was always a very uphill battle for the AICPA to be challenging this program."

Smith said that while the district court opinion mentioned questions about whether the IRS acted properly in initiating the annual filing season program, it is hard to discern what plaintiff could challenge the program under the district court's analysis.

"Given that the AICPA cares about this very strongly, I think there will probably be an appeal on this issue," Smith said.

Earlier in the week, Pat was quoted in a Tax Notes story regarding a pending petition for certiorari in the Supreme Court relating to the Tax Injunction Act, **News Analysis: Take Two for the Tax Injunction Act at the Supreme Court?**

The facts in *Huang* may make the petition a hard sell, even in light of *Direct Marketing Association*. "The problem that the taxpayer has in this case is that it is a dispute about a tax that has already been assessed," said Patrick J. Smith of Ivins, Phillips & Barker Chtd. That considerably weakens Huang's ability to argue that the TIA does not apply, Smith said. "The government has a good case to say that the taxpayer is trying to restrain the collection of a tax that has already been assessed, and that is a lot harder to bring within the reasoning of *Direct Marketing*," he said.

If the taxpayer had brought the challenge at the time the summons was issued and before the tax was assessed, he would have a stronger argument, Smith said. But the fact that the tax had already been assessed and the summons was never enforced puts Huang at a disadvantage.

Although the fates of the Anti-Injunction Act and the TIA are largely intertwined because the Anti- Injunction Act was the model for the TIA and they have similar language, the question of how penalties are treated is no longer as significant under the former as it is under the latter. The decisions in *Florida Bankers Association v. Treasury*, No. 14-5036 (D.C. Cir. Aug. 14, 2015), and *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), regarding the Anti-Injunction Act indicate that the IRC has a clear classification of penalties. "For purposes of the Tax Injunction Act generally, there is not such a clear statutory classification," Smith said.

Even if the Supreme Court denies cert in Huang, a similar case brought in a more plausible procedural context could provide guidance not only for the TIA but also the Anti-Injunction Act, because there are summonses under the code as well, Smith said. "I think the *Florida Bankers* decision was clearly wrong, and it seems to me that *Direct Marketing Association* has a lot of implications for the Tax Injunction Act and the Anti-Injunction Act," he said. "I think this area is ripe for development."