Ivins Attorney Pat Smith Quoted in Tax Notes re Multiple Acquisition Anti-Inversion Rule

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Ivins attorney Pat Smith was quoted in a Tax Notes article about the motions filed by the plaintiffs and the government in the federal district court challenge to the multiple acquisition anti-inversion rule under section 7874, ***Chamber of Commerce, IRS Face Off in Inversion Rule Challenge***.

> Treasury made no good-cause finding, much less provided a statement of reasons in the rule itself, as the APA requires, the plaintiffs say. "There is no excuse for Treasury's suspension of the APA's requirements in this case, which is presumably why it did not even attempt to offer one," according to the memo. It is this argument that has "the broadest application, as the IRS and Treasury have engaged in a long-standing practice of disregarding the notice-and-comment requirements through the issuance of temporary regulations," said Patrick J. Smith of Ivins, Phillips & Barker Chtd. As the plaintiffs' motion argues, "the specific references to temporary regulations in section 7805(e) do not justify this practice since these provisions impose restrictions on the use of temporary regulations and should be read as premised on the assumption that the IRS and Treasury have satisfied the good cause exception under the APA before these provisions even come into play," Smith said.
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> "Supreme Court case law makes clear that refraining from engaging in activity the plaintiff would otherwise engage in is enough to provide standing to challenge the action that is affecting the plaintiff's behavior," Smith said. But most of the section 7874 regulations issued on April 4, and in particular the multiple acquisition rule, present much greater challenges to establishing standing than more conventional regulations, he

said.

The universe of parties to which the multiple acquisition rule applies is small, the complaint doesn't identify any specific companies that would be hurt, and the government's brief also correctly argues that past harm is not sufficient to give standing, Smith said. The bottom line of this analysis seems to be that tax regulations like the serial acquisitions rule would be "essentially immune from challenge" because no taxpayers would be willing to bring themselves within the rule so as to be in a position to challenge it in a Tax Court deficiency action or refund suit, Smith said. "This sort of Catch-22 might find a sympathetic audience with some judges," he said, acknowledging that the possibility has long odds. "I would anticipate that the district court will conclude that the plaintiffs do not satisfy the standing requirement," he said.

Until the Direct Marketing decision last year, the AIA argument would have been a clear winner for the government, Smith said. Under two 1974 Supreme Court decisions cited in the government's motion -- Bob Jones University v. Simon, 416 U.S. 725 (1974), and Alexander v. "Americans United" Inc., 416 U.S. 752 (1974)-- the prevailing view was that any suit in district court involving federal taxes, other than a tax refund suit, was barred under the AIA if success by the plaintiffs could in any way result in the receipt of less tax revenue for the government, Smith said.

Direct Marketing did not directly involve the AIA, but instead the similar provision concerning state taxes, the TIA, Smith said. Still, the Court's analysis in that case should have direct application to the AIA because the Court relied heavily on the AIA in interpreting the TIA narrowly, in a way that seems inconsistent with the traditional broad view of the AIA's scope, he said.

Under the Court's reasoning in Direct Marketing, when a plaintiff challenges the validity of a tax regulation that has no current applicability to the plaintiff because the plaintiff has not engaged in the type of transaction for which the challenged regulation would provide adverse tax consequences, the AIA should not apply because there is no possibility of assessment or collection of taxes from the plaintiff based on the application of the challenged regulation, Smith said. That is exactly the type of situation that exists in the Chamber of Commerce and Texas Association of Business's challenge to the multiple acquisition rule, Smith said.