



## Pat Smith Quoted in Tax Notes re: Ax v. Commissioner

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### *Tax Notes*

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Ivins attorney Pat Smith was quoted in a *Tax Notes* article on yesterday's Tax Court decision in *Ax v. Commissioner, Administrative Procedure Act Doesn't Apply to Deficiency Case*.

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said, "The Tax Court reached exactly the right conclusion." He added that the Tax Court's long-standing position is correct that the de novo review of the NOD justifies not entertaining challenges based on the "faults" in the NOD. The de novo review of deficiency cases by the Tax Court makes the APA principle of an agency being forbidden in later litigation from relying on reasons not disclosed when it made the decision inapplicable to those cases, he said.

While he expressed the contrary view in 2012 2012 TNT 11-10: Special Reports, Smith said that on more recent analysis, he has concluded that the traditional Tax Court position is correct.

Smith said that the principle only makes sense for cases subject to the arbitrary and capricious standard of review, under which "the agency is given quite a bit of deference, which is clearly not the case in a de novo review setting."

The new and better step, according to Smith, is the Tax Court for the first time clearly explaining how the APA applies to NODs. The Tax Court has "done a good job explaining, in APA terms, why you can say the APA applies but still that it's de novo review and the lack of an explanation in a deficiency notice is not a basis for overturning the IRS decision," he said.