



Ivins Attorney Pat Smith Quoted in Tax Notes re: Deficiency Notices

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Ivins attorney Pat Smith was quoted in the Tax Notes story *How Detailed Should Deficiency Notices Be?* dealing with a pending Fourth Circuit case that presents the issue of whether the reasoned explanation requirement under the APA's arbitrary and capricious standard applies to deficiency notices issued by the IRS.

The question of how the APA might apply to notices of deficiency is undeveloped because the arbitrary and capricious standard -- not the de novo standard -- is what typically applies to other agency actions, said Patrick J. Smith of Ivins, Phillips & Barker Chtd. However, the legislative history of the APA makes it clear that Congress contemplated that deficiency actions in the Tax Court and refund actions in district courts would be litigated on a de novo basis, and that means that de novo review would satisfy the APA, he said. Further, case law highlights the necessary relationship between the reasoned explanation requirement of the arbitrary and capricious standard and the reviewing court being limited to upholding agency action based solely on the rationale that the agency relied on, said Smith. It is this consideration that has caused him to change his mind about this issue, Smith said, in comparison to the position he expressed in a Tax Notes article in 2012.

"Given that the Tax Court has de novo review in deficiency actions, the rationale for requiring a reasoned explanation simply disappears," he added.



| 2 | Ivins Attorney Pat Smith Quoted in Tax Notes re: Deficiency Notices

The conclusion that the reasoned explanation requirement does not apply to deficiency notices is also supported by the harmless error principle reflected in the language at the end of section 706, Smith said.

"Because of de novo review in the Tax Court, the taxpayer has not been harmed by the lack of explanation in the deficiency notice," he said. However, "the arbitrary and capricious standard clearly does apply to deficiency notices that reflect IRS action under a few code sections, such as section 482 and section 446, where the IRS is given discretion to make certain determinations," added Smith.