



Pat Smith quoted in Tax Notes on Brevity of SALT notice as avoiding APA challenge

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Ivins attorney Pat Smith was quoted in a *Tax Notes* article on the brevity of the recent SALT notice as possibly intended to avoid an APA challenge to regulations that may later be issued on this subject based on a failure to follow proper notice-and-comment rulemaking procedures. *A Notice That Fits on a Postcard: Anomaly or Sign of the Times?*

Patrick J. Smith of Ivins, Phillips & Barker Chtd. was quick to relate Hickman's hiring to the structure of the SALT notice and argued that her criticism of tax rulemaking invalidity under the APA could be applied to traditional notices as well.

"This is something that is equally improper to put out a notice, as the IRS and Treasury have done this up until [the SALT notice], that says we intend to issue these rules and go through it in great detail," Smith said. "That clearly would provide a basis for somebody to say, Well, you have already made up your mind before a notice and comment process was in place. And that just is not proper."

Smith pointed to two cases from the D.C. Circuit that would support that contention.

Smith contrasted the SALT notice to another of significant consequence, Notice 2014-52, 2014-42 IRB 712, which laid out in painstaking detail the measures Treasury and the IRS would use to police a different vehicle for tax avoidance that was making major news at the time: inversions.

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An APA requirement that judicial review be confined to final agency actions could restrict a challenge to a notice directly because a notice is often viewed as only a step along the way toward regs. But even if a notice does not meet the threshold itself, Smith thought it could still be relevant to a future APA challenge.

"When the process plays out and they do issue regulations pursuant to one of those very detailed notices, and assuming they do go through formal notice and comment, at that point when the regulations become final . . . it would be a basis for challenge," Smith said.