



Pat Smith Quoted in Tax Notes on Erroneous Justice Department View that Supreme Courts State Farm Decision Is Irrelevant for Tax Lawyers

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IPB attorney Pat Smith was quoted in a *Tax Notes* article prompted by statements by a Justice Department official at the recent ABA Tax Section meeting to the effect that the Supreme Court's landmark administrative law decision in *State Farm* is irrelevant for tax lawyers, although the article did not refer directly to these statements, instead citing them only through a link. *DOJ May Be Wrong on State Farm, but How Much Does It Matter?*

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said *Encino Motorcars* represents the strongest authority to counter the government's attempts to distance tax from the *State Farm* decision because the case presented "clearly an issue of just statutory interpretation."

"There wasn't any dispute, for example, about what the nature of the work done by a service adviser is. Nobody disagreed about that. That was totally clear," Smith said. "This case just by itself is certainly the clearest evidence to show that the statement about *State Farm* being limited to factual cases is just not correct."

Smith also said *Encino Motorcars* was novel in articulating a relationship between *State Farm* and *Chevron* and holding that it was first necessary to decide procedural validity before reaching *Chevron*.

"If you look back at the original *Chevron* opinion, it doesn't say anything about reasoned decision-making. It doesn't say anything about the decision-making process. It doesn't say anything about the explanation. All it says is the second step of the test is whether the result reached by the agency was reasonable," Smith said. "It's only subsequently that there started to be discussions of [whether] there is really a difference . . . but even today you wouldn't necessarily get



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every judge to interpret *Chevron* step 2 as including the reasoned decision-making [standard]."

"People say tax is complicated. In my experience, immigration is even more complicated," Smith said. "[*Judulang*] wasn't a case of statutory interpretation, but it also clearly wasn't a factual question. It was whether the principle that the Board of Immigration Appeals applied in deciding a certain category of cases made sense."

Chevron could be understood as more appropriate to analyzing the rule itself, with *State Farm* dedicated to the procedural aspects of rule creation, Smith argued. He added that he could foresee some tax regs being invalidated under *State Farm* that would survive *Chevron* step 2, assuming they reached a judge who didn't equate the two standards.

As evidence of potential peril to tax regs, Smith cited to a bygone Internal Revenue Manual entry. Although it no longer appears there, IRM 32.1.5.4.7.3(1) used to include a statement that "it is not necessary to justify the rules that are being proposed or adopted or alternatives that were considered." Smith labeled this position as "flatly contradictory to *State Farm*."