Pat Smith Quoted in Tax Notes on Mayo Clinic and Silver Cases

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IPB attorney Pat Smith was quoted in Tax Notes articles on recent developments In the Eighth Circuit *Mayo Clinic* case and the D.C. district court *Silver* case.

Mayo Clinic is an appeal by the government of a Minnesota district court decision invalidating a regulation defining an "educational organization" on the basis that the regulation adds requirements to the definition that are not contained in the statutory provision the regulation is interpreting. The *Tax Notes* story reports on the government's opening appellate brief. *Mayo Clinic Decision Will Disrupt Settled Law, DOJ Says*.

Patrick J. Smith of Ivins, Phillips & Barker Chtd. told *Tax Notes* that he thought the Justice Department's brief was surprisingly strong. "I felt that the district court's opinion was almost certainly correct," he said. "The government's [appeal] brief has introduced a little bit of doubt. But overall I still think the court's statutory analysis is very persuasive."

Silver is a pre-enforcement challenge to the validity of regulations issued under section 965 on the basis that the IRS and Treasury did not conduct a proper analysis of the effect of the regulations on small businesses as required by the Regulatory Flexibility Act. The district court denied the government's motion to dismiss that was based on standing issues and the Anti-Injunction Act. *Silver Strikes Gold for Taxpayer Administrative Law Challenges*.

"The IRS and Treasury have not been conscientious about following what the Regulatory Flexibility Act requires. . . . There is definitely a lot potential in applying the same analysis [in Silver] to other regulations," said Patrick J. Smith of Ivins Phillips & Barker Chtd. "Oftentimes there

are specific provisions in regulations that companies want to challenge. They're not necessarily interested in having the whole package invalidated. This is kind of a sledgehammer approach. . . . Still, if this is what works "

Smith said this language from the court's holding could be read as applicable even beyond the PRA and RFA. The same analysis could be applied to IRS defects in notice and comment procedures required for reg writing.

Speaking generally about the IRS's typical RFA section, Smith said it was often "very perfunctory." He compared it with the analysis under Executive Order 12866.

"They now go through the motion of doing those, but the analysis is very unpersuasive. It's basically always the benefit to taxpayers is certainty and clear answers," Smith said. "It certainly doesn't justify any particular rules."

Smith said one of the most striking things about the decision is the failure to address *Florida Bankers Association v. U.S. Department of Treasury*, 799 F.3d 1065 (D.C. Cir. 2015). In that case, the D.C. Circuit held that the AIA barred U.S. banks from challenging a regulation that required reporting of nonresident aliens' interest income. The case was addressed by both the government, which wanted to rely on it, and the taxpayer, which wanted to distinguish it, on brief.

Smith had predicted that *Florida Bankers* would present a significant hurdle to Silver looking to reach the merits of his case.

"The idea that the plaintiffs in this case are not seeking to have their tax liability determined but are instead seeking to compel the IRS and Treasury to follow the procedures that they are statutorily required to follow by the Regulatory Flexibility Act in particular: that seems to me to be a very plausible and respectable position, and certainly, something that could be applied much more broadly," Smith said.

When it was first handed down, Smith said, he did not count on *Cohen* having much application, given its narrowness involving litigation of a refund procedure. He did acknowledge, however, "a lot of broad language" in that decision about the IRS "trying to insulate itself from all types of challenges" through the AIA.

"What the government kept saying was, He doesn't owe tax yet.' Well, the transition tax is a one-time tax. It's not something you are going to owe every year. So if he doesn't owe it yet, he's never going to owe it," Smith said.

Both Smith and Hickman were confident that the government would be eager to appeal the decision. If the D.C. Circuit were to reach the same result, Smith argued, it would be easier to do so on the grounds that Silver had no tax to pay.

"Probably the safest thing to do is apply the provisions of the reg until something else happens, as though it was still good," Smith said.