Pat Smith's Two-Part Blog on Florida Bankers Association v. Treasury Department Featured in Procedurally Taxing

PRACTICE AREAS

Tax

Tax Accounting

Tax Controversies

Procedurally Taxing

August 18, 2015

Wednesday, August 18, update: TaxProf Blog link to *Procedurally Taxing* post:

- *TaxProf Blog*

On Monday, August 17, the tax procedure blog *Procedurally Taxing* published the first part of Ivins attorney Patrick Smith's two-part post on the D.C. Circuit's decision in *Florida Bankers Association v. Treasury Department*, dealing with the Anti-Injunction Act, *D.C. Circuit Majority Opinion in Florida Bankers Not Consistent with Supreme Court's Direct Marketing Decision*:

- Procedurally Taxing (Part 1)

On Tuesday, August 18, the second part of the tax procedure blog was published:

- Procedurally Taxing (Part 2)

In addition, on Monday, August 17, he was also quoted in articles in both the Bloomberg BNA *Daily Tax Report* and *Tax Notes* in stories about the *Florida Bankers* decision, and in a Tax Notes story about the Tax Court's recent *Altera* decision.

Banks Can't Challenge Reporting Rule Prior to Enforcement (Daily Tax Report)

Patrick Smith, a partner at Ivins, Phillips & Barker, Chartered in Washington, told Bloomberg BNA on Aug. 14 that "not only am I disappointed in the outcome, but also the nature of reasoning in the

majority opinion."

Smith said he would have expected that if the D.C. Circuit ruled against the banks, it would have been because the appeals court wanted to wait for the U.S. Supreme Court to explicitly state that the narrow approach taken by the court in the *DMA* decision is also applicable under the AIA.

Smith was referring to *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 2015 BL 55913 (2015).

Smith said he was further surprised by Kavanaugh's decision, because during oral arguments Kavanaugh got the government's counsel to admit that it was a criminal penalty.

Smith said that he expects an en banc review of the decision, because of the weak majority opinion and strong dissent.

In addition, Smith said Kavanaugh's reasoning conflicted with the D.C. Circuit's recent decision in *Z St. v. Koskinen*, 791 F.3d 24, 2015 BL 196808, (D.C. Cir. 2015), in which the court found that the AIA didn't bar a challenge to an IRS procedure. In that case, the court relied on *South Carolina v. Regan*, 465 U.S. 367 (1984), where the Supreme Court ruled that a lawsuit by a state against the U.S. Treasury wasn't barred by AIA, because the state had no other way of bringing its challenge.

In dicta in *Z Street*, the court said the AIA shouldn't apply based on the *DMA* reasoning, Smith said.

Anti-Injunction Act Bars Suit in *Florida Bankers* (Tax Notes)

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said that the outcome of *Florida Bankers* was surprising in light of the Supreme Court's analysis in *Direct Marketing Association*. The Supreme Court's narrow reading of the limitation of the Tax Injunction Act would seem to lead to a similarly narrow reading in the AIA, he said. "It is hard to see how the broad reading [in *Florida Bankers*] can be reconciled with *Direct Marketing Association*," he said. "Given the weakness of the majority opinion and the strength of the dissent, I hope that the challengers file a request for rehearing *en banc*."

News Analysis: *Altera* Alters the Landscape for Reg Challenges (Tax Notes)

In *State Farm*, the Supreme Court established that agencies must provide reasoned explanations for decisions but that the arbitrary and capricious standard is highly deferential.

| 3 | Pat Smith's Two-Part Blog on Florida Bankers Association v. Treasury Department Featured in Procedurally Taxing

"As long as the agency gives an explanation that is understandable and makes sense, it has fulfilled the requirement," said Patrick J. Smith of Ivins, Phillips & Barker Chtd. "The explanation does not have to be elaborate." Pointing to the preamble to T.D. 9424 as an example, he said it explicitly addresses comments and extensively explains how the final rules took them into account.