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U.S. Supreme Court grants certiorari in challenge to IRS notice and compliance with Administrative Procedure Act

The U.S. Supreme Court today agreed to review a Sixth Circuit decision concerning the reach of the Anti-Injunction Act (Code section 7421(a)) that provides “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.”

At issue is whether federal courts have jurisdiction to entertain an action to enjoin enforcement of a notice issued by the IRS, prior to any action by the IRS to assess or collect any tax associated with a failure to comply with the notice, based upon the alleged failure of the IRS to comply with the Administrative Procedure Act (APA) in issuing the notice.

The case is: *CIC Services LLC v. IRS*, Docket no. 19-390 (cert. granted May 4, 2020)

Background

The case originated when the plaintiff (a material advisor to taxpayers engaging in micro-captive transactions) filed a complaint in federal district court alleging that the IRS promulgated Notice 2016-66 in violation of the APA and the Congressional Review Act, and sought to enjoin its enforcement.

Notice 2016-66 identified certain “micro-captive transactions” as “transactions of interest” (a subset of reportable transactions), and explained that these transactions have “a potential for tax avoidance or evasion,” but that the IRS lacked sufficient information to distinguish between those that are lawful and those that are unlawful. By deeming these transactions to be reportable transactions, Notice 2016-66 imposed the requirements and potential penalties on taxpayers engaging in them, and on material advisors aiding the taxpayers in engaging in the transactions.

Before the federal district court, the plaintiff alleged that Notice 2016-66: (1) was a legislative rule that required notice-and-comment rulemaking; (2) was arbitrary and capricious, and therefore *ultra vires*; and (3) was a rule that required submission for congressional review before it could go into effect. The plaintiff also filed a motion for a preliminary injunction.

The IRS asserted that the plaintiff's complaint was barred by both the Anti-Injunction Act (Code section 7421(a)) and the tax exception to the Declaratory Judgment Act (28 U.S.C. § 2201), which divest federal district courts of jurisdiction over suits "for the purpose of restraining the assessment or collection of any tax."

Lower court decisions

The federal district court granted the IRS's motion to dismiss for lack of subject matter jurisdiction.

On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed. Read the [Sixth Circuit's opinion](#) [PDF 286 KB]

Subsequently, the Sixth Circuit denied the plaintiff's petition for a rehearing, en banc. Read the Sixth Circuit's [denial of the rehearing petition](#) [PDF 210 KB]

The U.S. Supreme Court today granted certiorari. Read the Court's [order](#) [PDF 67 KB]

KPMG observation

Tax professionals believe that a taxpayer victory at the Supreme Court could have broad implications for the IRS and the way it issues guidance in the future.

Specifically, a decision for the taxpayer could require more IRS guidance items to follow more formal protocols provided for in the APA, including compliance with a notice and comment period. These protocols could slow the issuance of guidance, potentially change the substance of those items, and delay the effective date of the proposed IRS position until the conclusion of the review process.

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