

Bloomberg Tax

Special Treatment for Tax Regulations Faces Latest Legal Test

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April 23, 2020

The outcome of a case—now pending at the U.S. Supreme Court—that deals with a Civil War-era law could strike a further blow to a long tradition of special treatment for Treasury Department regulations.

The Anti-Injunction Act was enacted in 1867 to help with the administration of the first federal income taxes. The act, which blocks many lawsuits trying to restrain tax assessment or collection, is facing a test as the Supreme Court goes to conference on Friday, where it could decide to take up a case that strongly divided appeals court judges.

The case, CIC Services, LLC v. Internal Revenue Service, highlights a distinctive feature of how some courts have handled legal challenges to Treasury regulatory actions that haven't yet been enforced—by dismissing the lawsuits as violations of the Anti-Injunction Act. This treatment is unique to Treasury actions: similar lawsuits against regulatory actions by other federal agencies are allowed.

This special treatment for Treasury's actions has sometimes been labeled as a form of "tax exceptionalism," a term describing distinct administrative norms and law for tax regulation.

Other forms of tax exceptionalism have historically included a separate standard of court deference for Treasury regulations and an executive branch arrangement that meant Treasury's regulatory actions were subject to much less independent oversight than those of other federal agencies. But in the past 10 years, both of those have been curtailed.

A decision from the Supreme Court in CIC Services to limit the scope of the Anti-Injunction Act could similarly significantly cut back at the tradition of treating tax differently, said Kristin Hickman, a professor at the University of Minnesota Law School, who wrote a third-party brief supporting the CIC Services cert petition.

"If the Supreme Court were to conclude that the Anti-Injunction Act does not bar pre-enforcement review of even some tax regulatory actions, that would represent a seismic shift away from tax exceptionalism in judicial review," said Hickman, who served as special adviser

to the administrator of the White House's Office of Information and Regulatory Affairs from 2018 to 2019.

Testing Tax Exceptionalism, Again

Since the enactment of the Anti-Injunction Act, Congress has created exceptions in particular contexts, including when taxpayers are claiming a tax refund or disputing the IRS's determination that they owe more taxes. But it has never either repealed the act or explicitly approved applying it across the breadth of today's tax regulatory areas.

Meanwhile, tax exceptionalism as a practice has been curtailed in recent years—and the outcome of CIC Services could be the next instance.

In 2011 the Supreme Court rejected a distinct judicial test for tax regulations that was less deferential to Treasury. In Mayo Foundation for Medical Education and Research v. United States, the court said it wasn't inclined "to carve out an approach to administrative review good for tax law only" without justification.

Then, in 2018, the Office of Information and Regulatory Affairs came to a new agreement with Treasury that created a process for review of significant tax regulations, bringing its relationship with the department into greater alignment with its longstanding oversight of other federal agencies.

Now, CIC Services wants the Supreme Court to review an interpretation of the Anti-Injunction Act by the U.S. Court of Appeals for the Sixth Circuit that blocked the firm's challenge to an IRS reporting requirement. The Sixth Circuit held that the act blocked the lawsuit because it was trying to restrain the assessment or collection of a penalty for failing to report, which the court deemed a "tax" for Anti-Injunction Act purposes.

A Debate

The Cato Institute, and the Chamber of Commerce both filed third-party briefs urging the justices to overturn the Sixth Circuit's ruling.

On the other side, Treasury argues that the Sixth Circuit's ruling is consistent with decisions from the Supreme Court and other courts of appeals.

Some who defend Treasury's position say that a robust Anti-Injunction Act helps protect Treasury's valuable work in raising revenue.

"Having regulations be challenged before they actually are enforced is kind of a situation for a lot of chaos and for elongation of the process of collecting taxes," said Mark Mazur, director of the Urban Institute's Tax Policy Center and a former Treasury assistant secretary for tax policy.

Mazur stressed that Treasury's role in raising revenue is distinct from other government agencies and in a sense pays for those other agencies.

Hickman questioned the degree to which modern-day tax regulations are focused on raising revenue, pointing to programs such as tax credits to combat poverty or to help people buy health

insurance. She also argued that allowing pre-enforcement challenges to tax regulatory actions could strengthen public perceptions of the legitimacy of those actions by inspiring more lawsuits that are able to test that legitimacy.

Hope for Others

Even if the Supreme Court declines to take up CIC Services, Treasury's fight over the scope of the Anti-Injunction Act won't be over.

In a separate case, Silver v. Internal Revenue Service, a man and his company scored a preliminary win in December when the U.S. District Court for the District of Columbia rejected the government's motion to dismiss the case under the Anti-Injunction Act.

The court said the plaintiffs, who allege that Treasury didn't conduct required reviews when it issued regulations, weren't asking the court to block Treasury from collecting taxes but simply to order Treasury to conduct the reviews.

An ultimate win for the plaintiffs in either CIC Services or Silver would probably give legal hope to other individuals who are questioning the validity of a Treasury regulatory action, said Stu Bassin, founder of the Bassin Law Firm PLLC and attorney in Silver.

"It would persuade other taxpayers who want to address tax issues outside of the deficiency or refund contexts that they should give it a try," he said.