No. 19-930

In The
Supreme Court of the United States

CIC SERVICES, LLC,

Petitioner,

v.

INTERNAL REVENUE SERVICE; DEPARTMENT OF TREASURY; UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PATRICK J. SMITH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the petitioner's challenge to the validity of Notice 2016-66 barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a)?

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INTEREST OF *AMICUS CURIAE*

The *amicus curiae* has been a practicing tax attorney in the District of Columbia since 1981.[1] In addition, *amicus* has written extensively on various issues relating to challenges to the validity of federal tax regulations. *See*, *e.g.*, Patrick J. Smith, *Life After* Mayo*: Silver Linings*, *Tax Notes*, June 20, 2011, p. 1251;[2] Patrick J. Smith, *The APA's Arbitrary and Capricious Standard and IRS Regulations*, *Tax Notes*, July 16, 2012, p. 271.[3] *Amicus* is frequently quoted in the tax press on these types of issues.

Amicus has also written extensively specifically on the Anti-Injunction Act as it relates to challenges to the validity of federal tax regulations. *See*, *e.g.*, Patrick J. Smith, *Is the Anti-Injunction Act Jurisdictional?*, *Tax Notes*, November 28, 2011, p. 1093;[4] Patrick J. Smith, *Challenges to Tax Regulations: The APA and the Anti-Injunction Act, Tax Notes*, May 25, 2015, p. 915;[5] Patrick J. Smith, *Pre-Enforcement Challenges and the*

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae* and his law firm made a monetary contribution intended to fund the preparation or submission of the brief. Both parties consented to the filing of this brief.

[2] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1866497

[3] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111136

[4] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1963869

[5] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2615726

Anti-Injunction Act, *Tax Notes*, May 14, 2018, p. 1001;[6] Patrick J. Smith, *D.C. Circuit in* Florida Bankers *Misapplies Anti-Injunction Act*, *Tax Notes*, December 21, 2015, p. 1493.[7] The last listed of these articles was cited in Judge Nalbandian's dissent in this case.

Based on his research, writing, and reflection in connection with the Anti-Injunction Act, *amicus* has a strong professional interest in an authoritative determination of the proper interpretation of the Anti-Injunction Act, particularly as it relates to challenges to the validity of tax regulations. In particular, as expressed in this brief, *amicus* believes that, under a proper interpretation of the Anti-Injunction Act, the Act does not apply in a case where the plaintiff is challenging the validity of a tax regulation, and where, during the time the suit is being maintained, the plaintiff has not engaged in any activity that would provide a basis for the IRS to assert that the plaintiff owes a tax liability under the regulation that is being challenged.

SUMMARY OF ARGUMENT

In the case of all regulations issued by all federal administrative agencies, other than tax regulations issued by the Internal Revenue Service and the Treasury Department, the way in which parties that are

[6] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3445071

[7] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710600

adversely affected by such regulations ordinarily challenge the validity of such regulations is to bring suit in federal district court, soon after the regulations are issued, without the need to first have the regulations applied to such parties as a prerequisite to bringing suit. In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Court held that such pre-enforcement challenges to the validity of regulations issued by federal administrative agencies are authorized by the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

However, in the case of tax regulations issued by the IRS and Treasury, the prevailing view has been that pre-enforcement challenges to the validity of such regulations are barred by the AIA. This view is based on two 1974 decisions of the Court, *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), which substantially expanded the scope of the AIA, without providing any rationale for doing so that had any basis in the text of the AIA, and without even acknowledging that this expansion was taking place.

Instead, based on these two 1974 decisions, the prevailing view has been that the validity of tax regulations issued by the IRS and Treasury may be challenged only in the same types of litigation in which all other tax issues are litigated, namely, tax refund litigation and challenges in the Tax Court to deficiency notices issued by the IRS, in each case only after the challenged regulations have been applied to the taxpayer making the challenge. However, the inability of taxpayers to engage in pre-enforcement challenges to

the validity of tax regulations creates two very substantial disadvantages for taxpayers who are adversely affected by particular tax regulations and who would like to challenge these regulations.

First, a decision by a court on the merits of a challenge will necessarily come much later, in comparison to a pre-enforcement challenge, when the challenge must be made in the conventional forms of tax litigation, because of the need to have the regulation first applied to particular actions by a specific taxpayer before a challenge can be begun. Second, and even more significant, in order for a taxpayer to be able to challenge the validity of a tax regulation through the conventional forms of tax litigation, the taxpayer must first engage in actions that make the regulation applicable to the taxpayer.

However, if the challenge fails, the taxpayer will then be burdened with the adverse tax consequences resulting from application of the regulation to the taxpayer's actions. In many cases, this second disadvantage means that certain tax regulations are effectively immune from challenge, because the adverse tax consequences of a failed challenge to these regulations will be too severe and substantial for any taxpayer to risk.

Of course, if the bar on pre-enforcement challenges to the validity of tax regulations were dictated by the clear text of the AIA, there would be no basis for objecting to this broad view of the scope of the AIA. However, the text of the AIA says absolutely nothing about

challenges to the validity of tax regulations. Instead, in the 1962 decision of this Court that was the most recent decision on the AIA before the two 1974 decisions noted above, *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1 (1962), the Court stated that the AIA barred only suits relating to "taxes alleged to be due."

In the case of pre-enforcement challenges to the validity of tax regulations, where the party bringing the challenge has not engaged in any actions that would provide a basis for the IRS to apply the regulations to that party, there is no possibility of any taxes being "alleged to be due" based on the application of the challenged regulation, and, accordingly, the AIA should not apply to such a case. In the present case, petitioner has fully complied with all the requirements of Notice 2016-66, and, as a result, there would be no basis for the IRS to assert that petitioner owes the penalty for non-compliance with the requirements of the notice that, according to the Sixth Circuit, forms the basis for applying the AIA in the present case. If application of the AIA is properly limited to cases involving "taxes alleged to be due," it is clear that the AIA is not applicable to this case.

The Court's 2015 decision in *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015), interpreted the AIA's sister statute, the Tax Injunction Act, in a careful and precise way that is entirely incompatible with the extremely broad interpretation of the AIA that was applied in the two 1974 decisions referred to above. *Direct Marketing* is extremely relevant to the

proper interpretation of the AIA both because, as the Court noted in that case, the TIA is modeled on the AIA, and also because, as the Court also noted in that case, "[i]n defining the terms of the TIA, we have looked to federal tax law as a guide." *Id.* at 1129.

Just as "the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes," *id.* at 1131, likewise, the AIA is not directed at all activities relating to the overall federal tax system. In *Direct Marketing*, the actions that would provide a basis for the taxing authority to assert a liability for taxes owed, namely, sales to Colorado residents by out-of-state retailers, had already taken place at the time of the suit, but in spite of that fact, the Court nevertheless held the TIA was inapplicable. Where the actions by the plaintiff that would provide a basis for the IRS to assert a federal tax liability against the plaintiff have *not* taken place at the time of the suit, the AIA should not be applicable.

Although many court decisions have justified a broad reading of the AIA on the basis of the need to assure an uninterrupted flow of tax revenue to the federal government, nevertheless, since 1924, this rationale has been seriously undermined by the fact that in most cases involving a tax liability that is asserted by the IRS against individuals, businesses, and other entities, the Tax Court is available as a forum where the party against which the tax liability is asserted has the ability to contest the asserted tax liability without first having to pay the contested tax. As a result, the need to assure an uninterrupted flow of tax revenue to

the federal government no longer provides an adequate justification for a broad reading of the scope of the AIA.

The D.C. Circuit decision in *Florida Bankers Association v. Treasury*, 799 F.3d 1065 (D.C. Cir. 2015), which was relied on by the Sixth Circuit majority in this case, distinguished *Direct Marketing* on a trivial basis and completely ignored the relevance of the reasoning in *Direct Marketing* to the interpretation of the AIA. Because *Florida Bankers* did not even consider the potential application of the reasoning in *Direct Marketing* to the proper interpretation of the AIA, the decision in *Florida Bankers* should be given no weight in this case.

ARGUMENT

I. The Anti-Injunction Act applies only where the taxes that are relied on by the government as the basis for applying the Act are taxes that are "alleged to be [currently] due."

A. *Williams Packing* established that the Anti-Injunction Act applies only where the taxes involved in the suit are taxes that are "alleged to be [currently] due."

The AIA provides in relevant part as follows: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."

The Court's 1962 decision in *Williams Packing* succinctly described the "manifest purpose" of the AIA in part as follows: "The manifest purpose of section 7421(a) is to permit the United States to assess and collect *taxes alleged to be due* without judicial intervention. . . ." 370 U.S. at 7 (emphasis added). Earlier in the opinion, the Court referred to the AIA as applying only to cases challenging "the collection of federal taxes not lawfully due." *Id.* at 6. And at the end of the opinion, the Court noted that "in general, the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid." *Id.* at 8. Thus, in order for a suit against the government relating to taxes to be barred by the AIA, the suit must relate to taxes that are "alleged to be [currently] due."

Where the plaintiff in a suit challenging the validity of a tax regulation issued by the IRS and Treasury has not, before or during the time the suit is pending, engaged in the type of activity that would cause the plaintiff to owe taxes under the challenged regulation (or penalties that are treated as taxes for purposes of the AIA), then the suit cannot possibly relate to taxes that are "alleged to be due" within the meaning of this test from *Williams Packing*. As a result, the AIA cannot possibly bar the suit under these circumstances.

In the present case, the plaintiff has fully complied with the information reporting requirements that were imposed by Notice 2016-66. As a result, there are no penalties for non-compliance that could possibly be "alleged to be due" from the plaintiff as a result of the

issuance of the notice. Accordingly, the AIA is not applicable to the present case.

Thus, in a case where the plaintiff might potentially, at some indefinite time in the future, owe taxes (or tax-equivalent penalties) under the challenged regulation, based on activity the plaintiff might potentially engage in at some indefinite point in the future that would cause the plaintiff to owe taxes (or tax-equivalent penalties) as a result of application of the challenged regulation, this type of speculative, uncertain, and completely conditional and contingent *potential* future tax liability is not sufficient to bring the AIA into effect. Such merely *potential future* tax liability is clearly not sufficient to satisfy the test that there must be "taxes alleged to be [currently] due" in order for the AIA to be applicable.

The principle that there must be "taxes alleged to be [currently] due" in order for the AIA to be applicable is not in any way limited to situations where the plaintiff is challenging a regulatory mandate that does not affect the plaintiff's actual current or future income tax liability, but where there is a penalty for non-compliance with the regulatory mandate that is treated as a tax for purposes of the AIA. Instead, the principle that there must be "taxes alleged to be [currently] due" in order for the AIA to be applicable also applies in cases where the "tax" for purposes of the AIA is an actual income tax that might potentially be imposed on the plaintiff based on applying the challenged income tax regulation to activity the plaintiff might possibly engage in at some time in the future, but has not yet

engaged in at the time the suit is being maintained. Unless the plaintiff has in fact already engaged in the activity that would result in additional income tax liability under the challenged regulation as of the time the suit is being maintained, the AIA does not bar the plaintiff's suit challenging the validity of the regulation.

B. *Bob Jones University* and "*Americans United*" substantially expanded the scope of the Anti-Injunction Act far beyond suits involving "taxes alleged to be [currently] due," without either acknowledging or justifying this expansion.

Despite the clear principle that was articulated in *Williams Packing* as to the circumstances in which the AIA applies, namely, to suits involving "taxes alleged to be [currently] due," nevertheless, in two decisions issued on the same day in 1974, the Court very substantially expanded the scope of the AIA in comparison to the scope articulated a mere twelve years before in *Williams Packing.* In *Bob Jones University, supra*, and "*Americans United*," *supra*, the Court held that where previously tax-exempt organizations challenged the revocation of their tax-exempt status by the IRS, application of the AIA barred these challenges, based at least in part on the fact that success by the organizations in their challenges would reduce the amount of income taxes that *might be owed in the future* by donors to the organizations based on *potential future*

contributions to the organizations by these donors and based on the future income tax deductions the donors would be able to claim with respect to these potential future contributions. "[P]etitioner seeks to restrain the collection of taxes from its donors—to force the Service to continue to provide *advance assurance* to those donors that contributions to petitioner will be recognized as tax deductible, thereby reducing their tax liability." *Bob Jones University*, 416 U.S. at 739 (emphasis added). "The obvious purpose of respondent's action was to restore *advance assurance* that donations to it would qualify as charitable deductions under § 170 that would reduce the level of taxes of its donors." "*Americans United*," 416 U.S. at 760-61 (emphasis added).

These two 1974 decisions did not acknowledge that they were substantially expanding the scope of the AIA in comparison to the scope that had been contemplated in *Williams Packing*. Instead, these decisions claimed to be merely applying the understanding of the AIA that had been applied in *Williams Packing*. "[T]he Court's unanimous opinion in *Williams Packing* indicates that the case was meant to be the capstone to judicial construction of the Act." *Bob Jones University*, 416 U.S. at 742.

While these 1974 decisions cited *Williams Packing* as support for the approach that was taken in these cases, the decisions resorted to paraphrase in citing the language from *Williams Packing* quoted above, presumably in order to avoid having to address the clear statement in *Williams Packing* that the AIA applies

only to suits involving "taxes alleged to be due." *See*, *e.g.*, *Bob Jones University*, 416 U.S. at 736 ("The Court has interpreted the principal purpose of this language to be the protection of the Government's need to assess and collect taxes [omitting the qualifying language "alleged to be due"] as expeditiously as possible with a minimum of pre-enforcement judicial interference."). Since these two 1974 decisions did not acknowledge that they were expanding the scope of the AIA, they likewise did not make any attempt to justify this expansion.

Based on the extremely broad scope of the AIA as applied in these two 1974 decisions, the lower courts in subsequent cases have interpreted the AIA as barring any district court litigation relating in any way to federal income taxes (other than actual tax refund suits), if success by the plaintiffs in the litigation has any potential for reducing the total amount of tax revenue that will be received by the federal government, no matter how remote and attenuated the relationship between the litigation and this potential reduction in tax revenue. Thus, pre-enforcement challenges to the validity of tax regulations have been viewed as being barred by the AIA if there is any potential that the litigation might result in any adverse effect on federal tax revenue.

C. *Direct Marketing* requires a return to the test from *Williams Packing* that the Anti-Injunction Act applies only to suits involving taxes that are "alleged to be [currently] due."

This remained the state of the legal landscape regarding the scope of the AIA from 1974 until the Court's 2015 decision in *Direct Marketing*. *Direct Marketing* was a challenge to the constitutionality of a Colorado statute requiring out-of-state retailers to file information returns with the state reporting on sales of merchandise to Colorado residents. Colorado contended that this suit was barred by the Tax Injunction Act, 28 U.S.C. § 1341, which provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." The Tenth Circuit agreed with Colorado, but the Court disagreed.

The Court began its analysis as follows:

> In defining the terms of the TIA, we have looked to federal tax law as a guide. Although the TIA does not concern federal taxes, it was modeled on the Anti-Injunction Act (AIA), which does. The AIA provides in relevant part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." We assume that words used in both Acts are

> generally used in the same way, and we discern the meaning of the terms in the AIA by reference to the broader Tax Code.

135 S. Ct. at 1129 (citations omitted).

The Court interpreted the terms "assessment," "levy," and "collection" in the TIA by reference to the meaning these terms have in the Internal Revenue Code and concluded that "these three terms refer to discrete phases of the taxation process that do not include informational notices or private reports of information relevant to tax liability." *Id.* "[T]he TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes. . . . The TIA is keyed to the acts of assessment, levy, and collection themselves, and enforcement of the notice and reporting requirements is none of these." *Id.* at 1131.

The Court also rejected the broad reading given by the Tenth Circuit to the term "restrain." "The Court of Appeals' definition of 'restrain,' . . . leads the TIA to bar every suit with . . . a negative impact" on the amount of tax revenue collected by a state. *Id.* at 1133. "Applying the correct definition, a suit cannot be understood to 'restrain' the 'assessment, levy or collection' of a state tax if it merely inhibits those activities." *Id.*

The broad scope of the TIA that was rejected by the Court in *Direct Marketing* is essentially equivalent to the broad scope of the AIA that was applied in *Bob Jones University* and "*Americans United*." While *Direct Marketing* did not deal directly with the AIA, nevertheless, the fact that the AIA, and the Internal Revenue

Code generally, played such a central role in the Court's reasoning in *Direct Marketing* clearly undermines the validity of the broad understanding of the scope of the AIA that was applied in *Bob Jones University* and "*Americans United*." Unless the Court is willing to impose a substantial inconsistency and disparity between the scope of the TIA and the scope of the AIA, the broad scope of the AIA that was applied in *Bob Jones University* and "*Americans United*" must be rejected as inconsistent with *Direct Marketing*.

D. *Florida Bankers* ignored the reasoning in *Direct Marketing*.

The first court of appeals case in which the potential effect of *Direct Marketing* on the interpretation of the AIA was presented as an issue was the 2015 D.C. Circuit *Florida Bankers* case, which was pending at the time the *Direct Marketing* decision was issued. *Florida Bankers* was a challenge to the validity of a regulation issued by the IRS and Treasury that required banks to submit information returns to the IRS regarding accounts in the banks held by non-resident aliens. Although non-resident aliens are not subject to federal income taxation by the United States on the interest earned on such accounts, nevertheless, the IRS and Treasury justified the information reporting requirement as being necessary to assist in satisfying obligations of the United States under information-sharing agreements with other countries.

The district court in *Florida Bankers Association v. Treasury* rejected the government's argument that the suit was barred by the AIA but also rejected the plaintiff's challenge to the validity of the regulations on the merits. 19 F. Supp. 3d 111 (D.D.C. 2014). In rejecting the government's reliance on the AIA, the district court noted that none of the member banks in the plaintiff bankers association had violated the reporting requirement imposed by the regulation that was being challenged. *Id.* at 121.

However, the D.C. Circuit, in a split decision, held the AIA barred the suit. The majority opinion did not address the issue of what relevance the reasoning in *Direct Marketing* has with regard to the proper interpretation of the AIA. The majority opinion in *Florida Bankers* instead distinguished *Direct Marketing* on the basis that the penalty for non-compliance with the reporting requirement that was being challenged in *Florida Bankers* is treated as a tax for purposes of the AIA, whereas there was no indication in *Direct Marketing* that the penalties for non-compliance with the reporting requirements at issue in that case were treated as taxes within the meaning of the TIA. Instead of addressing the relevance of the reasoning in *Direct Marketing* to the proper interpretation of the AIA, the majority opinion in *Florida Bankers* simply applied the broad understanding of the scope of the AIA derived from *Bob Jones University* and "*Americans United*" to hold that the AIA was applicable to the challenge.

The failure of the *Florida Bankers* majority opinion to consider the potential effect of *Direct Marketing*

on the proper interpretation of the AIA has the consequence that the *Florida Bankers* opinion should be given no weight in this case. As a result, the Sixth Circuit was mistaken to rely on *Florida Bankers* in this case.

II. The existence of the Tax Court as a forum where taxpayers are able to contest a tax liability asserted against them by the IRS, without first having to pay the amount of the contested tax, very substantially undercuts the traditional rationale for the Anti-Injunction Act that has been invoked in support of a broad application of the Act.

The passage from *Williams Packing* quoted in part earlier contains additional material that is relevant to this case. The complete passage is as follows:

> The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. *In this manner the United States is assured of prompt collection of its lawful revenue*.

370 U.S. at 7. A footnote to the second sentence in this passage contains the following quotation from the legislative history of the TIA as an explanation for the rationale of the need for "prompt collection of . . . lawful [federal tax] revenue":

> The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

Id. n.6.

Thus, *Williams Packing*, and many subsequent lower court decisions, have relied, in interpreting the AIA, on the proposition that the underlying purpose of the AIA is to assure a steady flow of tax revenue to the federal government, by requiring that taxpayers pursue disputes about their liability for federal taxes only in tax refund suits that are necessarily filed only after the taxpayers have paid the amount of the disputed taxes. The reliance on this rationale as a basis for giving the AIA a broad scope completely ignores the fact that since the creation of the predecessor to the Tax Court in 1924, in the overwhelming majority of cases involving disputes between taxpayers and the IRS regarding the amount of the taxpayers' liabilities for federal taxes, taxpayers have been able to litigate these disputes in the Tax Court without being required to

first pay the amount of the disputed taxes as a prerequisite to engaging in the litigation.

The indisputable purpose for the existence of the Tax Court and its predecessors is to permit taxpayers to litigate the propriety of a tax deficiency asserted against them by the IRS without first having to pay the contested taxes. In light of the availability of the Tax Court as a forum for taxpayers to litigate tax liabilities asserted against them by the IRS without first paying the contested tax, the rationale for a broad interpretation of the AIA as being necessary to assure an uninterrupted flow of tax revenue to the federal government no longer makes any sense.

The significance of the availability of the Tax Court as a forum for taxpayers to litigate their tax disputes with the IRS without first having to pay the disputed tax does not seem to have been recognized in any decided cases addressing the scope or applicability of the AIA. However, the failure of the courts to so far recognize the significance of the availability of the Tax Court with regard to the proper interpretation of the AIA does not excuse continued reliance on the rationale of the need for an uninterrupted flow of tax revenue to the federal government as a justification for a broad interpretation of the scope of the AIA.

III. The broad interpretation of the Anti-Injunction Act that was adopted in *Bob Jones University* and "*Americans United*," as applied to bar pre-enforcement challenges to the validity of tax regulations, causes substantial hardship to taxpayers that are adversely affected by particular tax regulations and that would like to challenge the validity of these regulations.

In the case of all regulations issued by federal administrative agencies, other than tax regulations issued by the IRS and Treasury, private parties who could be adversely affected by these regulations are able to bring pre-enforcement challenges to the validity of those regulations without first having made themselves subject to these adverse effects. This proposition was established by the Court's decision in *Abbott Laboratories, supra.*

However, as a result of the *Bob Jones University* and "*Americans United*" decisions, private parties who believe they could be adversely affected by federal tax regulations issued by the IRS and Treasury have been precluded from bringing pre-enforcement challenges to the validity of these regulations. Instead, in order to challenge the validity of federal tax regulations, these private parties have been forced to follow the traditional routes for challenging actions by the IRS, namely, either tax refund suits in district court or the Court of Federal Claims or petitions for redetermination of tax deficiencies in the Tax Court.

The restriction that challenges to the validity of federal tax regulations may be pursued only in the Tax Court or in tax refund cases imposes two very severe disadvantages for private parties who could be adversely affected by federal tax regulations in comparison to bringing pre-enforcement challenges to tax regulations. First, there is a substantial time delay in obtaining a judicial resolution of a challenge pursued either in Tax Court or in tax refund cases in comparison to pre-enforcement challenges pursued in federal district court, because of the need for the challenged regulation to first be applied to a particular taxpayer for a particular taxable year before any challenge to the validity of the regulations can be brought.

Challenges in either the Tax Court or tax refund litigation require that before bringing the challenge, the taxpayer must first engage in actions that would make the regulation to be challenged apply to these actions by the taxpayer in a way that would increase the federal tax liability of the taxpayer. In the case of challenges in the Tax Court, it is then necessary for the taxpayer to file a tax return reporting these actions as not being subject to the regulations, have that treatment examined by the IRS, and have the IRS issue a notice of deficiency based on the taxpayer's failure to apply the regulations. Only then is the taxpayer able to bring its challenge in Tax Court. The foregoing process ordinarily takes at least several years to play out. In contrast, if the pre-enforcement challenge route were available, challenges to the regulations could be

brought in federal district court as soon as the regulations were issued in final form.

In the case of challenges to the validity of tax regulations that are raised in tax refund suits, like challenges in Tax Court, it is necessary for taxpayers wishing to challenge the validity of federal tax regulations to engage in actions that would make them subject to the regulations and file a tax return in which those actions are reported. However, in contrast to Tax Court challenges, taxpayers would apply the regulations in their tax returns with the resulting increase in tax liability. The taxpayers would then need to file a refund claim with the IRS before being able to file a tax refund suit. If the IRS considers the refund claim, this process could again take several years to play out.

In addition to the serious disadvantage resulting from the inevitable delay in the timing of a challenge in comparison to pre-enforcement challenges, the requirement to pursue challenges to federal tax regulations only in Tax Court or in tax refund litigation presents a second very serious disadvantage that is even more severe than the disadvantage resulting from delay. This second very severe disadvantage results from the fact, noted above, that in order to engage in challenges to the validity of federal tax regulations either in Tax Court or in tax refund litigation, the taxpayer who wishes to bring the challenge must first engage in actions that would make the regulation the taxpayer wishes to challenge applicable to these actions by the taxpayer.

However, if the challenge is unsuccessful, the taxpayer will then be burdened with the adverse tax consequences that result from applying the regulation to the activity that it was necessary for the taxpayer to engage in so as to be able to bring the challenge. In many cases, these adverse tax consequences will be so consequential that no taxpayer will be willing to take the risk of subjecting themselves to these consequences in the event the challenge is unsuccessful. In those cases, the regulations will effectively be immune from challenge.

Because of these significant disadvantages to pursuing challenges to the validity of tax regulations through the conventional forms of tax litigation, many tax regulations that have significant procedural and substantive flaws are never challenged. If this result were clearly required by the AIA, there would be no legal basis for objecting to that result. However, the AIA does not require this result. Instead, if the AIA is properly interpreted, as it was in *Williams Packing*, as being applicable only in cases relating to taxes that are "alleged to be due," pre-enforcement challenges to the validity of tax regulations will frequently be available.

CONCLUSION

Based on the reasons set forth above, the decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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