No. 19-930

In The
Supreme Court of the United States

CIC SERVICES, LLC,

Petitioner,

v.

INTERNAL REVENUE SERVICE, ET AL.,

Respondents.

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

---

BRIEF OF *AMICUS CURIAE* PROFESSOR BRYAN T. CAMP IN SUPPORT OF RESPONDENTS

BRYAN T. CAMP
Counsel of Record and Amicus Curiae
TEXAS TECH UNIVERSITY SCHOOL OF LAW
3311 18th Street
Lubbock, Texas 79409-0004
806-834-8606
bryan.camp@ttu.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

Statement of Interest of *Amicus Curiae* 1

Introduction and Summary of Argument 1

I. Statutory Structure and Early Cases Support Reading the AIA as Broadly Protecting the System of Assessments and Collections 3

II. History of Tax Administration Since 1867 Supports Broad Scope............................... 10

A. Shift in Payment Obligation 11

B. Shift from Individual to Collective Engagement.. 14

C. The Centrality of Information Reporting 15

D. The Role of Statutory Exceptions........ 23

III. The TIA and AIA Are Cousins, Not Twins ... 25

IV. Petitioner Has Statutory Remedies 30

Conclusion.. 34

APPENDIX

Appendix 1: List of Lower Court Cases Approved in *Snyder v. Marks* .... App. 1

Appendix 2: Federal Tax Revenues 1871-1874 ..... App. 6

Appendix 3: Growth of Third-Party Information Return Requirements .... App. 8

Appendix 4: Growth of AIA Statutory Exceptions .... App. 14

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Americans United Inc., 416 U.S. 752 (1974) ... 12, 13

Alkan v. Bean, 1 Fed. Cas. 418 (Cir. Ct. E.D. Wisc. 1877) ... 7, 24

Avrahami v. Commissioner, 149 T.C. 144 (2017) ... 21

Bishay v. Commissioner, T.C. Memo 2015-105 ... 31, 32

Bob Jones University v. Simon, 416 U.S. 725 (1974) ... 12, 16, 24

Bull v. United States, 295 U.S. 247 (1935) ... 16

Cheatham v. U.S., 92 U.S. 85 (1875) ... 4, 6

Cheek v. United States, 498 U.S. 192 (1991) ... 33

Cohen v. U.S., 578 F.3d 1 (D.C. Cir. 2009) ... 30

Cutting v. Gilbert, 6 F. Cas. 1079 (1865) ... 4

Direct Marketing Ass'n v. Brohl, 575 U.S. 1 (2015) ... 25

Dows v. City of Chicago, 78 U.S. 108 (1870) ... 25

Educo, Inc. v. Alexander, 557 F.2d 617 (7th Cir. 1977) ... 15

Enochs v. Williams Packing & Nav. Co. v. United States, 370 U.S. 1 (1962) ... 12, 13, 26, 27

Gouge v. Hart, 250 F. 802 (W.D. Va. 1917) ... 29, 30

Hibbs v. Winn, 524 U.S. 88 (2004) ... 27

Howland v. Soule, 12 F. Cas 743 (Cir. Ct. D. Cal. 1868) ... 6

TABLE OF AUTHORITIES – Continued

Page

In re: Inland Gas Corp., 241 F.2d 347 (6th Cir. 1957) 30

Investment Annuity, Inc. v. Blumenthal, 609 F.2d 1 (D.C. Cir. 1979) 15

Keller Tank v. Commissioner, 854 F.3d 1178 (10th Cir. 2017) 32

Kensett v. Stivers, 10 F. Cas. 517 (Cir. Ct. S.D.N.Y. 1880) 7

Kissinger v. Bean, 14 F. Cas. 689 (Cir. Ct. E.D. Wisc. 1871) 6, 7, 27

Levin v. Commerce Energy, Inc., 560 U.S. 413 (2010) 25, 27

Miller v. Standard Nut Margarine Company, 284 U.S. 498 (1932) 26

Moore v. Miller, 5 App. D.C. 413 (Ct. App. D.C. 1895) 9

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) 13

Reserve Mechanical v. Commissioner, T.C. Memo. 2018-86 22

Ruesch v. Commissioner, 154 T.C. No. 13 (June 25, 2020) 24

Scott v. Western Pacific R.R. Co., 246 F. 545 (9th Cir. 1917) 29

Sego v. Commissioner, 114 T.C. 604 (2000) 31

Slodov v. United States, 436 U.S. 238 (1978) 24

TABLE OF AUTHORITIES – Continued

Page

Snyder v. Marks, 109 U.S. 189 (1883)......... 5, 6, 8, 9, 23

U. S. v. Black, 24 F. Cas. 1151 (Cir. Ct. S.D.N.Y. 1874)..7

U. S. v. Pacific R.R., 27 F. Ca. 397 (Cir. Ct. E.D. Mo. 1877)..7

United States v. American Friends Service Committee, 419 U.S. 7 (1974)....................................... 13

United States v. Powell, 379 U.S. 48 (1964)................12

Yari v. Commissioner, 143 T.C. 157 (2014)................31

OTHER AUTHORITIES

Arthur Acevedo, *Abusive Tax Practices: The 100-Year Onslaught on the Tax Code*, 17 Barry L. Rev. 179 (2012) 20, 21

Bittker & Lokken, 1 Federal Taxation of Income, Estates and Gifts, ¶111.3.......................................21

Bittker, McMahon & Zelenak, *Federal Income Taxation of Individuals*, 3d. §51.10 13

Bruce A. McGovern, Cassady V. Brewer, *Recent Developments in Federal Income Taxation: The Year 2017*, 71 Tax L. 725 (2018).......................22

Bryan Camp, *A History of Tax Regulation Prior to the Anti-Injunction Act*, 63 Duke L. J. 1673 (2014)...10

Bryan Camp, *Franklin Roosevelt and the Forgotten History of the Earned Income Tax Credit*, 20 Green Bag 2d 337 (2017) 11

TABLE OF AUTHORITIES – Continued

Page

Bryan Camp, *Jesus and the Anti-Injunction Act*, 136 Tax Notes 1335 (Sept. 10, 2012) 4, 5

Bryan Camp, *'Loving' Return Preparer Regulation*, 140 Tax Notes, 457 (2013) 16

Bryan Camp, *New Thinking About Jurisdictional Time Periods in the Tax Code*, 73 Tax Lawyer 1, 51-56 4

Bryan Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Fla. L. Rev. 1 (2004)...16

Bryan Camp, *Theory and Practice in Tax Administration*, 29 Va. Tax Rev. 227 (2009)............. 11

Erin Hawley, *The Equitable Anti-Injunction Act*, 90 Notre Dame L. Rev. 81 (2014)............................26

Henry Carter Adams, TAXATION IN THE UNITED STATES: 1789-1816 (Burt Franklin, NY 1970) 10

Joseph Thorndike, *Reforming the Internal Revenue Service, a Comparative History*, 53 Ad. L. Rev. 717 (2001) 17

Keith Fogg, *Access to Judicial Review in Nondeficiency Tax Cases.*, 74 Tax Law. 435 (2020) 32, 33

Kristen E. Hickman and Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683 (2017) 7

Leandra Lederman and Joseph Dugan, *Information Matters*, 2020 B.Y.U. L. Rev. ___ (forthcoming 2020) 19

TABLE OF AUTHORITIES – Continued

Page

Michael R. Harmon, *IRS Wins Micro-Captive Insurance Case*, 128 J. Tax. 20 (2018) 21

Note, *Judicial Determination of a Federal Tax Before Payment*, 45 Harv. L. Rev. 1221 (1932)........29

Plumb, *Refund Suits Against Collectors*, 60 Harv. L. Rev. 685 (1947) 4

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Bryan Camp is the George H. Mahon Professor of law at Texas Tech University School of Law. His specialty is tax administration history, theory, and practice. He has published about 30 scholarly articles on those subjects – some quite long and tedious – in the past 20 years. *Amicus* offers his expertise to help the Court understand the legal history and administrative context relevant to resolving the question presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

Statutes sometimes have a breadth of meaning far beyond the circumstances of their enactment. The Anti-Injunction Act (AIA), written in 1867, is one such statute. Just as "few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons," *Bostock v. Clayton County*, Slip Op. at 23, so few in 1867 could have envisioned how the words they wrote would apply to the system of modern tax administration.

This Court has given ample guidance over the past 137 years on how to remain faithful to the statute's text in the face of change. Key to that guidance is this Court's consistent reading of the AIA as broadly

[1] No counsel for any party has authored any part of this brief. No person other than *amicus* has monetarily supported this brief. All parties have consented to the filing of this brief per Rule 37.

protecting the *system* of tax administration created by Congress and carried out by the Internal Revenue Service ("Service"). As a result of this Court's fidelity to text, that protection has proved coextensive with Congressional changes to the system. Both lower courts and Congress have relied on this Court's consistent interpretation.

Petitioner and its *amici* invite a radical departure from this Court's settled reading of the text. They argue the AIA's text bars only those suits brought by persons against whom the government is proceeding directly to assess or collect a tax. They say this suit seeks only to restrain the collection of information and therefore an injunction here would not restrain the assessment or collection of any tax. They are wrong. They misread history, ignore the causal relationship between information reporting and assessment, and misapply the Tax Injunction Act (TIA). The AIA requires Petitioner to use the remedies Congress has provided in the Tax Code.

First, the AIA has always operated at a systems level, protecting the system of assessment and collection from premature judicial interference. The earliest cases held that the AIA prevented taxpayers from circumventing the system of remedies Congress created, even when those remedies were inadequate for the party seeking equitable relief, and even if the party seeking relief was not the taxpayer whose liability was being collected. From the get-go, the AIA ensured that courts respected Congressional design of the machinery of tax administration.

Second, this Court has held the plain text of AIA continues to serve that same purpose, even as tax administration has changed and grown in scope. A straightforward application of this Court's most relevant precedent shows that the AIA bars a suit from a party who seeks to restrain the pre-assessment collection of information about taxpayer activities and transactions. To allow an injunction here would necessarily restrain the assessment and collection of taxes, and would invite premature judicial interference in the system of tax administration.

Third, differences in text and purpose make it inappropriate to map the TIA onto the AIA. In contrast, this Court has appropriately used the language in the TIA to support a broad construction of the AIA. The more relevant statute is the Declaratory Judgment Act (DJA) which, when enacted, codified prior case law reading "restraining" in the AIA broadly in order to block suits for declaratory judgments.

Fourth, Congress has given Petitioner remedies. First is the refund remedy. Second is a statutory remedy called Collection Due Process.

I. Statutory Structure and Early Cases Support Reading the AIA as Broadly Protecting the System of Assessments and Collections

Statutory structure and early case law both support the plain reading this Court currently gives the statute: it protects the *system* of assessment and collection from preenforcement judicial interference. The

AIA was originally linked to the system of remedies Congress created for taxpayers. It was enacted to plug a hole in that system of remedies. And courts so interpreted it.

Before 1866 it was unclear whether taxpayers could file refund suits of any kind under the new internal revenue laws. To fix that problem Congress enacted §19 of the Revenue Act of 1866, 14 Stat. 98, 152, authorizing a suit for refund. *See* Bryan Camp, *New Thinking About Jurisdictional Time Periods in the Tax Code*, 73 Tax Lawyer 1, 51-56 (describing "mixed parentage" of tax refund suit); *See generally* Plumb, *Refund Suits Against Collectors*, 60 Harv. L. Rev. 685 (1947). Congress folded into that judicial remedy, however, the requirement that taxpayers first seek non-judicial administrative remedies. Thus §19 referenced a *system* of remedies, not a single one. *Cheatham v. U.S.*, 92 U.S. 85, 88-89 (1875).

One year later, Congress amended §19 in the Act of March 2, 1867, 14 Stat. 472, 475 to add this language at the end: "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." Such suits had been gaining traction, notably *Cutting v. Gilbert*, 6 F. Cas. 1079 (1865), where a group of stockholders sought *pre-assessment* relief against both the assessor and collector. Justice Nelson, riding circuit, denied the requested injunction but not before opining "I do not doubt the jurisdiction of the courts to interfere, and prevent the threatened imposition of the tax, if it is illegal." *Id*. at 1081. The AIA was enacted to preclude such interference. *See* Bryan

Camp, *Jesus and the Anti-Injunction Act*, 136 Tax Notes 1335 (Sept. 10, 2012).

The fact that the original AIA was linked to the remedies in §19 of the 1866 Act was important to this Court in *Snyder v. Marks*, 109 U.S. 189 (1883), the first case where this Court interpreted the AIA. There, the taxpayer asserted that an excise tax on tobacco assessed against him was illegal. The taxpayer argued that the suit was not to restrain "taxes" within the meaning of the AIA because the AIA's text meant only legal taxes. This was a plausible argument because by 1883 the AIA had been codified into its own section, §3224, in the Revised Statutes while the refund remedy had been codified in a separate section.

The Court rejected the taxpayer's narrow reading of the word "taxes." The Court did so by looking at the AIA's structural relationship to the first part of §19. It noted that the AIA "was in *pari materia* with the previous part of the section." *Id.* at 192. That previous part was the part that authorized taxpayers to sue for any "tax alleged to have been erroneously or illegally assessed or collected." 14 Stat. 98, 152. By tying the AIA's prohibition to the remedies Congress had provided, the Court concluded that there was "no force in the suggestion that section 3224, in speaking of a 'tax,' means only a legal tax; and that an illegal tax is not a tax. . . ." 109 U.S. at 192.

The focus of the Court's rationale was to link the AIA prohibition to the remedy Congress has provided taxpayers. Wrote the Court:

> The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law. *Id.* at 193.

The *Snyder* Court then string-cited nine circuit opinions unanimously holding that the AIA's plain language protected Congress's choice of remedy, as well as two of this Court's prior opinions interpreting §19 of the 1866 Act, including *Cheatham*. Appendix 1 summarizes the nine cases and their rationales.

A fair reading of those cases supports the idea that they treated the AIA as building a wall around the system of assessments and collections, a wall that channeled aggrieved taxpayers to the remedies Congress provided. *First*, early courts applied the AIA using a what-if-everyone-did-it rationale. They rested their judgment on the view that to permit the suit in front of them would have an adverse impact on the *system* because it would open the door to multitudes of suits. *E.g.*, *Howland v. Soule*, 12 F. Cas 743 (Cir. Ct. D. Cal. 1868).

Second, early courts disregarded whether the taxpayer before the court could actually use the judicial refund remedy Congress created. It was enough that the *system* provided remedies. For example, in *Kissinger v. Bean*, 14 F. Cas. 689 (Cir. Ct. E.D. Wisc. 1871) the taxpayer claimed he could not use the refund

remedy because he could not pay the $236,000 assessment. The *Kissinger* court said the particular taxpayer's inability was not material to application of the AIA. *See also Kensett v. Stivers*, 10 F. Cas. 517 (Cir. Ct. S.D.N.Y. 1880) (same).

Third, early courts read the AIA as barring even defenses raised in suits to collect. *See U. S. v. Pacific R.R.*, 27 F. Ca. 397 (Cir. Ct. E.D. Mo. 1877)(taxpayer not allowed to raise equitable offset under a what-if-everybody-did-it rationale); *U. S. v. Black*, 24 F. Cas. 1151 (Cir. Ct. S.D.N.Y. 1874)(non-taxpayer sureties not allowed to defend on theory that assessment was illegal because the system gave them a refund remedy).

Fourth, early courts read the AIA as barring suits from non-taxpayers. They applied the AIA to suits by third parties who were not themselves subject to tax liability but who simply held competing liens on property the government was attempting to seize. For example, in *Alkan v. Bean*, 1 Fed. Cas. 418 (Cir. Ct. E.D. Wisc. 1877) the court barred suit by a landowner to prevent seizure. Wrote that court: "The scope of this section is not limited in terms to the party taxed. The evident purpose of the section is to prevent any interference with the prompt and regular collection of the revenue." *Id.* at 421 (citations omitted).

Petitioner and its *amici* rely heavily on Kristen E. Hickman and Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683 (2017). Those authors say this Court has deviated from the AIA's true meaning. They say the AIA does not protect the system

of tax administration, but only prevents judicial interference in specific cases involving "direct and particular engagement between revenue officials . . . and taxpayers." *Id.* at 1753. Thus, they urge the AIA to be "restored" to what they say is its original scope. It should block only "those lawsuits that arise after the IRS has already engaged a taxpayer about its own particular tax liability." *Id.* at 1724.

Hickman and Kerska's conclusion rests on a significant misreading of the early statutes. Before this Court, *amici* Hickman repeats the error. She claims that "in the Revenue Act of 1867, Congress amended section 19 of the *1862* Act . . . " Merits Brief at 13 (emphasis added). Since the *1862* Act §19 dealt only with specific post-assessment acts of collection, she makes the *pari materia* argument that "the new AIA language facilitated that specific process by ensuring that individual cases of assessment and collection in progress would not be stalled by judicial review." *Id.* (emphasis omitted). Likewise, in their article, Hickman and Kerska commit the same mistake and on it rest their conclusion: "Thus, the amendment fit neatly into Section 19 as a limited remedy for judicial obstruction of those particular procedures." *Restoring* at 1724.

This would be a reasonable structural argument if Hickman had linked the AIA to the right §19. But Hickman gets her §19's confused. These were Revenue Acts, not Codes. The Revenue Act of 1867 amended §19 of the *1866* Act, as this Court well explained in *Snyder*. By 1867 §19 of the 1862 Act was long gone. It died in 1864, being replaced by §28 of the Revenue Act of 1864.

13 Stat. 223, 232. Section 9 of the Revenue Act of 1866 then amended §28 of the 1864 Act. 14 Stat. 98, 106. And §19 of the 1866 Act was new, creating the refund remedy. 14 Stat. at 152.

Discarding their erroneous reading of the early statutory structure leaves Hickman and Kerska's thesis resting on two unfocused observations. *First*, the system of tax administration in 1867 involved only specific interactions between individual taxpayers and individual revenue officers. 103 Va. L. Rev. at 1749-1753. That is true, but by linking to the wrong §19, Hickman ignores the role of *pre-assessment* interactions between assistant assessors and taxpayers. In particular, they ignore the information collection interactions that were vital to assessments, discussed in Part II-C, *infra*.

Second, most early fact-patterns involved taxpayers seeking injunctions against collectors. Again, that is mostly true, although three of the cases approved by *Snyder* deviate from that pattern. *See* Appendix 1. And at least one case after *Snyder* applied the AIA pre-assessment. *See Moore v. Miller*, 5 App. D.C. 413, 432 (Ct. App. D.C. 1895). More importantly, however, fact patterns where courts *applied* the AIA don't reveal what fact patterns would lead courts to *refuse* to apply the AIA. As a practical matter, it makes sense that early fact patterns would generally be post-assessment. First, most early cases involved excise taxes which

required monthly filing.[2] For those there was a short flash-to-bang between filing and assessment. Second, payment was not due until after assessment so it cost nothing to wait.

To understand how early courts viewed the AIA, one must read the opinions. The *rationes decidendi* in those opinions viewed the AIA as protecting the *system* of assessment and collection, requiring those aggrieved to use the remedies Congress built into the system. Neither Petitioner nor its *amici* give any reason, grounded in the opinions themselves, to doubt that the early courts meant what they said.

II. History of Tax Administration Since 1867 Supports Broad Scope

The system of tax administration has changed over time. The biggest change has been the relentless expansion of tax to larger and larger populations.[3]

[2] *Amicus* Hickman states that "Congress originally enacted the AIA . . . to support the administration of a short-lived income tax. . . ." Brief in Support of Cert. at p. 5. That is incorrect. Congress enacted the AIA to support its creation of a massive system of mostly internal excise taxation. The "income duty" was minor. Bryan Camp, *A History of Tax Regulation Prior to the Anti-Injunction Act*, 63 Duke L. J. 1673, 1694 (2014). A substantial system of excise taxes survived the demise of the income duty in 1872. *See* Appendix 2. To suggest that the AIA was only, or even mostly, connected to the Civil War *income* tax mis-states its scope.

[3] Congress has always used tax statutes to implement social policy as well as raise revenue. Henry Carter Adams, TAXATION IN THE UNITED STATES: 1789-1816 (Burt Franklin, NY 1970). What has changed over time is the mix of persons or activities

This has (A) shifted payment obligations from post-assessment to pre-assessment, and (B) shifted administration from individualized interactions with taxpayers to group interactions through automated data processing. Those shifts have (C) integrated third-party information reporting into assessment. What has not changed is (D) the careful attention Congress gives the AIA.

A. Shift in Payment Obligation

Before 1918 taxpayers were not required to pay their taxes until after examination and assessment. Every return was personally reviewed with the result that what we now consider audit happened simultaneously with what we now consider processing. Bryan Camp, *Theory and Practice in Tax Administration*, 29 Va. Tax Rev. 227, 229-239 (2009). The 1917 wartime tax legislation dramatically expanded the number of taxpayers obligated to file returns, from 500,000 total returns in 1915 to over 3.5 million returns in 1917. *Id.* By June 1918, the agency had a backlog of approximately 4 million un-reviewed returns for which no assessment had been made. *Id.* That was a huge drag on revenue collection. Accordingly, in §250(a) of the 1918 Revenue Act Congress shifted the payment obligation to require taxpayers to pay with their returns. 40 Stat. 1082.

---

subsidized or penalized. *E.g.*, Bryan Camp, *Franklin Roosevelt and the Forgotten History of the Earned Income Tax Credit*, 20 Green Bag 2d 337 (2017).

At the same time, Congress relieved the agency from the obligation to assess by a hard date and instead created the concept of an assessment period. Camp, *Theory and Practice* at 239. While Congress had before given the agency the authority to re-examine returns, the authority now changed to permit the Service to make its *initial* examination *after* processing the return. *Id.* at 230-231. This enabled the agency to quickly process returns and assess the amounts reported without having to examine each one. It also enabled the agency to pick and choose particular returns for closer examination later, what we now call audit. The agency's enthusiasm in that regard soon led Congress to add what is now §7604(b), which generally restricts the agency to one crack at each return. Revenue Act of 1921, 42 Stat. 310. *United States v. Powell*, 379 U.S. 48 (1964)(reviewing history of §7604(b)).

Petitioner and its *amici* argue this shift in payment obligation makes post-assessment collection unimportant to the revenue and, hence, the AIA becomes less important. To the extent that view is based on Hickman and Kerska's mis-linking the original AIA to collection disputes, it loses force.

More importantly, the shift from post-assessment to pre-assessment payment obligation simply squeezed the balloon. The text of the AIA still applies to the system, and so applies to pre-assessment as well as post-assessment suits. This Court so held in: *Enochs v. Williams Packing & Nav. Co. v. United States*, 370 U.S. 1 (1962); *Bob Jones University v. Simon*, 416 U.S. 725 (1974); *Alexander v. Americans United Inc.*, 416 U.S.

752 (1974); and *United States v. American Friends Service Committee*, 419 U.S. 7 (1974). *Enochs* was the paradigmatic suit where a specific taxpayer sought to enjoin collection. The other three applied the AIA to fact patterns much closer to this case, to pre-assessment activities unconnected to any immediate collection of identified tax dollars. All four, however, continued this Court's teaching that the AIA protected the *system* of assessments and collection, and explained how allowing the requested injunctions would adversely affect the system. Justice Blackmun's sole dissent in *Americans United* is illuminating precisely because he believed "the applicability of the statute depends on the direct effect the relief sought would have *on the plaintiff* and not *on the system* as a whole." *Id.* at 768 (emphasis added). His eight colleagues disagreed.

Lower courts have consistently obeyed this Court's teaching. A leading treatise notes that courts apply the AIA "to bar suits seeking to enjoin the IRS at virtually any stage of the taxation process, including investigations and the issuance and revocation of rulings." Bittker, McMahon & Zelenak, *Federal Income Taxation of Individuals*, 3d. §51.10 (collecting cases).

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) is not to the contrary. There, this Court held that the AIA will not bar suits where there are simply no taxes involved in the suit, either with respect to the plaintiff or with respect to downstream third parties. There, the only possible assessment or collection was of the Individual Mandate, a statutory duck-billed

platypus having some aspects of a tax but not others. Once this Court decided it was not a tax, there was no argument that an injunction forbidding its collection would have any downstream effects on the assessment or collection of any taxes. There was simply nothing for the AIA to operate on.

B. Shift from Individual to Collective Engagement

A second consequence of the relentless expansion of taxation has been the shift from individualized administration to collective administration, particularly after WWII. One aspect of that shift has been an increasing reliance on automated data processing. Camp, *Theory and Practice* at 245-264. An equally important aspect of that expansion has been in how the Service pushes out guidance to taxpayers about what the law requires of them. *See generally* Camp, *Tax Regulation* at 1700-1708. This shift from the personal to the collective means that the Service no longer engages with each taxpayer individually but instead engages with groups of taxpayers through batch processing and through generalized guidance.

This shift to collective administration raises the stakes in suits seeking injunctions. In this case, for example, an injunction would prohibit the Service from enforcing Notice 2016-66 not only against CIC but also against any taxpayer and any other material advisor. Shutting down the Service's collection of information here does not just block one interaction with one

taxpayer. It stops up the system. Likewise, as in the early cases, allowing CIC's suit to proceed here opens the door to other suits. One need look no further than the number of *Amici* eager to stop other allegedly illegal information collections and more.

To adopt Petitioner's view would permit third-party advisors who create transactions for clients to force the Service to either issue or revoke informal rulings regarding the transactions. Petitioner would say that the AIA permits such suits because, even though such informal rulings may have a collateral downstream revenue "effect," they would not be a "direct engagement" with the particular tax advisor. That would reverse current case law. *Investment Annuity, Inc. v. Blumenthal*, 609 F.2d 1, 7-8 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980)(AIA blocked suit to enjoin revenue rulings on tax consequences of certain insurance products marketed by plaintiff); *Educo, Inc. v. Alexander*, 557 F.2d 617, 620 (7th Cir. 1977)(AIA blocked suit to enjoin revenue rulings on tax consequences of certain educational benefit plans marketed by plaintiff).[4]

C. The Centrality of Information Reporting

Petitioner artfully frames this suit as seeking to restrain only a "demand for information unrelated to any instances of . . . assessment." Complaint ¶71. The framing is futile. It attempts to separate an integrated

[4] *Investment Annuity* also contains Judge Leventhal's thoughtful consideration of the APA's relation to the AIA.

process. Currently, §6201 requires the Service "to make the inquiries, determinations, and assessments of all taxes (including . . . assessable penalties) imposed by this title." That language traces back to §8 of the 1862 Revenue Act. That language describes a process, not an act.

True, §6203 provides that the "assessment shall be made by recording the liability of the taxpayer in the office of the Secretary." But this Court has never held that the AIA term "assessment" means only the ultimate act of recording a liability of a single taxpayer. That is because recording an assessment means recording a judgment. *Bull v. United States*, 295 U.S. 247, 259-260 (1935). The act of recording is simply the cumulative step of a process, much as a clerk records the judgment of a court.

True, most assessments are based on taxpayer returns. Despite political rhetoric, however, our system is not one of self-assessment. It is a system of self-reporting. Bryan Camp, *'Loving' Return Preparer Regulation*, 140 Tax Notes, 457, 462-466 (2013). The shift separating returns-processing from audit, and the shift from individual to collective engagement simply means the Service has made a systemic "determination" to trust most taxpayer returns up front, then verify later. That is still a judgment. It still depends upon the Service's inquiries and determinations. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Fla. L. Rev. 1, 5-16 (2004). That is why this Court has held, in *Bob Jones* and other

cases, that the term as used in the AIA refers to the process. That is why a suit blocking pre-assessment inquiries and determinations is a suit to restrain assessment.

Collection of accurate information has always been central to the system of assessment and collection protected by the AIA. Camp, *Inquisitorial Process* at 20-26. *See generally* Joseph Thorndike, *Reforming the Internal Revenue Service, a Comparative History*, 53 Ad. L. Rev. 717 (2001). Since 1862 Congress has given broad powers to the Service to collect from taxpayers the information necessary to assess and collect taxes. Over time Congress has expanded that authority to include information collection from third parties.

The Service's systemic powers to collect information started in 1862. They survive in almost unchanged language in the current code. For example, the authority to broadly regulate information flow from taxpayers through a system of lists and returns traces back to §6 of the 1862 Act. 12 Stat. at 434 and is now in §6011(a). The authority to inquire of taxpayers who failed to file returns and "to make, according to the best information which he can obtain, and on his own view and information," a substitute for the taxpayer's return, was given in §8 and is now codified in §6020. Substitutes for returns are now done mostly by computers using information provided in third-party information returns.

In 1917 – at about the same time that the shift in payment obligation separated the concept of returns

processing from auditing – Congress dramatically expanded information-gathering by authorizing the Service to create systemic rules for third-party "returns of information." War Revenue Act of 1917, 40 Stat. 300, 336-337. The Finance Committee explained how third-party information reporting was a substitute for the previous collection strategy of tax withholding:

> The proposed amendment is conducive to a more effective administration of the law in that it will enable the Government to locate more effectively all individuals subject to the income tax and to determine more accurately their tax liability. *This is of prime importance from a viewpoint of collections.* * * * It is the Treasury Department's judgment based upon close observation and study of the . . . withholding feature of the income tax law . . . that information at the source is a foundation upon which the administrative structure must be built if the income-tax law is to be rendered most effective. . . . Sen. Rpt. 65-103 (August 6, 1917) at 20 (emphasis added).

Since 1917 Congress has continuously expanded the scope of third-party reporting. Appendix 3 lists 50 expansions. It is not exhaustive, but gives a sense of how Congress has increasingly glued third-party information reporting to the system of assessment and collection.

One sees the connection in the numbers. In FY19 the Service processed about 253 *million* taxpayer returns from both individuals and entity taxpayers. 2019 IRS Data Book, Table 2. To ensure accuracy and

identify errors in those returns, the Service processed over 3.5 *billion* third-party information returns. *Id.* Table 22.

Third-party information reporting remains "of prime importance from a viewpoint of collections." *First*, it keeps taxpayers honest. Empirically, studies show that without third party reporting, taxpayers vastly underreport their income. Leandra Lederman and Joseph Dugan, *Information Matters*, 2020 B.Y.U. L. Rev. ___ (forthcoming 2020)(reviewing studies). Thus, the third-party reporting system created by Congress and enforced through Chapter 68B, is a structural component of the system of tax assessment and collection.

Second, it is integral to audit selection. "Economists and legal experts have long recognized that the government needs information about taxpayers' transactions in order to determine whether their reporting is honest." Lederman and Dugan, *Information Matters*, at ___. Specifically, the Service uses third-party information to identify (1) taxpayers who did not file required returns (non-filers) and (2) taxpayers whose filed tax returns have audit potential (under-reporters). Figure 1 below is taken from the 2019 IRS Data Book. It shows how the Service uses third-party reporting to collectively engage groups of taxpayers through automated computer systems and correspondence exams.

Figure 1:

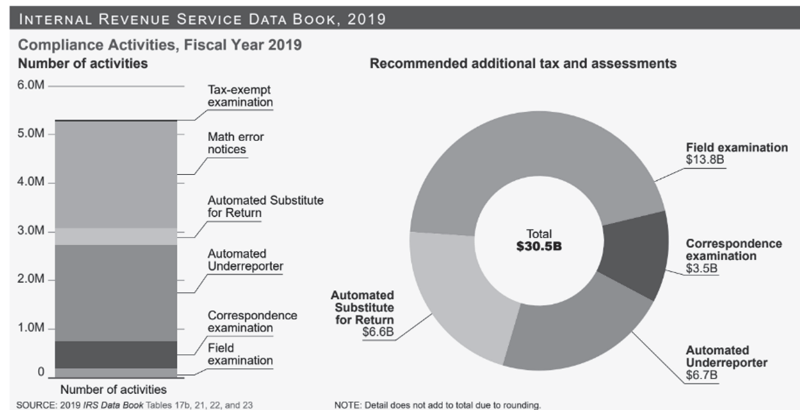

Figure 1 also shows information about field audits. Those are the stereotypical face-to-face encounters that are the stuff of jokes and nightmares. Figure 1 shows that while field audits comprise but a small percentage of all enforcement activities, they comprise a major part of the stream of taxes assessed and collected. It is third-party information that helps identify specific returns for field audit. It is a valuable tool for an agency whose resources permit it to audit only 0.60% of individual returns and only 0.97% of corporate returns. 2019 IRS Data Book, Table 17a. Finding and correcting the returns most likely to contain errors is critical to collecting the proper amount of tax. Third-party reporting magnetizes those specific needles in the haystack of 253 million taxpayer returns.

Information reporting is especially important in combatting the robust tax shelter industry. Arthur Acevedo, *Abusive Tax Practices: The 100-Year Onslaught on the Tax Code*, 17 Barry L. Rev. 179, 213-217

(2012). Sophisticated and reputable firms like CIC market "tax reduction strategies" to clients. Some of their complex schemes do not withstand a scrutiny they would prefer not occur. See generally: Bittker & Lokken, 1 Federal Taxation of Income, Estates and Gifts, ¶111.3 ("Tax Shelter Reporting and Penalties").

This case involves information reporting and the tax shelter industry. Audits had raised a concern that taxpayers were misusing the financial product marketed by CIC and others. Notice 2016-66 was how the Service collectively engaged taxpayers and their advisors, including CIC.

Petitioner and its *amici* characterize Notice 2016-66 as heavy-handed, arbitrary, overbroad. More neutral observers have a different take: "Notice 2016-66 enumerated all of the factors that would make a transaction reportable, but it was actually a list of warning signs that the IRS would look for to determine if the micro-captive was really an insurance company. These behaviors were so egregious, so ridiculous, and so absurd that no serious person would ever include them in a [legitimate] deal." Michael R. Harmon, *IRS Wins Micro-Captive Insurance Case*, 128 J. Tax. 20, 22 (2018).

The concerns reflected in Notice 2016-66 were vindicated in *Avrahami v. Commissioner*, 149 T.C. 144 (2017). Commentators described that case this way: "The taxpayers didn't name their captive insurance company 'Tax Dodge Insurance Company, Ltd.,' but

that's about the most we can say in their favor. The Tax Court has sent a torpedo through the hull of many micro-captive insurance arrangements." Bruce A. McGovern, Cassady V. Brewer, *Recent Developments in Federal Income Taxation: The Year 2017*, 71 Tax L. 725, 822 (2018).

The Service has since won more cases in Tax Court, involving substantial amounts of unpaid taxes. *E.g.*, *Reserve Mechanical v. Commissioner*, T.C. Memo. 2018-86 (sustaining tax deficiency of $477,216 plus 30% penalty). In January 2020 the Service announced that, of the taxpayers under audit for these transactions, 80% had made "substantial concession of the income tax benefits claimed by the taxpayer together with appropriate penalties." IR-2020-26 (January 31, 2020). The Service also announced it expected to open audits related to thousands of taxpayers. And the Service knows where to find the needles thanks to the third-party information reporting triggered by Notice 2016-66.

In sum, Notice 2016-66 causes the assessment and collection of taxes by fulfilling the twin functions of third-party reporting: it ensures taxpayers accurately self-report their taxes and it helps the Service identify problematic returns. More importantly, it allows the Service to act quickly within the three-year window allowed by §6501(a). To enjoin enforcement of Notice

2016-66 would force the government to bear the costs of the delay inherent in judicial resolution of Petitioner's grievance. It would prevent the Service from assessing and collecting taxes. That is contrary to the choice Congress made by enacting the AIA: the risks of delay are to be borne by the taxpayer, not the federal fisc.

D. The Role of Statutory Exceptions

Congress pays attention to the AIA and continues the linkage between it and the system of remedies that this Court found important in *Snyder*. Since 1867, Congress has added numerous remedies for parties aggrieved by *this* agency's actions. For many, but not all, Congress has directed the Service to suspend assessment or collection and has put a corresponding statutory exception in the AIA. Appendix 4 lists the growth of statutory exceptions to the AIA and the corresponding remedy to which each relates.

Petitioner and its *amici* argue the exceptions show disapproval of a broad reading of the AIA. That argument is not only counter-intuitive, but disproved by history. The straightforward reading is that the exceptions prove the rule. When Congress adds a remedy, it needs to put a corresponding exception in the AIA to prevent the broad reach of the statute from blocking access to that remedy. For example, in 1966 Congress added a remedy for third parties who wanted to prevent seizure of property on which they had a competing lien. It needed to put an exception because courts had,

for 83 years (since *Alkan*, *supra*), held the AIA to bar such suits. Had Congress disapproved of *Alkan*, it would not have waited 83 years, nor would it have added the phrase "by any person, whether or not such person is the person against whom such tax was assessed" to ensure courts did not overread the exception. *See Bob Jones*, 416 U.S. 725 n.6. Congress did not modify the AIA to express disapproval; it did so to coordinate with the new remedy it had created.

Congress does not create an AIA exception for every remedy. For example, the 2015 FAST Act, 129 Stat. 1312, added §7345, authorizing the Service to periodically send lists of seriously delinquent taxpayers to the State Department, who must then take certain actions regarding passports. Taxpayers can seek judicial review of the Service's action either in Tax Court or federal district court. However, Congress did not prohibit continued collection and did not create a statutory exception to the AIA. Taxpayers can seek to enjoin the Service's act of reporting them but cannot do more. *See Ruesch v. Commissioner*, 154 T.C. No. 13 (June 25, 2020) (describing limits of §7345 remedy).

Congress crafts carefully in this regard. Appendix 4 shows that two of the statutory exceptions involve Chapter 68B assessable penalties (§6672 and §6694).[5]

---

[5] Chapter 68B penalties are sometimes substitutes for taxes otherwise evaded. *E.g.*, *Slodov v. United States*, 436 U.S. 238 (1978)(§6672 substitutes for unpaid trust fund taxes). Similarly, Congress added §6720A to counter evasion of a diesel fuel excise tax by persons disregarding relevant EPA regulation. H. Rept. 109-203 at 1121-1122.

For those, Congress has created a modified refund remedy and has been careful to align the AIA with the new remedy. Congress has not, however, created a modified remedy for the Chapter 68B penalties involved in this case. Instead, Congress leaves taxpayers subject to those penalties to the standard remedies.

III. The TIA and AIA Are Cousins, Not Twins

Direct Marketing Ass'n v. Brohl, 575 U.S. 1 (2015) is unhelpful here. It interprets a different statute that serves a different purpose using different text.

First, the TIA serves a different purpose than the AIA. The TIA concerns federal-state power-sharing. It is not concerned with the specifics of any state's tax system. Federal courts have long used the equitable doctrine of comity to refuse certain cases, otherwise falling within their jurisdiction, when doing so might interfere with state powers. *Dows v. City of Chicago*, 78 U.S. 108 (1870).

Congress enacted the TIA to be a *subset* of that federal equity practice. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 424 (2010). It was concerned that federal courts were ignoring federal/state relations in tax cases. *Levin*, 560 U.S. at 423. The TIA is a jurisdictional statute that, when it applies, removes the discretion comity allows. If the TIA does not apply, however, federal courts are still left to decide whether comity counsels against hearing the case. *Id*.

In contrast, the AIA has nothing to do with federal/state relations. It's purpose is to regulate inter-branch power sharing. It protects the federal government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference by requiring that taxpayers adjudicate disputes using the remedies Congress has provided. The AIA ensures federal courts respect the specific system design choices made by a co-equal branch.

The AIA is the opposite of the TIA. The AIA is not a subset of prior equity practice. Instead, prior equity practice is subsumed into the statutory prohibition. That is the import of *Enochs*. As with the comity doctrine, courts sitting in equity before the AIA's enactment would generally not hear a petition when the taxpayer had adequate remedies at law. *See generally* Erin Hawley, *The Equitable Anti-Injunction Act*, 90 Notre Dame L. Rev. 81 (2014).[6] Some early courts suggested the AIA was simply a restatement of equity practice. *Pullan v. Kinsinger*, *supra*. This Court arguably endorsed that view in *Miller v. Standard Nut Margarine Company*, 284 U.S. 498, 509 (1932).

Enochs held the AIA was broader than prior equity practice. The Court compared the AIA to the TIA and noted that Congress omitted any reference to the no-legal-remedy rule in the AIA but had included such

[6] Ms. Hawley makes a strong argument that this Court would not, as an original matter, consider the AIA a subject-matter limit on jurisdiction. However, that issue is not presented here. The question of the AIA's scope is not affected by whether the statute is a claims-processing rule or a jurisdictional one.

language in the TIA. That textual choice "shows that such a suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise." 370 U.S. at 6. The only exception would be if the taxpayer could show a certainty of victory in that later remedy. Only then would the court look to see whether the taxpayer *also* met the requirements for an injunction: irreparable injury and no legal remedy. In this, the *Enochs* Court used the very same rationale used in 1875 in *Kissinger*, *supra*. Like *Enochs*, that court wrestled with where to draw the line when taxpayers alleged illegality of agency action. Like *Enochs*, that court read the AIA as more prohibitive than equity, and came up with the same "no-way-to-win" test.

Second, the difference in purpose is reflected in text. Congress made different textual choices in the TIA. This Court has consistently interpreted the TIA text in light of its purpose of being a equity carve-out. *Direct Marketing* is in line with other cases where this Court has read the TIA text to apply in such a way as to leave room for comity. *Levin*, *Hibbs v. Winn*, 524 U.S. 88, 104 (2004).

Direct Marketing was a case about the meaning of text in the TIA. 575 U.S. at 15, note 2 (" . . . the text of the TIA resolves this case . . . "). This Court's decision turned on the word "restrain." *Id.* ("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."). This Court looked to the TIA's relationship with equity practice to

find that the term "restrain" must mean other than inhibit or interfere. A broader meaning "leads the TIA to bar every suit with such a negative impact." *Id.* at 14.

Since the TIA was but a partial codification of a broader equity practice, the term could not be construed to make the TIA broader than comity. Supporting that narrow interpretation was "the company 'restrain' keeps." *Id*. at 13. A broad meaning would make the words "enjoin" and "suspend" unnecessary. *Id.* Accordingly, this Court held that a suit which may have some negative impact on how a state assesses or collects taxes does not rise to the level of restraint required by the TIA. *Id.* While such a suit might contain a good reason for a court to exercise its discretion under comity, that was not an issue. *Id.* at 15.

Direct Marketing did not try to map the AIA's language onto the TIA. It just looked to federal tax law in general for help in understanding how Congress may have intended to use the terms "assessment" and "collection" and "levy" when it wrote the TIA to be a subset of equity practice. Nor are the texts twins. The company "restraining" keeps in the AIA is very different from the surrounding language in the TIA. Congress did not write "enjoin" or "suspend"; it only wrote "restraining." Congress did not write "assessment, levy, or collection"; it only wrote "assessment or collection."

What excites Petitioners is this Court's statement that collection of information is a "phase of tax administration procedure that occurs before assessment,

levy, or collection." 575 U.S. at 8. But that says nothing about what the term "assessment" means in the AIA. In fact, the opinion sensibly points out that while the term can have a narrow meaning, "[i]t might also be understood more broadly to encompass the process by which that amount is calculated." 575 U.S. at 9. Yep. That's the AIA meaning. *Direct Marketing* simply concluded that Congress intended the term in its narrow sense for the TIA. It is unlikely that brief *dicta* about a narrow meaning of "assessment" for TIA purposes overrides decades of holdings that the AIA blocks suits seeking to enjoin a pre-assessment actions that are part of the assessment process.

The more relevant statute is the DJA. Prior to the DJA's enactment, lower courts were sometimes asked to issue declaratory judgments construing the taxing statutes. Taxpayers argued that the AIA did not apply because they merely sought instructions from the court as to the validity and amount of taxes, and did not seek to restrain the assessment. Getting a declaratory judgment worked around the AIA. *See* Note, *Judicial Determination of a Federal Tax Before Payment*, 45 Harv. L. Rev. 1221 (1932)(reviewing AIA exceptions in light of *Standard Nut*). Some courts agreed, particularly when being asked to adjudicate tax claims in bankruptcy proceedings. *See Scott v. Western Pacific R.R. Co.*, 246 F. 545 (9th Cir. 1917).

Other courts disagreed, reading the AIA broadly as prohibiting even suits seeking only declaratory judgments. Key to such decisions was a broad understanding of the term "restraining." *Gouge v. Hart*, 250

F. 802 (W.D. Va. 1917) gives a thorough explanation for its finding that "the word 'restraining' in this statute was intended in the broad, popular sense of hindering or impeding, as well as of prohibiting or staying. . . ." *Id.* at 803. It found particularly instructive that this Court's "repeated expressions of opinion, not dropped unthinkingly in passing, but uttered as the result of careful consideration," connected the AIA language to a "complete system of relief" and one that is "exclusive of all other relief." *Id.* at 805.

Enactment of the DJA affirmed the broad reading of cases like *Gouge* and overruled cases like *Scott*. *In re: Inland Gas Corp.*, 241 F.2d 347, 384 (6th Cir. 1957)(DJA overruled *Scott*). That is why courts have long acknowledged the AIA and the DJA are to be read *pari materia*. Because the DJA was enacted to cement a broad judicial construction of the AIA as applying to declaratory judgments, its broader language is far more appropriate to guide interpretation of the AIA than the narrow language of the TIA. *See Cohen v. U.S.*, 578 F.3d 1, 15 (D.C. Cir. 2009)(Kavanagh, dissenting).

IV. Petitioner Has Statutory Remedies

This is not a case where the aggrieved party has no remedies. Petitioner's remedies would require it to refuse to comply and take the penalty hit under Chapter 68B. It could then use two procedures to assert its claim that Notice 2016-66 is invalid. The refund procedure is the obvious one. Less obvious is that Petitioner

could invoke Collection Due Process (CDP) rights and potentially obtain pre-payment Tax Court review.

Section 6330 requires the Service to give taxpayers the opportunity for a pre-collection administrative hearing with the Independent Office of Appeals ("Appeals"). This is a statutory exception to the AIA. During the CDP hearing, taxpayers can contest the merits of the assessment if they "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." §6630(c)(2)(B). Taxpayers unhappy with the decision of Appeals may petition the Tax Court for review – still without having to pay the assessment. The Tax Court reviews contested liabilities *de novo*. *Sego v. Commissioner*, 114 T.C. 604, 610 (2000).

Chapter 68B penalties are not assessed through the deficiency process, so Petitioner will not have received a notice of deficiency. Petitioner would therefore be able to get Tax Court review on the merits if it did not "otherwise have an opportunity to dispute" the Chapter 68B penalty within the meaning of §6330(c)(2)(B). Thus, while an APA argument might not succeed in Appeals, Petitioner could get a do-over in Tax Court.

Taxpayers have been able to contest a §6707A penalty when they had no prior opportunity to contest it prior to assessment. *Yari v. Commissioner*, 143 T.C. 157 (2014). However, the Tax Court has interpreted §6330(c)(2)(B) narrowly to find the relevant prior opportunity does not have to be a judicial one. *Bishay v.*

Commissioner, T.C. Memo 2015-105. Thus, taxpayers have not been able to contest a §6707A penalty in CDP cases when they received a conference with Appeals prior to assessment. *Keller Tank v. Commissioner*, 854 F.3d 1178 (10th Cir. 2017). Thus, Petitioner's ability to obtain judicial review in a CDP case would depend on whether the Service offered Petitioner an administrative hearing in Appeals prior to assessing the Chapter 68B penalty, at least under current interpretation of the remedy.

The CDP remedy may be imperfect for this taxpayer, just as the refund remedy has always been imperfect in particular cases. Imperfections in the remedial scheme, however, should be fixed by judicial reinterpretation – or by Congressional revision – of the remedies themselves. This Court has never allowed taxpayers to use the AIA as a back-door attack on the remedial scheme. Rather, the inquiry is whether Congress has given a remedy for taxpayers like the one before the Court. If so, then "[t]he remedy so given is exclusive, and no other remedy can be substituted for it." *Snyder*, 109 U.S. at 193. Here, Congress has.

Appendix 4 shows Congress has been quite receptive over the years to creating new remedies for taxpayers and, when appropriate, creating a corresponding statutory exception to the AIA. The important policy problems about scope of remedies for low income taxpayers, for example, are for Congress to fix as part of a comprehensive design change and not for this Court to try and fix in a case about tax shelters. Proposals abound. *See, e.g.*, Keith Fogg,

Access to Judicial Review in Nondeficiency Tax Cases, 74 Tax Law. 435, 485-493 (2020).

Petitioner objects that both remedies require initial non-compliance. It fears that the Service has "a powerful incentive to withhold the penalty" because "the IRS knows it would [then] be the defendant in a refund suit." Petitioner's Merits Brief at 35. It also fears the government will go to the other extreme and prosecute it under §7203, a specific intent misdemeanor.

Both fears assume bad faith. The proper assumption is that the Service will enforce Notice 2016-66 in the usual way, as explained in the Notice. *Omnia praesumuntur rite esse acta*.

Notice 2016-66 says nothing about criminal prosecution. Prosecutions for tax crimes are made only upon recommendation from the Service's Criminal Investigation Division (CID), followed by DOJ approval. Saltzman & Book, IRS Practice & Procedure §12.01[6]. CID's own Criminal Investigation Strategies manual says its only non-filer program relates to tax protestors. IRM 9.5.3.2.9 (02-09-2005). More importantly, a good faith refusal to obey an illegal requirement is a complete defense to a §7203 prosecution. *Cheek v. United States*, 498 U.S. 192 (1991). Petitioner's very Complaint makes a good faith claim that it had no reporting duty because Notice 2016-66 was illegal. Given *Cheek*, prosecution can only be fathomed here by assuming bad faith.

CONCLUSION

For these reasons, this Court should affirm the Sixth Circuit.

Respectfully submitted,

BRYAN T. CAMP
Counsel of Record and Amicus Curiae
TEXAS TECH UNIVERSITY SCHOOL OF LAW
3311 18th Street
Lubbock, Texas 79409-0004
806-834-8606
bryan.camp@ttu.edu