



Federal Tax ADVISORY ■

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Enjoining Regulations

Florida Bankers Association v. United States Department of the Treasury, 799 F.3d 1065 (D.C. Cir. 2015), cert denied June 6, 2016.

The Florida Bankers Association lost an attempt to invalidate regulations requiring banks to withhold certain taxes by a 2–1 vote in the D.C. Circuit Court. The bankers hoped that the Supreme Court would hear the case and reverse, but recently the Court denied the petition. The issue is of interest to many taxpayers because of a continuing desire to avoid the time consuming and expensive process of having to contest an assessment—or worse yet, to pay a tax and sue for refund—when they view the issue as the province of a regulation.

The bankers needed to circumvent the Anti-Injunction Act, 26 U.S.C. 7421(a). There are ways around it, as we learned in the dispute over the “individual mandate” in the Affordable Care Act. The Supreme Court ruled that it was not a tax for purposes of the Anti-Injunction Act but was a tax for purposes of making it constitutional. So the Court was able to hear the case before the tax ever became due and uphold it as a tax.

Perhaps that sort of argument will not apply to attacks on regulations generally, but the bankers thought they had found another way out: they objected to an Internal Revenue Service reporting requirement that is enforced through a penalty that is defined by statute to be a “tax,” but does not really look like a tax. Nevertheless, the appellate court ruled that the Anti-Injunction Act blocked the action.

The dissenter in the circuit took a position that would open up all Treasury regulations to pre-enforcement challenge under the Administrative Procedure Act and limit the Anti-Injunction Act to challenges to IRS assessments. With one more vote in the circuit, that could have been the law if the Court had refused to review it. Of course, it is more likely that the Court would have issued the writ of certiorari in that case since a split in the circuits would exist.

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What the Florida Bankers Association tried will be tried again, particularly in attacking a regulation that has draconian consequences. A prime example will be the proposed Section 385 regulations on treating corporate debt as equity. And attacks on regulations now look like better possibilities for taxpayers due to a body of case law requiring logical explanations by the agency adopting the regulation.

It might seem that holding "legislative regulations" to an "arbitrary or capricious" standard is a weak limiter, but that is turning out not to be the case. What lawyers do is decide whether something makes sense. So courts can be eager to identify illogical choices agencies make in the details of regulations. This has already been applied to Treasury regulations and will be again.

For additional information, call [Jack Cummings](#) at 919.862.2302.

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