

inheritance tax. However, because Illinois generates state estate tax, the marital trust will be reduced and thus federal taxation will occur when none should. The application of the state estate tax law will result in a violation of the *Windsor* decision with which the revenue ruling purports to comply. The only way to avoid *Chenoweth* is to change the language of the governing instruments to pay the tax from the credit shelter trust.³⁴ That approach might also violate *Windsor*, I would argue, because it treats same-sex couples differently merely because they are living in a state that has a state-level DOMA.³⁵

A counterpoint to this argument is that there are a limited number of states that have both a state estate tax and a state-level DOMA. I find this counterpoint unpersuasive for two reasons. First, there are large states with both, such as Illinois and New Jersey. As long as one state has the problem, it is a real problem. Second, and more importantly, as Ruth Mason has pointed out, once federal tax preferences differ enough from state preferences, the states will opt out of the federal regime.³⁶ It is quite reasonable to assume that as states decouple from the federal estate tax regime, such as by enacting state-level estate taxation, this problem will be exacerbated.

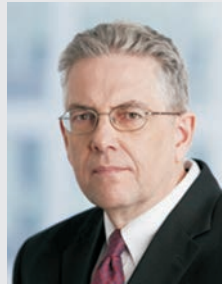
³⁴There are also other options, such as limiting the credit shelter trust to the federal and state tax exemptions, but that may still result in tax at the first death.

³⁵I have a detailed description of this point in my forthcoming law review article.

³⁶Ruth Mason, "Delegating Up: State Conformity With the Federal Tax Base," 62 *Duke L.J.* 1267 (2013).

May Regulations That Violate the APA Be Remanded to the IRS?

By Patrick J. Smith



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Last year in *Dominion Resources*, the Federal Circuit invalidated a tax regulation in part on the basis that it violated the Administrative Procedure Act's arbitrary and capricious standard. The IRS failed to provide an explanation for the regulation at the time it was issued. It was the first time a court of appeals invalidated a tax regulation on that basis. Smith discusses a recent case comment in the *Harvard Law Review* contending that although many tax regulations would be vulnerable to similar challenges, large-scale invalidation would be prevented by remanding defective regulations to the issuing agency for corrective action while leaving them in effect. Smith disputes that contention, arguing that the practice of remanding without vacating would not apply to most tax litigation because of the Anti-Injunction Act.

Introduction

A recent case comment in the *Harvard Law Review*¹ discusses *Dominion Resources Inc. v. United States*.² In the case, the Court of Appeals for the Federal Circuit held invalid a provision in the interest capitalization regulations. That holding was partly based on the court's conclusion that the provision violated the arbitrary and capricious standard in the Administrative Procedure Act (APA)³ as interpreted by the Supreme Court in *State Farm*.⁴ *State Farm* held that a regulation is valid only if a federal agency provides an explanation of the rationale supporting it at the time the regulation is issued. *Dominion* held that Treasury failed to provide that explanation in the regulation at issue and invalidated it. It bears noting that *Dominion* was the

¹"Administrative Law — Judicial Review of Treasury Regulations — Federal Circuit Invalidates a Treasury Regulation Under *State Farm* for Lack of Contemporaneous Statement of Justification," 126 *Harvard L. Rev.* 1747 (2013) (case comment).

²681 F.3d 1313 (Fed. Cir. 2012).

³5 U.S.C. section 706(2)(A).

⁴*Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

first time a court of appeals applied the APA's arbitrary and capricious standard to invalidate a Treasury regulation.

The *Harvard* case comment refers to my report on the application of the arbitrary and capricious standard to IRS regulations.⁵ In that report, I point out that a provision in the Internal Revenue Manual on the drafting of preambles to regulations, which explicitly tells IRS personnel that it is not necessary for a preamble to justify the provisions in the regulations to which the preamble relates,⁶ is inconsistent with the requirement imposed by the arbitrary and capricious standard in *State Farm* that an agency must provide an explanation of the rationale supporting a regulation at the time the regulation is issued. Because I was one of the attorneys who represented the taxpayer in *Dominion*, I had several reasons for reading the case comment with interest.

As my report notes, and as the case comment acknowledges, because of the IRS's disregard for the APA requirement that mandates a contemporaneous explanation of a regulation's rationale, many tax regulations are vulnerable to challenge as violating the arbitrary and capricious standard.⁷ Still, the case comment concludes that "*Dominion* is unlikely to trigger large-scale invalidation of Treasury regulations."⁸ The case comment asserts that that kind of multitudinous invalidation would be prevented by a practice regularly followed by the D.C. Circuit, and occasionally by other circuits, of remanding to the issuing agency regulations the court has determined were issued in violation of the arbitrary and capricious standard. Remanding to the issuing agency provides it the opportunity to correct the violation, while leaving the regulation in place pending attempted corrective action. That practice has been referred to in various ways.⁹ I will refer to it as "remand without vacating."¹⁰

⁵See Patrick J. Smith, "The APA's Arbitrary and Capricious Standard and IRS Regulations," *Tax Notes*, July 16, 2012, p. 271.

⁶*Id.* at 274. See IRM section 32.1.5.4.7.3(1) ("It is not necessary to justify the rules that are being proposed or adopted or alternatives that were considered").

⁷See Smith, *supra* note 5, at 274; see case comment, *supra* note 1, at 1751-1752.

⁸Case comment, *supra* note 1, at 1748.

⁹The practice is sometimes referred to as remand without vacation, and more often as remand without vacatur.

¹⁰For commentary on that practice, see, e.g., Brian S. Prestes, "Remanding Without Vacating Agency Action," 32 *Seton Hall L. Rev.* 108 (2001); Kristina Daugirdas, "Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings," 80 *N.Y.U. L. Rev.* 278 (2005); Ronald M. Levin, "'Vacation' at Sea: Judicial Remedies and Equitable Discretion in Administrative Law," 53 *Duke L. Journal* 291 (2003); Daniel B. Rodriguez, "Of Gift Horses and Great Expectations," 36 *Ariz. State L. Journal* 599 (2004).

In deciding whether to remand a procedurally defective regulation to the agency that issued it without vacating the regulation, or whether instead to vacate the regulation, the D.C. Circuit applies a test that balances the severity of the agency error against the potentially disruptive consequences of vacating the regulation.¹¹ Thus, remand without vacating, even in the D.C. Circuit, is by no means automatic in all cases of agency violations of the arbitrary and capricious standard in the issuance of regulations.

This article explains why the *Harvard* case comment is incorrect in concluding that the large-scale invalidation of tax regulations under the arbitrary and capricious standard for the IRS's lack of a contemporaneous explanation of the regulation's rationale is unlikely to occur because of the supposedly likely application of the remand without vacating practice. The short explanation of why any type of remand to the Service of a procedurally defective regulation is not an appropriate remedy is that the Anti-Injunction Act wouldn't allow it. The Anti-Injunction Act prohibits any "suit for the purpose of restraining the assessment or collection of any tax."¹²

Any resolution of tax litigation that affects tax liability other than the particular tax liability that is directly at issue in the case would violate the Anti-Injunction Act, and any remand to the Service of a procedurally defective regulation would have that effect. However, a more extended explanation of why the case comment is incorrect is worthwhile because a complete understanding requires knowledge of distinctions between litigation relating to the validity of regulations issued by Treasury and regulations issued by other federal agencies that are likely not to be widely understood in the tax world.

Remand Not an Option in Tax Cases

The fundamental problem with the case comment's conclusion is that any form of remand of an invalidated regulation to Treasury, let alone a remand without vacating, would not be an appropriate remedy in either a tax refund suit or a Tax Court

¹¹See, e.g., *Allied-Signal Inc. v. NRC*, 988 F.2d 146, 150-151 (D.C. Cir. 1993) ("The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed'").

¹²Section 7421(a) (With specifically enumerated exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person").

deficiency action.¹³ Part of the reason for that conclusion is that those cases do not directly challenge the validity of the regulations, but rather challenge the IRS's determination of a particular taxpayer's tax liability for a specific tax year, even though a regulation whose validity the taxpayer disputes was applied in determining his tax liability.

In contrast, cases outside the tax context involving remand to an agency of a regulation issued by the agency that a reviewing court has determined to be procedurally invalid directly challenge regulations. Ordinarily those direct challenges to regulations are authorized by the applicable statute that gives the agency the authority to issue regulations.¹⁴ The difference in tax cases is that direct challenges to the validity of regulations are generally prohibited by the Anti-Injunction Act.

In litigation involving the validity of nontax regulations, the challenge in virtually all cases is not to the regulations' application. Rather, the challenge is to the regulations and to their potential application to anyone affected by them and is filed soon after the regulation was issued. There are generally

¹³There are other problems with the case comment's conclusion. The case comment does not sufficiently make clear that the procedure of remanding without vacating is commonplace only in the D.C. Circuit. That fact is relevant because relatively few tax cases are heard in the D.C. Circuit. While the case comment asserts that other circuits follow the practice of remanding without vacating, still, in the only other circuit that has applied the practice in more than isolated instances, the practice is reserved for special circumstances. Thus, the Ninth Circuit opinion the case comment cites says that "we have only ordered remand without vacatur in limited circumstances." *California Communities Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012). The case comment cites *National Organization of Veterans' Advocates Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001), for the proposition that the Federal Circuit has adopted the practice of remand without vacating, but that decision appears to be an isolated instance of the practice's use in the Federal Circuit. The same is true of the case comment's citation of *Central Maine Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001), and *Central and South West Services Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000), for the proposition that the First and Fifth circuits have adopted the practice. Second, it is common for a challenge to the validity of a Treasury regulation to be directed at a single provision of the regulation rather than on the entirety of its structure established by the regulation. That was the case, for example, with the challenge in *Dominion*. For such narrowly focused challenges, even apart from the fact that remand without vacating would be inapplicable for the reasons discussed in the main text, and even for a court that applies the remand without vacating remedy as frequently as the D.C. Circuit, the narrow focus of the challenge makes it less likely that the court would find that vacating the regulation would be disruptive enough to justify remand without vacating.

¹⁴Typically, those statutory provisions provide for the challenge to be brought in a court of appeals. For lists of examples of those provisions, see, e.g., Toni M. Fine, "Appellate Practice on Review of Agency Action: A Guide for Practitioners," 28 *U. of Toledo L. Rev.* 1, 12, nn.82, 83, and 13, n.87 (1996).

short statutory time limits for bringing those challenges. Therefore, the nontax regulations' validity is challenged long before they have actually been applied.

In contrast, in tax litigation, because of the Anti-Injunction Act,¹⁵ challenges to regulations' validity arise only in the context of a regulation's application in the determination of a particular taxpayer's tax liability. The action in dispute is either that: (1) the IRS's determination that the taxpayer owes more than the taxpayer reported on its income tax return for a particular year (Tax Court deficiency cases); (2) the IRS's denial of a claim for refund of tax filed by the taxpayer for a particular tax year (refund suits in U.S. district court or the Court of Federal Claims); or (3) the IRS's failure to act on the refund claim within six months after the claim was filed (also a type of refund suit).

In cases outside the tax context that involve challenges to agency regulations in which remand by a reviewing court to an agency is an available remedy, a court remands to an agency to allow the agency to correct the action the agency performed incorrectly in the first place. In tax cases, the agency action being challenged is the determination of the tax liability of a particular taxpayer for a particular tax year. While the validity of an IRS regulation may affect that determination, the agency proceeding in which the regulation was issued is separate from the agency proceeding in which the tax liability at issue was determined. Because the two proceedings are separate, the IRS cannot correct errors that it made in issuing the regulation as part of its correction of the tax liability determination for the particular taxpayer.

The question before the court in a case involving the tax liability of a particular taxpayer for a particular tax year regards the determination of that tax liability. That the determination of that tax liability may turn in part on the validity of a regulation does not change the question to be answered by the court.

In those cases, if the court determines that the applicable regulation is invalid, the only course of action available to the court is to apply that determination of the regulation's invalidity in determining the taxpayer's tax liability. When the regulation is determined to be invalid based on the Service's failure to explain the rationale for the regulation when it issued the regulation, remand to the IRS to correct the error is simply not an option available to

¹⁵For discussions of the Anti-Injunction Act, see Smith, "Is the Anti-Injunction Act Jurisdictional?" *Tax Notes*, Nov. 28, 2011, p. 1093; Smith, "D.C. Circuit: 'The IRS Is Not Special,'" *Tax Notes*, Aug. 29, 2011, p. 907.

the court.¹⁶ That remedy would violate the Anti-Injunction Act, which provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.”¹⁷ That language has been interpreted to apply not only when success in the suit would adversely affect the collection of tax revenue from the party challenging the IRS, but also when a successful challenge would adversely affect the collection of revenue from persons who are not parties to the suit.¹⁸

Consequently, taxpayers pursuing refund litigation or Tax Court deficiency actions when the controlling issue is the validity of a regulation cannot seek an injunction against the application of the regulation if the regulation is determined to be invalid. An injunction would violate the Anti-Injunction Act. In Tax Court deficiency actions, another reason an injunction would be unavailable is because the Tax Court is a court of limited jurisdiction. There is no statutory authority in the Internal Revenue Code for the Tax Court to issue an injunction in those circumstances. Similarly, the Court of Federal Claims would have no statutory authority to issue an injunction for refund litigation, even without the Anti-Injunction Act prohibiting it.

District courts, however, have considerably broader authority than the Tax Court or the Court of Federal Claims, and thus have the general authority to issue injunctions against the application of invalid regulations issued by agencies other than Treasury. In district court cases, the Anti-Injunction Act would be the controlling reason why an injunction on the application of a procedurally invalid regulation cannot be issued or sought in conjunction with a refund suit based on the assertion of that regulation’s invalidity. With the Anti-Injunction Act

preventing an injunction in those cases, a remand of the regulation to the IRS would be equally unavailable, because a remand would have the same effect as an injunction, namely, preventing the collection of tax revenue.

That conclusion seems beyond dispute in the case of a remand in conjunction with the vacating of the regulation. And that remand without vacating, even for those courts that follow that practice, is not a free-standing remedy, but simply an alternative to remand in conjunction with vacating. As noted above, remand without vacating is by no means automatic in the case of regulations that the court has determined were issued in violation of the arbitrary and capricious standard.

Thus, that a remand without vacating would have no immediate effect on the collection of tax revenue does not prevent such a remand from violating the Anti-Injunction Act. It is the nature of the suit and the nature of the potential remedy, and not the nature of the actual remedy granted, that is evaluated under the Anti-Injunction Act. A suit that has the potential to affect the collection of tax revenue is barred by the Anti-Injunction Act. Moreover, remand without vacating would violate the Anti-Injunction Act because there is no assurance that the IRS would succeed in its attempt to cure the procedural defect; in that case, the result prohibited by the Anti-Injunction Act would clearly follow, because the regulation would then be invalidated based on the Service’s failure to cure the defect, and the collection of revenue would at that point clearly be affected.

That a remand of a procedurally defective regulation to the IRS is unavailable as a remedy in cases involving a challenge to the validity of the regulation in the context of the litigation of a particular taxpayer’s tax liability for a particular tax year does not mean that the Service cannot voluntarily attempt to cure an error in the issuance of the regulation after the court has identified the error. Any attempted cure, if successful, cannot affect the outcome in the case before the court, or in any other case that arises in the interim in a court that would be bound as a matter of *stare decisis* by the earlier decision.¹⁹

¹⁹The only previous discussion of those issues that I am aware of seems to have analyzed them somewhat differently than I have. See Kristin E. Hickman, “A Problem of Remedy: Responding to Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements,” 76 *George Washington L. Rev.*, 1153, 1194-1200, 1196 (2008) (“So, if a court vacates and remands a Treasury regulation on procedural rather than substantive grounds, that court must consider what to do with the IRS’s adjudicatory decision and the question of the taxpayer’s liability”).

¹⁶An example of a similar situation outside the tax context is the series of decisions by various courts of appeals involving a regulation issued by the attorney general regarding the Sex Offender Registration and Notification Act. One issue in those cases is whether the issuance of the regulation violated the APA’s notice-and-comment requirements for rulemaking. However, the actual issue in each case was the validity of a particular individual’s criminal conviction based on those regulations. None of the decisions purported to have a broader effect than the particular criminal conviction that was at issue in the case. See, e.g., *United States v. Reynolds*, 710 F.3d 498 (3d Cir. 2013) (citing the other prior court of appeals decisions).

¹⁷Section 7421(a).

¹⁸See, e.g., *Bob Jones University v. Simon*, 416 U.S. 725, 739 (1974) (“Moreover, petitioner 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. Although in this regard petitioner seeks to lower the taxes of those other than itself, the Act is nonetheless controlling”).

The situation would be different, however, when a challenge to a regulation could be brought outside the context of a refund suit or a Tax Court deficiency action. In a case in which that kind of direct challenge to a regulation could be brought without violating the Anti-Injunction Act, based on the fact that the particular regulation being challenged did not affect the collection of revenue, a challenge to an IRS regulation should be in no different posture than a direct challenge to a regulation issued by any other agency.²⁰ Regulations that do not affect the collection of revenue are rare, but they do exist.²¹ If the regulation were invalidated on procedural grounds, it would be appropriate for the court to remand the regulation to the IRS, the Service would have the opportunity to attempt to correct the defect, and it would be necessary for the court to address whether remand without vacating was appropriate in the particular case based on the balancing test applied by the D.C. Circuit. And none of that would happen unless the case was before a court that follows the remand without vacating practice.

Additional support for the conclusion that remand of a regulation to the IRS is not an appropriate remedy in refund suits and Tax Court deficiency

²⁰While there is no provision in the code authorizing direct challenges to the validity of Treasury regulations in situations when direct challenges would not be barred by the Anti-Injunction Act, those challenges can be brought in district court under the judicial review provisions of the APA and the district courts' general federal question jurisdiction. Although *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (*en banc*), involved a challenge to the validity of an IRS notice rather than a regulation, the panel opinion held that the notice represented a substantive rule for purposes of the APA. See *Cohen v. United States*, 578 F.3d 1, 6, 8 (D.C. Cir. 2009). And nothing in the *en banc* opinion altered that holding by the panel opinion. As a consequence of being a substantive rule, the notice was subject to the APA requirement that substantive rules must be issued using notice and comment procedures, and those procedures had not in fact been followed. The challenge in *Cohen* was a challenge brought in district court under the judicial review provisions of the APA, and both the panel opinion and the *en banc* opinion held that that challenge was not barred by the Anti-Injunction Act because it involved refunding a tax that the IRS conceded had been improperly collected, and thus the challenge could not affect the collection of revenue. For more extensive discussion of that case, see Smith, *supra* note 15. A more recent example of a challenge to a Treasury regulation being brought in district court directly under the judicial review provisions of the APA is *Loving v. IRS*, 917 F. Supp.2d 67 (D.D.C. 2013), *appeal pending*, No. 13-5061 (D.C. Cir.). In that case, the district court held that IRS regulations purporting to license tax return preparers were invalid because they exceeded the authority granted by the statutory provision the IRS claimed authorized them. That case took the form of a direct challenge brought under the judicial review provisions of the APA. The government did not argue that the challenge was barred by the Anti-Injunction Act.

²¹The regulation challenged and held to be invalid in *Loving, id.*, is an example.

actions is that those cases are conducted as trials *de novo*. The APA judicial review provisions place challenges to agency action that take the form of trials *de novo* in a separate category from challenges to agency action that are governed in their entirety by the arbitrary and capricious standard.²² While that does not prevent the arbitrary and capricious standard from applying in refund suits and deficiency actions, that the proceeding as a whole is conducted as a trial *de novo* makes a remand to the agency an improper remedy. Remand to the agency is a proper remedy only when the entire proceeding is governed by the arbitrary and capricious standard, as is the case with direct challenges to the issuance of regulations outside the tax context. When, as in the case of refund suits or Tax Court deficiency actions, the judicial proceeding takes the form of a trial *de novo*, the judicial proceeding represents the final resolution of all the issues relating to the determination of the taxpayer's tax liability for the year at issue. The only action that is left for the IRS to perform after the completion of the judicial proceeding is the implementation of the court's judgment relating to the proper amount of tax liability as determined by the court.

Remand Means Nationwide Effect

The circumstances under which a court judgment can have nationwide application make remand to the Service of a procedurally defective regulation an unavailable remedy in refund cases and Tax Court deficiency actions. In refund cases and Tax Court deficiency actions, the judgment of any court other than the Supreme Court on an issue of law does not have nationwide effect. When a court other than the Supreme Court decides an issue of law in either of those two types of cases, that decision is binding only on courts that are bound to follow that decision as a matter of *stare decisis*. That simply is another effect of the Anti-Injunction Act.

Thus, a decision on a legal issue in a refund case or a Tax Court deficiency action by a particular court of appeals is binding only in subsequent cases subject to review in that court of appeals. Courts hearing refund suits or Tax Court deficiency actions that are appealable to other courts of appeals are not bound to follow the decision. The principle applies when the legal issue is either the substantive or procedural validity of a regulation.

In contrast, in cases outside the tax context involving the validity of regulations issued by agencies other than the IRS, where remand of the

²²The arbitrary and capricious standard is in 5 U.S.C. section 706(2)(A), while trials *de novo* are referred to in 5 U.S.C. section 706(2)(F).

regulation to the issuing agency is an available remedy if the regulation is determined by the court to be procedurally or substantively invalid, a decision by any one court of appeals is binding nationwide. When a regulation in that kind of case is held to be procedurally invalid and remanded to the agency by a single court of appeals, the agency must either attempt to cure the procedural error or abandon the regulation entirely to comply with the court's decision, regardless of whether the regulation is vacated by the reviewing court.

Outside the tax context, when remand to an agency of a procedurally invalid regulation is available, an appellate court decision that the regulation is procedurally invalid has nationwide effect. However, in refund cases or Tax Court deficiency actions, an appellate court decision — including on the validity of a Tax Court decision — does not. The difference confirms that remand to the IRS of a procedurally invalid regulation is not an available remedy in a refund case or a Tax Court deficiency action. Remand in refund suits or Tax Court deficiency actions would imply nationwide effect that is simply not present in those cases, except for the ones reviewed by the Supreme Court.

Outside the tax context, the statutory rules that apply when a statute authorizes agency to issue regulations also authorize direct review of agency rules by the courts of appeals and include a rule regarding when multiple challenges to the same rule are filed in different courts of appeals at the same time. The statutory provision that addresses that situation currently provides that, when challenges to the same agency regulation are filed in more than one court of appeals within the first 10 days after the rule is issued, the judicial panel on multi-district litigation will randomly choose which court of appeals will hear the challenges.²³

When a challenge to that kind of regulation is filed in only one court of appeals during the 10-day period, the challenge is heard by that court, even though other timely challenges may be filed in other courts of appeals outside the 10-day period.²⁴ If no challenge to that kind of regulation is filed within that period, but multiple timely challenges are filed outside the period, the case is heard in the court of appeals where the earliest challenge was

filed.²⁵ Before an amendment in 1988, that first-to-file rule applied in all cases.²⁶

Under this provision, all challenges to agency regulations will be heard in a single court of appeals. As a result, courts of appeals cannot reach divergent resolutions on the validity of a particular regulation. That result is consistent with the notion discussed above that in the case of direct challenges to agency regulations, any invalidation of the agency regulation by a single court of appeals will have nationwide effect.

Another relevant consideration regarding permitting a reviewing court in a refund suit or a Tax Court deficiency action to remand a procedurally invalid regulation to the IRS to permit it to attempt to cure the defect is that it is virtually certain the Service would not welcome that kind of policy. If that were an acceptable practice, the Service would be required to either attempt a cure or abandon the regulation in order to comply with the court's holding. And, as discussed above, that would result in the court's holding having a binding nationwide effect.

In contrast, under an approach in which remand is not an option, the IRS can accept the outcome of the court's decision for taxpayers that are subject to the jurisdiction of the court issuing the decision, but it is free to continue to litigate the same issue in other jurisdictions. Presumably the IRS would prefer limiting the effect of an adverse decision on the procedural validity of a regulation to taxpayers located within the circuit of the court of appeals that issued the decision, rather than being bound by a decision that would apply to taxpayers nationwide.

Agency non-acquiescence is also relevant regarding the distinction between those court decisions reviewing agency actions that have nationwide effect and those that do not. There have been several articles discussing agency non-acquiescence.²⁷ The practice will be familiar to tax

²⁵*Id.*

²⁶For discussions of the problems under the prior rule that prompted the amendment, see, e.g., Toni M. Fine, "Multiple Petitions for Review of Agency Rulings: A Call for Further Reform," 31 *New England L. Rev.* 39, 46-59 (1996); Thomas O. McGarity, "Multi-Party Forum Shopping for Appellate Review of Administrative Action," 129 *U. of Pa. L. Rev.* 302, 319-327 (1980).

²⁷See, e.g., Samuel Estreicher and Richard L. Revesz, "Non-acquiescence by Federal Administrative Agencies," 98 *Yale L. Journal* 679 (1989); Matthew Diller and Nancy Morawetz, "Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz," 99 *Yale L. Journal* 801 (1990); Estreicher and Revesz, "The Uneasy Case Against Intracircuit Nonacquiescence: A Reply," 99 *Yale L. Journal* 831 (1990); Dan T. Coenen, "The Constitutional Case Against Intracircuit Nonacquiescence," 75 *Minnesota L. Rev.* 1339 (1991);

(Footnote continued on next page.)

²³28 U.S.C. section 2112(a)(3). See, e.g., *National Cotton Council of America v. EPA*, 553 F.3d 927, 932 (6th Cir. 2009). In that case, challenges to an EPA rule were filed in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. circuits, and the case was assigned by the judicial panel on multi-district litigation to the Sixth Circuit.

²⁴28 U.S.C. section 2112(a)(1).

professionals because the IRS pioneered the practice of not following a court decision that is adverse to the agency on legal issues. In the tax world, agency non-acquiescence is typically used with Tax Court decisions. Outside the tax context, the practice applies to courts of appeals decisions, and the IRS also follows the practice for courts of appeals decisions it disagrees with.

The articles discussing agency non-acquiescence make clear that the practice is most relevant for agencies that operate primarily or exclusively through case-by-case adjudication, such as the Social Security Administration and the National Labor Relations Board. The articles distinguish between intercircuit non-acquiescence, in which an agency refuses to follow a decision by one court of appeals in cases arising outside the circuit of the court that reached the decision, and intracircuit non-acquiescence, in which an agency refuses to follow a decision by a court of appeals in cases arising within the circuit of the court of appeals that reached the decision. The articles generally accept that intercircuit non-acquiescence is legitimate, but some strongly criticize the practice of intracircuit non-acquiescence.

The agency practice of non-acquiescence is relevant here because it illustrates the general principle that when a court decides a legal issue in the context of reviewing an agency adjudication for a particular party, such as a refund suit or a Tax Court deficiency action, that decision — from any court other than the Supreme Court — does not have nationwide effect, even though the legal issue is relevant nationwide. It has only *stare decisis* effect for courts that are bound to follow decisions by the court that decided the issue. That principle applies for all legal issues, including those regarding the validity of regulations issued by the agency whose adjudication is being reviewed.

In contrast, as noted above, for agencies other than the IRS, challenges to regulations ordinarily do not arise in cases when the regulation has been applied to a specific person, but instead occur in actions brought immediately after the regulation is issued. In those cases, if the outcome of the chal-

lenge is that the regulation is invalidated by the court of appeals, whether for substantive or procedural reasons, and whether or not, in the case of procedural challenges, the regulation is vacated, the effect of the court decision applies on a nationwide basis and is not limited to parties located within the circuit of the court of appeals that issued the decision.

In those cases, the Court of Appeals remands to the agency for the agency to correct its error. Unless the agency persuades the Supreme Court to grant certiorari and overturn the Court of Appeals's decision, the agency must perform the correction ordered by the Court of Appeals and that correction will necessarily not be limited in its effect to persons located within the circuit of the Court of Appeals that issued the decision. It will be applied on a nationwide basis.

As a consequence, in cases outside the tax context involving challenges to regulations that are brought under specific statutory authority shortly after the regulation is issued, there is simply no occasion for intercircuit non-acquiescence to arise because the agency cannot disagree with the court of appeal's decision regarding persons in other circuits. Tax cases are very different.

It is common for the IRS to pursue in other circuits those issues on which it has lost in one or more circuits. Many of those cases do not involve the validity of regulations, but some do. While none of the non-acquiescence cases involving the validity of regulations have involved regulations held invalid under the arbitrary and capricious standard, there should be no difference between cases involving regulations that have been held invalid on substantive grounds and cases in which regulations are held invalid on procedural grounds regarding whether the holding of invalidity applies on a nationwide basis or only in the specific circuit for the particular court of appeals.

Dominion Concurrence

While the conclusion that a remand of a procedurally defective regulation to the IRS to permit it to correct errors in the regulation promulgation process is not an available option to a court that is considering those errors in the context of the determination of a specific taxpayer's tax liability for a particular tax year follows logically and necessarily from the Anti-Injunction Act, there is no case law that deals directly with that question. One reason for that is that *Dominion* was the first, and so far only, court of appeals decision to hold an IRS regulation invalid under the arbitrary and capricious standard. However, because *Dominion* held

Drew A. Swank, "An Argument Against Administrative Acquiescence," 88 *N.D. L. Rev.* 1 (2012); Peter J. Rooney, "Nonacquiescence by the Securities and Exchange Commission," 140 *U. of Pa. L. Rev.* 1111 (1992); Kevin Haskins, "A 'Delicate Balance': How Agency Nonacquiescence and the EPA's Water Transfer Rule Dilute the Clean Water Act After *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*," 60 *Maine L. Rev.* 174 (2008); David A. Hartquist, Jeffrey S. Beckington, and Kathleen W. Cannon, "Toward a Fuller Appreciation of Nonacquiescence, Collateral Estoppel, and *Stare Decisis* in the U.S. Court of International Trade," 14 *Fordham International L. Journal* 112 (1990).

the regulation invalid under *Chevron* step two²⁸ as an impermissible interpretation of the statutory provision that the court made clear was not susceptible to correction, the majority opinion did not need to address what the remedy would have been had the regulation been held invalid only under the arbitrary and capricious standard.

Judge Raymond Clevenger's concurring opinion in *Dominion* made clear that if the regulation had been invalidated only under the arbitrary and capricious standard, he would have permitted the IRS to attempt to cure the lack of explanation, but not in any way that could have affected the outcome in the case before the court:

There appears to be no dispute among the panel that the government has not articulated any rational explanation for many details of the regulation before us, from the regulation's first proposal in the mid-'90s up to the current date. Such a failure makes the regulation procedurally unlawful. I would reverse on the grounds set forth in part V of the majority opinion, but would give the government another chance to explain and justify its view that the adjusted basis of property temporarily withdrawn from service can be taken into account in determining production expenses. . . .²⁹

The approach taken by the majority goes too far in that it creates a binding rule (at least in this circuit) that the government can never re-promulgate its associated-property rule for property temporarily withdrawn from service, no matter how well-formed its reasoning. I therefore concur in the result, and in Part V, of the majority's opinion, but otherwise respectfully dissent.³⁰

While Clevenger said that he "would give the government another chance to explain and justify its view," that does not mean that he was willing to give the government a second chance in the context of a remand to the IRS, which would leave the outcome of the particular case unresolved in the meantime. Instead, he objected to the majority's approach because it meant that "the government can never re-promulgate its associated-property rule for property temporarily withdrawn from service, no matter how well-formed its reasoning."

That objection to the majority approach on the basis that it meant that the IRS could never attempt

to correct the error suggests that any kind of re-promulgation that Clevenger would have permitted would have occurred separately from, and subsequent to, the resolution of the particular case that was before the court. Clevenger's clear statement that he would have reversed the trial court, and that he concurred in the majority's result, which was a reversal of the trial court's denial of the claimed refund, leaves no doubt that had the majority adopted the approach he preferred, any attempted cure by the Service of its error in issuing the regulation could not have been applied to affect the outcome in the case before the court, or in any other case presenting the same issue that might come before the Federal Circuit before a successful attempt by the Service to cure the defect.

Conclusion

It is clear that the case comment is incorrect in claiming that the Service will be protected against invalidation of its regulations that have been issued in violation of the APA arbitrary and capricious standard's requirement to explain the rationale for the regulation when it is issued. The practice followed by some courts of appeals under some circumstances of remanding those procedurally invalid regulations to the issuing agency so that the agency can attempt corrective action, without the courts vacating the regulation, is not available in refund suits and Tax Court deficiency actions involving challenges to the validity of regulations because any remand of an invalid regulation to the IRS of any type would be prohibited by the Anti-Injunction Act.

²⁸See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²⁹681 F.3d at 1320 (Clevenger, J., concurring).

³⁰*Id.* at 1322-1323.