Supreme Court's Direct Marketing Case May Have Great Significance in Anti-Injunction Act Cases

March 4, 2015 by Guest Blogger 1 Comment

We welcome back today as guest poster Patrick Smith of Ivins, Phillips & Barker. Pat discusses this week's Supreme Court Direct Marketing Association case, which will likely influence how courts will interpret the reach of the Anti-Injunction Act.

On Tuesday of this week, the Supreme Court issued its opinion in *Direct Marketing Association v. Brohl*. This decision related to a suit that had been brought in U.S. district court to enjoin notice and reporting requirements that had been imposed by the state of Colorado on out-of-state internet retailers relating to sales to Colorado residents. The purpose of these requirements was to assist the state in collection of use tax on these sales.

The issue in the case was whether the district court was barred from hearing the suit by the Tax Injunction Act (TIA), which requires that certain suits relating to state taxes must be pursued in state courts rather than federal courts. The opinion held that the U.S. district court was not barred from hearing the case by the TIA.

While the decision obviously has considerable significance in its direct application,

it may have equally great if not greater significance in its implications for the interpretation of the Anti-Injunction Act (AIA), section 7421(a) of the Internal Revenue Code, which imposes limitations on the types of suits relating to federal taxes that may be maintained in U.S. district courts that are quite similar to the limitations imposed by the TIA on suits relating to state taxes. The implications of the decision for the AIA are that as a result of this decision, the AIA may now be interpreted more narrowly than it has been since two significant Supreme Court decisions in 1974, *Bob Jones University* and "*Americans United*." These decisions held that a suit to enjoin revocation by the IRS of the tax-exempt status of the organization bringing the suit was barred by the AIA because of the effect the suit would have on tax revenues through the effect the suit would have on the ability of persons making contributions to the organization to claim tax deductions for the contributions.

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The Direct Marketing Case Takes a Different View than Prior Supreme Court Cases

These two decisions could be read as standing for the proposition that any suit that could, if successful, have an adverse impact on the collection of federal tax revenue is barred from being heard in district court by the AIA except through the mechanism of a tax refund suit. The *Direct Marketing* decision clearly rejected such a broad reading of the TIA, and this rejection should be equally applicable for the AIA.

The texts of the two provisions are very similar. The TIA provides in relevant part that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." The AIA provides in relevant part that, with a number of listed exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.

The Court relied on the similarities between the AIA and the TIA in its interpretation of the TIA. In addition, the Court also relied on the historical relationship between the two provisions, noting that the AIA, which was enacted originally in 1867, was the model for the TIA, which was enacted in 1937.

The Court focused on the close relationship between the TIA and the Anti-Injunction Act to give a narrow, technical reading to the terms "assessment," "collection," and "restrain," all of which appear in both the TIA and the Anti-Injunction Act. The Court relied on the fact that in the Internal Revenue Code, where the AIA is located, the terms "assessment" "levy" and "collection" have very narrow and precise technical meanings that "do not include informational notices or private reports of information relevant to tax liability." While the TIA includes the term "levy" and the AIA does not, that should not result in any significant difference in interpretation for the terms that appear in both provisions.

As the Court noted,

Foreclosure
Foreign account tax compliance act (FATCA)
Foreign financial institutions
Form 2848
Form 433-A(OIC)
Fraud
Golsen
Gross valuation misstatement
Information document request (IDR)
Injured Spouse
Innocent Spouse
Installment Agreement
Interest
Inversions
Issue Preclusion
Jeopardy
Levy
Lien
Math error
miscellaneous
Notice and Demand
Notice of deficiency
Offer in Compromise
OPR
Overpayment Interest
Potentially Dangerous Taxpayers
Preparer Penalties
Privilege
Protestor
Qualified Amended Return (QAR)
Qualified Offer
Reasonable Cause
Receivership
refund claim
Responsible Person
Restitution
Return
Return Preparer Regulation

> the Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection. 'Assessment'…refers to the official recording of a taxpayer's liability, which occurs after information relevant to the calculation of that liability is reported to the taxing authority. Finally, 'collection' is the act of obtaining payment of taxes due. '[C]ollection' is a separate step in the taxation process from assessment and the reporting on which assessment is based.
>
> Enforcement of the notice and reporting requirements may improve Colorado's ability to assess and ultimately collect its sales and use taxes from consumers, but the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes….The TIA is keyed to the acts of assessment, levy, and collection themselves, and enforcement of the notice and reporting requirements is none of these.

The Tenth Circuit had relied on giving the term "restrain," which appears in both the TIA and AIA, a broad meaning, basically, the sort of meaning that *Bob Jones* and *"Americans United"* might be read as giving to the AIA, namely, that "restrain" means any action that would have an adverse effect on the collection of tax revenue. The Court in *Direct Marketing* very clearly rejected that interpretation, in reasoning that is equally applicable to the AIA:

> [A]s used in the TIA, "restrain" acts on a carefully selected list of technical terms—"assessment, levy, collection"—not on an all-encompassing term, like "taxation." To give "restrain" the broad meaning selected by the Court of Appeals would be to defeat the precision of that list, as virtually any court action related to any phase of taxation might be said to "hold back" "collection."
>
> 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.

The fact that the Court in *Direct Marketing* interpreted terms in the TIA that appear in both the TIA and the AIA by reference to the precise meaning those terms have in the Internal Revenue Code should mean that in the context of the AIA, these precise meanings are if anything even more controlling. Thus, based on *Direct Marketing*, it seems very clear that the broad reading of the AIA that might be taken from *Bob Jones* and *Americans United* cannot be correct.

Impact on Other Cases: The Florida Bankers Case

Thus, for example, the *Direct Marketing* decision should be very relevant for the AIA issue in the *Florida Bankers Association* case, which is currently pending in the D.C. Circuit [Editor's Note: for Les' take last year in PT on the district court

Seizure
Sentencing Guidelines
setoff
Sham Transaction
Social Security
Sovereign Immunity
Statutes of Limitation
Step Transaction
Substitute for return
Summons
Systemic Advocacy
TAM
Tax Court
TEFRA
TFRP
Timely Mailing
UTP
Variance
Venue
VITA
Whistleblower
Writ Ne Exeat Republica
Wrongful levy

Helpful Links

Effectively Representing Your Client (ABA's book on practice before the Service, which is edited by Keith).
IRS Practice and Procedure (Michael Saltzman's seminal tax procedure treatise, currently being updated and rewritten by Les, with substantial contributions by Stephen).
Leslie Book's SSRN Page (Les' other scholarly work).
Keith Fogg's SSRN Page (Keith's other scholarly work).
Tax Prof Blog (Prof. Paul Caron's blog on all things tax).
Federaltaxcrimes.blogspot.com/ (Great criminal tax blog by Jack Townsend).
Federal Tax Procedure Blogspot (Jack

Florida Bankers case see APA and Challenges to Agency Guidance: Florida Bankers v US and More on Halbig v Sebelius; for Pat's prior articles in Tax Notes on Florida Bankers see here and here.]. This case involves a challenge to regulations requiring banks to report to the IRS information relating to interest earned on accounts held by non-resident aliens, even though such persons are not subject to U.S. tax on that interest. At oral argument on February 13 of this year, one of the judges on the panel, Judge Kavanaugh, the author of the D.C. Circuit opinion in *Loving*, focused his questioning on the possible applicability of the AIA to bar this challenge. *Direct Marketing* should provide strong support for the conclusion that the AIA does not apply in that case.

However, one very significant respect in which the TIA and the AIA are not similar is in the way they phrase their limitations. The TIA phrases its limitation in terms of the power of the district court to act but the AIA does not. In a recent post in this blog, Carl Smith discussed a recent Tax Court decision that represented the first time the Tax Court has acknowledged the line of Supreme Court cases in recent years that have made it clear that the courts must be more precise and analytical in their determination as to when statutory limitations on the ability to maintain an action in court are "jurisdictional" and when they are not than had been the case before this line of Supreme Court authority.

Justice Clarence Thomas, in his opinion for the Court in *Direct Marketing*, repeatedly referred to the TIA as jurisdictional. For more on this point see *Arkansas v. Arkansas Farm Credit Services*. This classification mattered in this case because the state of Colorado had not raised the TIA as an issue in the district court and in fact had affirmatively stated that the TIA did not apply. If the TIA were not jurisdictional, this would mean the TIA was waived. However, jurisdictional limitations can be raised at any stage of litigation.

I have argued previously that the AIA is not jurisdictional, based in part on the difference in the way the limitations in the two provisions are phrased. However, this issue remains to be definitively resolved by the courts.

Filed Under: AIA Tagged With: Patrick Smith

Townsend's excellent tax procedure blog).

Appellatetax.com/ (Good appellate tax blog by the law firm Miller and Chevalier).

Gawthrop Greenwood, PC (Stephen's law firm, which handles various types of tax matters).

Tax Litigation Survey (Daily summaries of tax litigation decisions by Prof. Timothy Todd).

Internal Revenue Manual Online

Internal Revenue Code (Legal Information Institute's frequently updated Internal Revenue Code online).

Treasury Regulations (Legal Information Institute's frequently updated Treasury Regulations).

Mauledagain (Tax and other musings by the venerable Professor James Maule).

Forbes Tax Blogs

Taxtrials.com (Good summary of recent tax opinions).

Villanova Law

Villanova Grad Tax Program

Tax Court Explanation Videos (Videos provided by the Court explaining the process).