NEWS ANALYSIS

Successful Challenges to IRS Guidance After *CIC Services*?

by Lee A. Sheppard

Senate Finance Committee member Elizabeth Warren, D-Mass., introduced a bill, the Restoring the IRS Act (S. 1788), to fund the IRS without appropriations and allow it to snoop in bank accounts of people whose income and assets are similar to those of her own household, but who have less visible income streams. (Related coverage: p. 1491.)

The Warren bill is the first time we have seen this intrusive idea in draft form. According to the bill, any covered financial institution would have to report the monthly inflows and outflows on any account related to a trade or business, as well as cash transactions, foreign currency transactions, and transfers to related accounts for any account that is not related to a trade or business. That's legalese for personal accounts, readers. And Treasury would be empowered to issue guidance to ask for more information not specified (proposed section 6050Z).

Sens. Tim Kaine, D-Va., and Angus S. King Jr., I-Maine, introduced similar legislation, the Stop Corporations and High Earners From Avoiding Taxes and Enforce the Rules Strictly (Stop CHEATERS) Act (S. 1857). Their short, similarly worded bill would reach literally every bank account, and completely depend on Treasury to issue guidance to restrict the range of what it wants.

The Biden administration also proposed bank account reporting. The Treasury summary of the Biden proposal reads as though every bank account will be searched. Previously mooted proposals were directed toward small business bank accounts. (Prior analysis: *Tax Notes Federal*, May 17, 2021, p. 1003.)

Why aren't banks vigorously opposing this? Reporting your customers to the government is bad customer relations, and sorting accounts for reporting would require expensive computer programming. Banks and their customers ought to challenge this grotesque invasion of privacy on constitutional grounds.

The broadly worded proposals would not be self-enforcing, and would have to be fleshed out by regulations and other guidance. Could guidance implementing bank account reporting be challenged in court?

Yes, according to the Supreme Court. A tax administrative rule can be challenged before enforcement if the reviewing court decides that it is not a component of the tax collection process.

Instead of asking whether a penalty for not reporting is a tax, even when it is assessed and collected like a tax, henceforth courts must ask how proximate actual tax collection would be to the challenged process, according to the Court. The Court unanimously held that the Anti-Injunction Act (AIA) does not prevent a pre-enforcement challenge to a tax shelter reporting requirement, even though a tax penalty would apply to noncompliance (section 7421). (*CIC Services LLC v. IRS*, No. 19-930 (S. Ct. 2021).)

CIC Services would make it easier for banks and taxpayers to challenge administrative guidance implementing any bank account reporting requirement. Once the affected parties get to court, however, a recent interpretation of the Administrative Procedure Act would make it difficult to prevail because the government would be able to cite the, um, emergency of the tax gap.

Background

The Supreme Court has been using the AIA as a result-oriented justification to stop cases it doesn't like and let other cases proceed.

The Court does the minimum to decide a case, answering only the question before it. Historically it merely asked whether collection of a tax would be impeded. But sometimes it finds other rationales for permitting or disallowing an AIA challenge. The Court has been known to employ what academics call "non-textual factors." (See Kristin E. Hickman and Gerald Kerska, "Restoring the Lost Anti-Injunction Act," 103 *Va. L. Rev.* 1683 (2017).)

Sen. Elizabeth Warren, designated hitter for bank account reporting. (Tom Williams/CQ Roll Call/Newscom)

The AIA dates from 1867 and prohibits lawsuits for the purpose of restraining the assessment or collection of any tax. It is a vestige of collection of taxes in specie and the actual use of those gold pieces and discounted bank-issued paper certificates to fund government. The AIA's purpose was to protect tax collection (*Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962)). The AIA determines jurisdiction and cannot be avoided by a court, which must apply it even if the executive branch wants to waive it. Moreover, Congress did not give the executive discretion to waive its application.

Unlike the federal government, states don't issue their own currencies, so they have to tax to fund government. Many have balanced-budget rules to boot. During the Civil War, aggrieved taxpayers got in the habit of challenging state tax collection in federal court. So Congress created the Tax Injunction Act (TIA) to stop these lawsuits. The TIA is generally read *in pari materia* with the AIA, on which it was modeled. The Supreme Court has interpreted the TIA to permit pre-enforcement challenges to state reporting requirements that were not proximate to collection.

The Court allowed a challenge to a state requirement that remote retailers report untaxed in-state purchasers. The Court narrowed the scope of the TIA to actual assessment and collection of tax, not preparatory activities that may facilitate eventual tax collection, like information reporting. The Court read the TIA very narrowly, focusing on the word "restrain" as modifying "the collection or assessment of any tax," limiting the rule to affirmative acts to obtain payment. So improving the state's ability to discern use tax liabilities was not a step in the collection process (*Direct Marketing Association v. Brohl*, 575 U.S. 1 (2015)).

It took until now for this reasoning to migrate to AIA analysis. Let's begin with the Obamacare cases. Those cases were so results-oriented and so maligned by scholars that the Court would just as soon forget about them. Like *CIC Services*, those cases confronted battling texts — the text of the tax penalty statute and the text of the AIA.

The D.C. Circuit upheld the Obamacare individual mandate under the commerce clause (section 5000A). The D.C. Circuit majority's desire to hear the case a couple years before the tax went into effect raised a question under the AIA. But the government waived it, and the majority deferred to that waiver, even though it was arguably invalid. The majority concluded that the penalty was not a tax and that it was constitutional under the commerce clause (*Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011)).

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When a conflict among the circuits developed, the Supreme Court had to get around the AIA to uphold the individual mandate as a tax. The government argued that the "shared responsibility fee" was a tax to preserve its constitutionality. The majority, in an opinion written by Chief Justice John G. Roberts Jr., held that the penalty was a tax because "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." He got the roadmap for that from then-Circuit Judge Brett M. Kavanaugh's dissent in *Seven-Sky*, arguing that it could survive a constitutional challenge only as a tax (*National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)).

Well, gee, how did the Court avoid the AIA? Roberts wrote that the penalty label on the shared responsibility fee meant that the AIA couldn't be invoked to deflect a challenge, especially given that other Obamacare exactions were labeled taxes. But the label did not resolve whether the shared responsibility fee was an exercise of the legislative power to tax. Got that? The shared responsibility fee was so low that it was clearly a behavioral device to compel a purchase, but the Court viewed it as a tax on not purchasing. Then the Court had to conclude it wasn't a direct tax so it wouldn't be unconstitutional under Article I (*Baldwin v. Sebelius*, No. 3:10-cv-01033 (S.D. Cal. 2010)).

Nearly half a century ago, the IRS revoked the tax exemption of a college that explicitly prohibited interracial dating. The dispute began as an AIA case — was the college allowed to challenge the revocation of exemption? Although it recognized that the target of a requested injunction has to be an actual tax obligation for the AIA to apply, the Court held that the potential loss of exemption was enough to trigger the AIA. The Court understood revocation to be a regulatory action (*Bob Jones University v. Treasury*, 416 U.S. 725 (1974). See also *Commissioner v. Americans United Inc.*, 416 U.S. 752 (1974)). Congress amended the law to permit review of denial of exemption. Bob Jones University went to the Court on the discrimination question and lost (*Bob Jones University v. United States*, 461 U.S. 574 (1983)).

Those decisions asked whether a pre-enforcement suit would "necessarily preclude" the assessment or collection of a tax. In *CIC Services*, the Sixth Circuit looked to those two cases and *Direct Marketing* for its decision, which the Court reversed. The appellate court followed a D.C. Circuit case on third-party reporting (*CIC Services LLC v. IRS*, 925 F.3d 247 (6th Cir. 2019)).

In that D.C. Circuit case, Miami bankers challenged the deposit interest reporting regulation, which only reaches nonresident individual depositors with directly held accounts (reg. sections 1.6049-4(b)(5), 1.6049-8). The D.C. Circuit reversed the district court decision that the AIA did not bar a challenge. It focused on whether the reporting rule being challenged was literally, legally a tax. Then-Circuit Judge Kavanaugh held that the penalty for nonreporting was a tax because the code treats penalties as taxes and the Supreme Court said so, relying on *NFIB v. Sebelius* (*Florida Bankers Association v. Treasury*, 799 F.3d 1065 (D.C. Cir. 2015)).

There is little daylight between *CIC Services* and *Florida Bankers*, as the Sixth Circuit recognized. *Florida Bankers* presents a simple, absolute, albeit harsh rule — if the code says it's a tax, it's a tax. Kavanaugh was not troubled by the regulatory purpose of the tax penalty. Only the dissenters in those two circuit court decisions assigned any significance to *Direct Marketing*. Kavanaugh said that the banks could refuse to comply, pay the penalty, and then get judicial review of the regulation. That's not the answer that challengers to third-party reporting requirements want.

CIC Services, a material adviser for microcaptive insurance, complied with tax shelter reporting requirements and then challenged them in court (Notice 2016-66, 2016-47 IRB 745). The microcaptive adviser was in exactly the same position as the Miami bankers — not wanting to rat out customers to the U.S. government. (Prior coverage: *Tax Notes Federal*, May 24, 2021, p. 1286.)

Captive insurance is a tax shelter, but so is real insurance. Indeed, differences are hard to spot. Real insurance is often undercapitalized and underpriced, but it insures real risks or at least enables policyholders to sue on claims. Some high-end policies are effectively self-insurance with outside administration. Tax shelter insurance is frequently overpriced, overcapitalized, and insures remote risks. Captive insurance is explicitly self-insurance with outside administration. Premiums are deductible, the IRS having lost the captive insurance cases, including a big one in the Sixth Circuit (*Humana Inc. v Commissioner*, 881 F.2d 247 (6th Cir. 1989)). For microcaptives, the shelter is enhanced by a statutory exclusion for the captive's premium income, making it taxable only on investment income (section 831(b)). There were IRS settlement offers (IR-2020-26, IR-2020-157, IR-2020-241).

How Proximate Is the Tax?

The Court extended *Direct Marketing* to the federal realm by finessing the tax penalty question and ignoring its own AIA precedent.

Congress books revenue for penalties, even though they are supposed to work as deterrents, which, if successful, would result in no revenues. Penalties are assessed and collected as taxes. Obamacare's various taxes, including penalties, were slated to raise revenue to offset the subsidies. Penalties are functionally taxes, and the AIA covers "any tax." The code provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by" subchapter 68B (section 6671(a)).

Previously, the only way to distinguish a penalty from a tax is the placement of the enabling statute in the code. Indeed, the Court in *NFIB v. Sebelius* said exactly that — section 5000A was not a penalty because it was not located in the penalty chapter of the code, subchapter 68B. The *CIC Services* Court didn't discuss code location. The Court didn't even admit that it was reversing *NFIB v. Sebelius.*

"A reporting requirement is not a tax; and a suit brought to set aside such a rule is not one to enjoin a tax's assessment or collection," Justice Elena Kagan wrote for the Court, relying on *Direct Marketing*. The opinion is very narrowly drafted. The Court decided only the question before it.

Kagan said that the Court no longer differentiates regulatory taxes from revenue taxes, which is probably a good thing since they are all regulatory. Moreover, the Court didn't care about CIC's motive for bringing a challenge — its motive being to protect customers from potential audits. But the Court does differentiate regulatory taxes from regulatory mandates with tax penalties, according to Kagan. OK, thank you for clearing that up.

The reporting requirement was backed by a tax penalty, which Congress enacted to bolster IRS authority to require reporting. CIC challenged the notice's designation of microcaptives as reportable transactions. CIC would face tax penalties if the IRS discovered that it did not report. The strict liability penalty for failure to report transaction details was $50,000, plus an annual charge of $10,000 for failure to furnish a client list (sections 6707A, 6708). CIC was in fact reporting according to the notice when it launched the challenge. It didn't violate the requirement in order to challenge it.

CIC ultimately requests an injunction of the notice's reporting requirement. The Court was impressed that the notice imposed separate compliance costs on third parties required to report. CIC's own estimate of its compliance costs was $60,000 annually. It might as well have griped about its tax return preparation costs. The administrative state, which four of the justices were installed to preserve or restrain (depending on party affiliation), imposes costs.

The Court paid too much attention to the unlikely criminal penalty and not enough to the strict liability civil penalty. The Court viewed the penalty tax as a distant prospect, so the requested relief would not encroach on assessment or collection. Inspired by *Direct Marketing* and the Sixth Circuit dissent, the Court went to great pains to separate the reporting mandate from the penalty tax. "Here, the tax functions, alongside criminal penalties, only as a sanction for noncompliance with the reporting obligation," Kagan wrote.

The government argued that CIC's lawsuit prevented the collection of the penalty tax itself — the line of argument accepted by the Sixth Circuit. Avoiding the cost of compliance is the same thing as avoiding the penalty, the government maintained. The Court rejected that analogy, footnoting the government's important concession that a pre-enforcement challenge to EPA regulations on diesel fuel resale would not be barred by the AIA, even though noncompliance would be sanctioned by a tax penalty (section 6715). That was an admission against interest on the part of the government.

The Court was impressed that Congress provided criminal penalties for willful failure to file required reports under the general misdemeanor for willful failure to file (section 7203). The statute makes willful failure to file any type of return or report a misdemeanor with a fine capped at $25,000 or a year in jail, plus costs. Willfulness is a stiff criminal standard of intentional violation of a known legal duty — that is, it is difficult to prove.

No one was risking jail here, and the government argued that it would not criminalize a good-faith challenger. But the remote possibility of criminal penalties for deliberate flouting of the reporting requirement sealed the deal for Kagan, who said that no previous AIA case required a challenger to break the law to get to court. Now, that misdemeanor lurks in the background in every other tax filing situation. Every challenger could make this argument. The Florida bankers were remiss in not jumping up and down about the prospects of country-club jail that theoretically awaited them (the dissent mentioned it).

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Nonetheless, the holding is consistent with the Court's unmentioned previous interpretations when there are obstacles to pre-enforcement challenges to the validity of an administrative rule. The Court insists on challengers having a practical route to contest the legality of a rule that does not risk criminal prosecution. The Court interprets the APA to presume the availability of pre-enforcement review of administrative rules without risk of prosecution, as the Sixth Circuit dissent noted (*Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)). The Court has held that the AIA does not apply when there is no practical alternative way to challenge a rule (*South Carolina v. Regan*, 465 U.S. 367 (1984)).

As Justice Sonia Sotomayor pointed out in her concurrence, the AIA answer would be different if the challenging party were a taxpayer subject to a penalty for failure to report. She mused that a reporting penalty could be a stand-in for an actual income tax. That makes no sense, but she was on the right track in believing that the AIA was originally intended to apply to actual taxpayers, not the filers of third-party reports. But her colleagues were not willing to go that far.

Direct Marketing did not involve a tax penalty, as Kagan noted. In *CIC Services*, the Sixth Circuit viewed the strict liability tax penalty as the proximate, relevant tax for AIA analysis. The justices' notion of far downstream tax collection makes sense under *Direct Marketing* only if the relevant tax is the potential liability of CIC's clients. Reporting would increase the chances that their microcaptives would be audited. Indeed, given that the IRS Large Business and International Division had a campaign for microcaptive issue audits, that likelihood may well have been 100 percent. And those taxpayers faced the prospect of liabilities exceeding CIC's costs and penalties.

Kavanaugh, separately concurring, commented on whether anything is left of whatever rule the Court promulgated in *Americans United* and *Bob Jones*. He wanted the Court to acknowledge that it was changing the law. Again. The AIA "is best read as directing courts to look at the stated *object* of a suit rather than the suit's downstream effects," he wrote, agreeing with the Court's decision to narrow the reach of the AIA. He did not mention *Florida Bankers* or *NFIB v. Sebelius*, on which the government relied, which his colleagues effectively reversed.

Kavanaugh read the Court as creating a new rule distinguishing "(i) pre-enforcement suits challenging the regulatory component of a regulatory tax, which remain prohibited because the requested relief necessarily runs against the assessment or collection of a tax, from (ii) pre-enforcement suits challenging a regulation backed by a tax penalty, which may proceed because the requested relief runs against an independent legal obligation."

The Merits

CIC is likely to lose on the merits.

CIC's argument on the merits is that the notice violates the APA (5 U.S.C. section 551 et seq.). Treasury has to comply with the APA, despite years of contending that tax rules are special (*Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44 (2011)). Sometimes Congress intends for the IRS to be able to use its discretion to flesh out a statute through notices and punish failure to disclose. The tax shelter reporting rules and list maintenance rules under which the IRS promulgated the microcaptive notice are this type of grant of authority (sections 6111, 6112, and 6707A).

The U.S. District Court for the Eastern District of Michigan understood that. Before that court was Mann Construction Inc., an S corporation that was required to report its participation in a cash value life insurance trust, which the IRS viewed as an abusive trust arrangement (Notice 2007-83, 2007-2 C.B. 960; 2007-45 IRB 960). Mann argued that the notice was issued without notice and comment in violation of the APA (*Mann Construction Inc. v. United States*, No. 1:20-cv-11307 (E.D. Mich. 2020)).

Called single-employer plans or 419(e) plans, these top-heavy welfare benefit plans use cash value life insurance policies to primarily benefit select employees of closely held businesses. Other employees are covered by term life insurance through the same vehicle. The business deducts employer contributions to the trust or VEBA as qualified costs (sections 419 and 419A). After several years, the business terminates the plan and distributes the cash value life insurance policies, cash, or other trust property to the business owner and key employees, who claim no income inclusion. The IRS might recharacterize the distributions as dividends or deferred compensation, or disallow a deduction for split-dollar life insurance (section 264(a)).

Mann disclosed its participation in the plan on Form 8275, and the IRS disallowed its deductions for contributions to the trust for four tax years, thus increasing the owners' income. The IRS imposed penalties for failure to disclose the arrangement on Form 8886 (section 6707A). The owners sued for a refund of the penalty, arguing that the notice was an "unauthorized agency action," "arbitrary and capricious," and improperly issued without public notice and comment, and that the plan was not a listed transaction or substantially similar to one. The government moved for summary judgment, which the court granted.

The government argued that Notice 2007-83 was an interpretive rule, not a legislative rule, and that Congress authorized it to be issued without notice and comment. On the previous motion to dismiss, the court held that the notice was a legislative rule, because it changed taxpayers' rights and obligations and because it was backed up by penalties. Mann dropped its request for an injunction. On the motion for summary judgment, the court agreed with the government that Congress authorized the notice to be issued without notice and comment.

The court found its answer in the text of the reporting rule. Under the statute, a listed transaction means a reportable transaction that is the same as, or substantially similar to, a transaction specifically identified by the Treasury secretary as a tax avoidance transaction (section 6707A(c)(2)). A reportable transaction is any transaction about which information is required to be included with a return or statement because it is of a type which the secretary determines as having a potential for tax avoidance or evasion under regulations (sections 6011, 6707A(c)(1)).

Those regulations have to comply with notice and comment procedures, and the government argued that they were incorporated into the statute. They allow the IRS to identify listed transactions by "notice, regulation, or other form of published guidance" (reg. section 1.6011-4). (See Stephanie Hunter McMahon, "Classifying Tax Guidance According to End Users," 73 *Tax Law.* 245 (2020).)

The problem with this reading, as the court recognized, is that administrators cannot draft around the APA, nor will courts presume that it has been superseded by implication. It states: "Subsequent statute may not be held to supersede or modify [the APA] . . . except to the extent that it does so expressly" (5 U.S.C. section 559). But Congress is allowed to specify when the APA need not be followed, as the D.C. Circuit held in a case when foreign airlines griped about overflight fees (*Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998)). So when a court comes across a delegation of authority, it can look to congressional intent.

In the case of the tax shelter reporting rules, Congress was distressed that they weren't being respected and wanted to give them some teeth in 2004. If the IRS had to follow the APA in tax shelter reporting, it would not be able to identify shelters early, defeating the purpose of the statute, the court noted. Thus Congress "endorsed the flexible reporting regime that the IRS had already developed." Mann countered that this was mere acquiescence. But Congress doubled down in subsequent legislation.

Would enforcement of a tax shelter reporting rule have to be held in abeyance while a taxpayer or third-party reporter challenged its validity? No. Indeed, the APA permits rules to remain in force while they are being litigated (5 U.S.C. section 705). Sometimes the challenger asks for a preliminary injunction pending judicial review. An agency can voluntarily postpone the effective date of regulations pending judicial review.

Frequently rules go into effect and remain so while they are being contested in court.

What about the emergency authorization to dispense with the APA? Can the IRS invoke that to pounce on tax shelters? Notice and comment procedure is not required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" (5 U.S.C. section 553(b)(B)).

Good cause is usually interpreted to require a real, physical emergency. Courts have held that "notice and comment procedures should be waived only when 'delay would do real harm,'" such as tourist air accidents (*Hawaii Helicopter Operators Association v. FAA*, 51 F.3d 212 (9th Cir. 1995)). But the 1947 blue book equivalent for the 1946 APA envisions a financial emergency.

The document is the U.S. attorney general's APA manual, which was written contemporaneously to elucidate understanding of the APA, which the Justice Department helped draft. The manual interprets the phrase "contrary to the public interest" to encompass financial emergencies. "'Public interest' connotes a situation in which the interest of the public would be defeated by any requirement of advance notice," the manual states. It provides an example of the issuance of emergency financial controls when advance notice of such rules would defeat their purpose.

The manual, which cites 1941 Senate hearings, was written when the United States was on the gold standard and had capital controls. Americans were not allowed to own gold bullion, and World War II wage and price controls were a fresh memory. Now there are no more capital controls and no real financial emergencies for the reserve currency, but Congress pretends the tax gap is meaningful, so Treasury could play along.

Kristin Hickman of University of Minnesota Law School believes that Treasury ought to give this exception a shot in appropriate circumstances, but it would have to explain at greater length and potentially to a court's satisfaction why notice and comment were "impracticable, unnecessary, or contrary to the public interest."

Ironically, *Mann* can be appealed to the Sixth Circuit — the very court that was reversed in *CIC Services*. "I think that when Congress references agency formats in the manner that the *Mann* opinion says that it did with section 6707A, Congress typically assumes compliance with the APA without evaluating whether or not its assumption is accurate, rather than implicitly and knowingly endorsing noncompliance with the APA," Hickman said.

Mann may be a bridge too far, according to Hickman, the most prominent critic of tax exceptionalism. "Although the courts do not necessarily require Congress to be 100 percent explicit in statutory text when it adopts alternative procedures for specific agencies, the courts also take the command of section 559 seriously, and I suspect the inferential leap taken by the *Mann* court may be a little too great for some courts to find persuasive."

Floodgates Opened

CIC Services makes it easier to get into court with an APA challenge. *Mann* makes it easier to lose.

The government complained in *CIC Services* that allowing the injunction lawsuit would enfeeble the AIA and tax litigation would shift from refund suits to pre-enforcement lawsuits. Kagan responded that the government "much overstates the possible consequences of today's ruling." That's not a sufficient response, according to Steve Johnson of Florida State University College of Law. "Time will tell, of course, but the Court's prediction may prove to have been too sanguine," he noted.

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CIC Services might lead to even more AIA litigation, in Johnson's view, because the Court did not prioritize and clarify its reasoning. "Few cases will be on all fours with the rationales developed in Justice Kagan's opinion for the Court," he said, noting that the Court threw out a bunch of rationales for its decision, some of which may have been unnecessary. "If only some of them are necessary, which are they?"

There are three conditions: separate costs to comply, tax penalty a remote prospect, and criminal penalty preventing noncompliance as a route to review. "Although the three listed conditions are clearly *sufficient* to overcome the AIA, Justice Kagan never said that all three conditions are *necessary* to achieve that goal," Hickman noted in her blog. "Drawing the line between regulatory taxes and regulatory mandates backed by tax penalties may not always be as simple as it was with the third-party reporting requirements in *CIC Services*."

The misdemeanor for willful failure to file was important to the Court. Every litigant could cite this remote possibility. "Imagine how taxpayers in future AIA cases would try to squeeze themselves into a 'no practical alternative' exception to the AIA. Indeed, their doing so would be facilitated by the CIC Court's undue stress on 'criminal prosecution possibility,' forcing the Court, in future cases, to reap the whirlwind of the seed planted in *CIC*," Johnson commented.

Sotomayor denied that the floodgates were being opened. "Whether such suits may proceed will depend on a context-specific inquiry into 'the relief the suit requests' and the 'aspects of the regulatory scheme' at issue," she wrote. Practitioners threw up their hands. (Related coverage: p. 1465.)

If Congress enacts bank account reporting as currently drafted, Treasury would have plenary power to outline what is and is not reported. IRS guidance would effectively be the law. For those of you planning to challenge transaction information reporting, including administrative implementation of Warren's proposed bank account reporting, the misdemeanor for willful failure to file would theoretically apply, as it does to every filing requirement.

But it should be noted that the civil tax penalty for failure to file would not be automatic (section 6721). Tax shelter reporting is strict liability, and there is no reasonable cause defense for failures (sections 6707 and 6707A, reg. section 301.6707-1). There is a reasonable cause defense for list maintenance failures (section 6708(a)(2)). Unlike tax shelter reporting, which is part of a tax return, information reporting has a reasonable cause excuse for failure to file (section 6724, reg. section 301.6724-1(d)).

Does a reasonable cause outlet help a challenger that does not want to comply with bank account information reporting guidance? Not at the front end of the process and only maybe at the back end. That is, a noncompliant challenger couldn't ask the IRS upfront not to impose a penalty because it was heading to court. If the noncompliant challenger went on to win its APA case, then asked for penalty abatement, reasonable cause might become relevant. When the issue is noncompliance with straightforward information reporting, reasonable cause has to be something more than the dog ate my financial records.

Reasonable cause requires taxpayers to exercise ordinary business care and prudence. Under the Warren proposal, the reporting entity would be a financial intermediary, which has records and presumably backup data storage. For information reports, the taxpayer must act responsibly before and after the failure, and there must be either mitigating factors or circumstances beyond the taxpayer's control. The Internal Revenue Manual Penalty Handbook contains reasonable cause standards (IRM sections 20.1.1.3.2, 20.1.7.12).

Hickman, while predicting more pre-enforcement challenges to IRS actions, argues that the 2018 memorandum of agreement on Treasury compliance with the APA should be kept in place to encourage compliance in promulgating guidance. Treasury regulations have not been substantially delayed by OIRA review, which has encouraged APA compliance (Hickman, "An Overlooked Dimension to OIRA Review of Tax Regulatory Actions," 105 *Minn. L. Rev. Headnotes* 454 (2021)). ■