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Following the APA Will Not Eliminate Useful Guidance

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To the Editor:

I write in response to the article "Judicial Deference Trend Favors Agencies, Says DOJ Official" (*Tax Notes*, Dec. 13, 2010, p. 1188, *Doc 2010-26072*, or *2010 TNT 235-7*). The article reports remarks of Ronald Buch Jr. of Bingham McCutchen LLP and of Gilbert Rothenberg, acting deputy assistance attorney general in the Department of Justice's Tax Division.

In part, Messrs. Buch and Rothenberg refer to the concurring opinion of Judge Halpern and Judge Holmes in *Intermountain Insurance Services of Vail v. Commissioner*, 134 T.C. No. 11 (May 6, 2010) (*Doc 2010-10163, 2010 TNT 88-12*, on appeal to the D.C. Circuit). In that case, the Tax Court invalidated then-temporary regulations under sections 6229 and 6501 to extend the six-year statute of limitations to cover over-25 percent income understatements resulting from overstatements of basis. The Judge Halpern/Judge Holmes concurrence maintained that the regulations are invalid because they were not promulgated through the notice-and-comment process under the Administrative Procedure Act (the APA), 5 U.S.C. section 553. I expressed agreement with that view in my article "*Intermountain* and the Importance of Administrative Law in Tax," *Tax Notes*, Aug. 23, 2010, p. 837, *Doc 2010-15990*, or *2010 TNT 163-4*.

The December 13 article reports the remarks of Messrs. Buch and Rothenberg as follows:

> A concurring opinion in *Intermountain* seems to imply that all regulations promulgated under section 7805 creating substantive guidance for tax law must be issued under notice and comment, said Buch. That analysis could create problems for taxpayers in some situations in which temporary regulations are necessary to provide quick answers, he said. Sometimes taxpayers need substantive rules without notice and comment, Rothenberg said. "It's quite a far-reaching opinion," because taken to its logical end, "it would invalidate every temporary reg," he added. So the government is taking issue with that position in appellate courts, he said.

I am glad that the DOJ is urging appellate courts to consider this issue. The extent of the Treasury's compliance, or lack thereof, with the APA has received too little attention from the courts. Hopefully, appellate consideration will clarify the issue.

I believe that the appellate courts should sustain the view of Judges Halpern and Holmes, not reject them. In particular, contrary to the views described in the December 13 article, requiring Treasury to abide by the APA in promulgating temporary regulations would not have the unfortunate effect of depriving taxpayers of useful guidance when quick answers are needed.

This concern is misplaced for three reasons. First, APA section 553(b)(A) provides that agencies need not use the notice-and-comment procedure when they issue "interpretive" rules; notice-and-comment is required only as to legislative rules. The difference is that legislative rules make or change binding law, while interpretive rules don't make law but merely describe how the agency construes or understands the law. (E.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-302 (1979); *National Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).)

As explained more fully in my August 23 article, the regulation at issue in *Intermountain* did not merely describe the IRS's view of the law, it attempted to change the law and make binding rules. Thus, that regulation was legislative in nature and did not qualify for the APA's "interpretive rules" exception to notice-and-comment.

In contrast, genuinely interpretive temporary regulations frequently provide useful guidance to taxpayers. Often, what taxpayers need and want to know is how the IRS understands a newly enacted statute and what positions the IRS intends to take as to the meaning of the statute. The APA does not require — nor do Judges Halpern and Holmes suggest that it requires — that merely interpretive temporary regulations go through notice-and-comment.

Second, in some situations, even legislative regulations may be promulgated without notice-and-comment. APA section 553(b)(B) provides an exception applicable "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."

This exception did not apply in *Intermountain*. The IRS did not assert the exception. Nor could it have credibly done. Whether the six-year limitations period applies to basis overstatements is a controversy that has been around for decades, and nothing material has changed recently (except that the IRS lost several high-profile cases on the issue in 2009). The views of Treasury and the IRS on the issue have long been well known. The conditions predicate to the "good cause" exception did not exist in *Intermountain*.

In contrast, the exception would apply in cases in which taxpayers genuinely need quick answers as to a new statute that contains significant ambiguities. The APA allows for this needed flexibility, and nothing in the Judge Halpern/Judge Holmes concurrence threatens that flexibility.

Third, the APA does not imperil pro-taxpayer rules. Assume that Treasury issues a legislative regulation without notice-and-comment in a situation not qualifying for the "good cause" exception. If that regulation creates a pro-taxpayer rule, taxpayers aren't going to challenge it. Thus, as a practical matter, failure to follow the notice-and-comment requirement has consequences when a regulation creates anti-taxpayer rules but not when it creates pro-taxpayer rules.

Treasury and the IRS are subject to the APA. See 5 U.S.C. section 551(1). Yet, for decades, Treasury has not consistently treated the APA notice-and-comment requirements with the seriousness they deserve. Let no one be confused. That inattention or disregard was for the convenience of the government, not for the convenience or welfare of taxpayers. Requiring the Treasury to honor the APA more consistently would not imperil the legitimate interest of taxpayers to receive prompt and meaningful guidance.

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