

Supreme Court Holds That Anti-Injunction Act Does Not Bar Pre-Enforcement Challenges To Reporting Mandates Backed By Both Tax Penalties And Criminal Punishment

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CIC Services, LLC v. IRS, No. 19-930

Today, the Supreme Court unanimously held that the Anti-Injunction Act does not bar pre-enforcement judicial review of reporting mandates enforced by tax penalties, at least when a mandate is also enforced by criminal punishment.

Background:

CIC Services, LLC advises companies that create and use “captive insurers” to fill gaps in third-party insurance coverage. In 2016, the IRS issued Notice 2016-66, which imposes reporting and recordkeeping requirements for taxpayers and tax advisors involved in captive-insurance transactions—transactions the IRS believes can facilitate tax avoidance. If taxpayers or advisors violate these requirements, they face hundreds of thousands of dollars in civil tax penalties; for willful violations, they face criminal punishment, including imprisonment. CIC filed a pre-enforcement suit to challenge Notice 2016-66 under the Administrative Procedure Act, arguing that the IRS should have promulgated the Notice through notice-and-comment rulemaking, and that the Notice was arbitrary and capricious because it was issued without a proven need.

The Sixth Circuit held that CIC’s suit was barred by the Anti-Injunction Act, which prohibits suits “for the purpose of restraining the assessment or collection of any tax.” 26 U.S.C. § 7421(a). Because the Notice is enforced by a tax penalty, the Sixth Circuit ruled, CIC’s challenge to the Notice necessarily seeks to restrain the assessment or collection of that tax.

Issue:

Whether the Anti-Injunction Act bars pre-enforcement challenges to reporting mandates enforced by tax penalties.

Court’s Holding:

The Anti-Injunction Act does not bar pre-enforcement challenges to reporting requirements enforced by tax penalties that also impose independent legal obligations enforced by criminal punishment, such that the only alternative way of challenging the reporting mandate—violating it, paying the penalty, and then suing for a refund—requires committing a crime.

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A suit “to enjoin a standalone reporting requirement, whose violation may result in both tax penalties and criminal punishment … is not a suit ‘for the purpose of restraining the [IRS’s] assessment or collection’ of a tax, and so does not trigger the Anti-Injunction Act.”

Justice Kagan, writing for the Court

What It Means:

- Tax advisors may bring pre-enforcement challenges to standalone tax-reporting and other requirements that are backed by both tax penalties and criminal punishment, where the challenge is to the reporting mandate itself, rather than a challenge to the tax penalty imposed for violating that mandate. In these situations, tax advisors do not have to risk criminal liability by violating a mandate before they can challenge its legality.
- The Court’s decision will make it easier to obtain judicial review of the IRS’s position that it can use informal guidance—as opposed to rules that go through the notice-and-comment process—to impose information reporting requirements on third parties. This could restrict the agency’s ability to gather information that is indirectly related to the computation of tax.
- Now that CIC’s suit can proceed, if on remand the courts rule that Notice 2016-66 should have gone through notice-and-comment rulemaking or is arbitrary and capricious, this could pave the way for similar challenges to other IRS information reporting requirements.
- Justice Kavanaugh wrote separately to observe that the Court’s focus on the objective purpose of a pre-enforcement suit aligns with the text of the Anti-Injunction Act and that the Court’s ruling narrows previous decisions suggesting that pre-enforcement suits are barred if they would have the effect of preventing the assessment or collection of a tax. Put another way, what matters is whether the plaintiff seeks relief from a legal obligation imposed by the challenged mandate that is separate and independent from the tax penalty.
- Although the Court did not distinguish suits brought by taxpayers from those brought by tax advisors like CIC, Justice Sotomayor wrote separately to suggest that the outcome might have been different had the plaintiff been a taxpayer. This issue likely will be presented in future litigation if the Government attempts to cabin the ruling to tax advisors.

The Court’s opinion is available [here](#).

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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