Silver Moves for Summary Judgment in Transition Tax Suit

by Andrew Velarde

A taxpayer hopes to make the kill shot in his suit challenging the transition tax regulations, which he asserts don't adequately address small business concerns, following his victory on standing and subject matter jurisdiction.

Monte Silver delivered on his promised summary judgment motion with a May 15 filing with the U.S. District Court for the District of Columbia. Silver's suit against the section 965 transition tax rules imposed on accumulated offshore earnings alleges that the IRS ignored its duty to perform the small business impact evaluations required under the Regulatory Flexibility Act (RFA) and the Paperwork Reduction Act (PRA). Silver asserts in his filing that the IRS violated the "letter and the spirit" of the RFA and PRA.

Silver's attorney, Lawrence Marc Zell of Zell & Associates International Advocates LLC, told *Tax Notes* that his client's suit makes two equally important points.

"First, it exposes and hopefully will remedy the IRS's long-standing disregard for the rules Congress enacted to protect small business from heavy-handed government regulation," Zell said. "Second, it is a clarion call for fairness for some 9 million loyal Americans living overseas who have been systematically overlooked and discriminated against by the powers that be in Washington."

Until Silver's suit, the RFA and PRA had been largely ignored in the tax world. The PRA's purpose is to minimize the paperwork burden for a number of entities, including small businesses. Under the RFA, enacted in 1980, an agency is required to perform an initial and final regulatory flexibility analysis when issuing proposed and final regs. The final analysis, under 5 U.S.C. section 604, must include a statement on the significant issues raised by public comments, a description of the number of small entities to which the rule will apply and the projected reporting and compliance requirements for those entities, and a description of the steps the agency has taken to minimize the economic impact on small entities.

There is an exception to the analysis if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. That exception requires a statement providing the factual basis for the certification.

Challenges under the RFA and PRA can be reviewed by a court under the Administrative Procedure Act, which allows courts to set aside agency rules that are "arbitrary, capricious, [or] an abuse of discretion."

Not an Iota

The IRS and Treasury certified in both the proposed regs (REG-104226-18) and final rules (T.D. 9846) that the guidance would not have a significant impact on small entities, but Silver alleges in his brief that the agencies did not include "a single substantiating fact" in those certifications, despite his having raised the issue with them several times.

> ***'There is not an iota of evidence in the administrative record, not a single document or email, which supports the certification that the rule would not, if promulgated, have a significant economic impact on a substantial number of small entities,' Silver's brief says.***

After the proposed rules were published, Silver and 400 small business owners emailed the government and submitted formal comments warning it of the "tremendous harm" that the rules would cause them, the brief says. The brief points to comments made at the hearing on the regs in October 2018 by American Citizens Abroad as further evidence of small businesses voicing concerns over the burdens they are facing. However, the final regs also certified that they would not have a significant economic impact on a substantial number of small entities.

"There is not an iota of evidence in the administrative record, not a single document or email, which supports the certification that the rule would not, if promulgated, have a significant economic impact on a substantial number of small entities. The very opposite is true. The administrative record is replete with evidence

showing that the proposed and final regulations would have a severe impact on a large number of small businesses," the brief states. "The lack of any factual basis in the Certification exacerbates the underlying issue, to wit: Defendants' assumption that the proposed and final regulations would not severely impact small businesses is simply wrong and arbitrary."

Under 5 U.S.C. section 611, if a court determines that the RFA has been violated, corrective action could include remanding the rule to the agency and deferring enforcement against small entities, both of which Silver seeks in his motion.

The regs failed under the PRA as well, Silver argues, because the administrative record contained no PRA certification.

"The only evidence that Defendants even considered PRA procedural safeguards is a single checklist entitled 'Paperwork Reduction Act Submission.' . . . Nothing in this document qualifies as a certification," the brief argues.

The brief states that a certification requires the agencies to address their attempts to reduce the burden on small businesses; address potential exemptions; draft the regs in "plain, coherent, and unambiguous terminology" that is understandable; and implement the rules within existing reporting and recordkeeping practices when possible. The IRS and Treasury failed on all these fronts, it says.

The brief says that Silver incurred and would continue to incur injury as a result of the compliance costs of the transition tax and its regs.

Part of a Larger Pattern

Practitioners previously argued that the Anti-Injunction Act (AIA) could present a high hurdle for Silver to clear in litigation. But in its December 2019 memorandum opinion and order, the district court denied the government's motion to dismiss for lack of standing and subject matter jurisdiction — a motion that had been based in part on the AIA. After that decision, which allowed the case to proceed to the merits, practitioners also argued that because of Treasury and the IRS's lack of care in following the RFA analysis historically, *Silver* could present an opportunity for taxpayers seeking to challenge other regs under a similar theory.

Addressing his relief request's interplay with the AIA, Silver argues that delaying enforcement of the rule against small businesses will not affect collection of the transition tax, because taxpayers are liable for the tax independently under the statute and "the vast majority" of small businesses don't owe it.

Under the AIA, suits that would restrain the assessment or collection of tax are disallowed.

The brief also cites a 2016 report by the Government Accountability Office that found that the IRS avoided the RFA in 99.5 percent of its cases. That report reviewed more than 200 regs from 2013 through 2015 and found that in nearly every case, the IRS and Treasury stated in the regs' preamble that either the RFA did not apply because the guidance didn't impose a collection of information requirement on small entities or that a regulatory impact analysis wasn't required because the rules would not have a significant economic impact on a substantial number of small entities.

> ***Delaying enforcement of the rule against small businesses will not affect collection of the transition tax, because taxpayers are liable for the tax independently under the statute and 'the vast majority' of small businesses don't owe it, Silver says.***

"Defendants' conduct in this case is not an isolated incident. Rather, it is an example of the Defendants' pattern of ignoring the requirements of the RFA and the interests of small business," the brief states. "Allowing Defendants to avoid scrutiny of their blemished record of willful disregard of small business rights by invoking the AIA would only serve to reward the Defendants' apparent disdain for the law."

Come to Their Senses

Silver told *Tax Notes* that Treasury and the IRS had received the terms on which he would settle his case "on numerous occasions," and he wondered if they would now "come to their senses."

"The essence of the motion for summary judgment was written months ago. All the games that Treasury/IRS played with hiding documents

and providing an incomplete record had no effect on me, but hurt them. Their questionable conduct is now visible to the court," Silver said.

Silver previously predicted that he would prevail on the merits, labeling the outcome a slam-dunk after his victory in December 2019. And his confidence hasn't abated regarding either his transition tax suit or a similar promised suit against the global intangible low-taxed income provision.

"Once I win the summary judgment, a lengthy process begins that will require them to adopt detailed processes to comply with the statutory procedures. And I will be there every step of the way to make sure that they comply in full," Silver said. "And of course, the GILTI lawsuit, to be filed in a few weeks, will start things all over again."

The case is *Silver v. IRS*, No. 19-cv-00247 (D.D.C. 2019). ■