

Republican Expat Group Takes Treasury To Task for Reg Failure

by Andrew Velarde

The political organization Republicans Overseas Inc. (RO) is throwing its support behind a small business's legal challenge to the transition tax, a cornerstone of the Tax Cuts and Jobs Act's international provisions.

The group, along with several of its country chapters, filed an amicus brief with the U.S. District Court for the District of Columbia on June 9 supporting Monte Silver's Regulatory Flexibility Act (RFA) and Paperwork Reduction Act challenge to the section 965 regs.

"The government's estimate regarding the small businesses that would be impacted by the transition tax and the final regulations ignores the over 150,000 small businesses owned and operated by American citizens residing outside of the United States," the amicus brief states. "Had the government even attempted to analyze the effect of the final regulations on small businesses . . . then it would have realized the scope and severity of this impact and possibly considered appropriate alternatives."

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 RFA and the Paperwork Reduction Act. Silver has filed for summary judgment, after successfully fending off the government's motion to dismiss for lack of standing and subject matter jurisdiction in December 2019.

Under the RFA, 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 their projected reporting and compliance requirements, and a description of the steps that the agency has taken to minimize the economic impact on small entities.

An exception from the RFA analysis is available if an agency certifies that the rules will not have a significant economic impact on a

substantial number of small entities — a certification that the IRS and Treasury asserted for the section 965 rules.

The amicus brief accuses the IRS and Treasury of having shirked their obligations by ignoring the required analyses, saying that their certification was a “complete detachment from reality,” given the significant number of small entities owned by U.S. citizens abroad.

“This kind of ‘shoot-from-the-hip’ certification is clearly not what Congress had in mind when it first included the certification alternative in the original 1980 RFA legislation and particularly after the 1996 amendments, which significantly bolstered the right of small business owners to challenge adverse action by the government,” the amicus brief states, citing the statutory authorization of judicial review of agency certification.

The brief argues that expatriates operating small businesses frequently use controlled foreign corporations and thus will be subject to the regs even if they are not subject to the tax itself. At the very least, expatriates will be required to expend substantial resources to ensure compliance, an argument previously made by Silver.

Presenting what it calls *prima facie* evidence that the government’s certification about the number of small entities affected was erroneous, the brief estimates that there are 71,000 American-owned businesses in just eight jurisdictions: Albania, France, Greece, Cyprus, Hong Kong, Israel, Switzerland, and Singapore.

“The impact on small businesses is no theoretical matter. It is real; it is palpable; and it is considerable. Yet, the government offers no believable explanation for why it was not considered,” the brief states.

Solomon Yue Jr., CEO of RO, told *Tax Notes* that when businesses move back to the United States, small business owners overseas become more important for U.S. job creation.

“They’re the sales force for American-made products and services. That’s why we’d like to see . . . when Treasury tries to formulate regulations to execute the [TCJA], those small business interests and difficulties for compliance [taken] into consideration,” Yue said.

Red Light, Green Light

The Justice Department previously asked and failed to get the court to disallow RO from filing an amicus brief in the case, arguing that it would be “nothing more than extra pages, and an echo chamber” of Silver’s position and further that it would be “patently partisan.”

Given that the TCJA was widely endorsed by Republicans in Congress and President Trump, that support for a challenge to the transition tax is coming from RO may seem surprising at first blush.

The group is no stranger to involvement with high-profile and politically charged international tax issues, however. Though unsuccessful, some of the group’s executive team members previously brought a suit against the Foreign Account Tax Compliance Act in *Crawford v. Treasury*, No. 16-3539 (6th Cir. 2017), challenging the law’s constitutionality. Along with groups like American Citizens Abroad, it has also been an outspoken proponent for a move away from citizenship-based taxation toward residency-based taxation, championing the proposed Tax Fairness for Americans Abroad Act.

The amicus brief argues that if the court finds against Silver, it would set a “dangerous precedent for the future.” It argues that the government has been “haphazard and negligent” in routinely disregarding the RFA and it specifically calls out the global intangible low-taxed income provision, which similarly did not contain an RFA analysis.

“Should the government be given the judicial ‘green light’ to circumvent the RFA’s small business protections as to the transition tax, nothing stands in its way to continue its illegal and insensitive approach to future regulation enactments [affecting] small businesses, such as GILTI and similar regulations,” the amicus brief states.

Silver has previously promised that a similar RFA challenge to GILTI would be forthcoming. Despite its objections to GILTI, Yue said that RO does not plan on filing a suit of its own against the regs. Rather, it is focusing its efforts on getting legislation on residency-based taxation passed.

“Lawsuits help, but a bill like [the Tax Fairness for Americans Abroad Act] will permanently fix

the unequal treatment between Americans in the states and Americans abroad,” Yue said.

RO joins the Center for Taxpayer Rights, which previously filed an amicus brief in support of Silver in May. In *Silver v. IRS*, No. 19-cv-00247, RO is represented by Alexander R. Green and J. William Eshelman of Clark Hill PLC. ■