ROCKY BRANCH TIMBERLANDS, LLC, et al
Appellant/Defendant
v.
UNITED STATES OF AMERICA, et al
Appellees/Plaintiffs

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Direct Appeal from Final Judgment, Dist. Court
#1:21-CV-2605-MB

INITIAL BRIEF OF Appellants

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Circuit R. 26.1-1, 26.1-3, and 27-1, it is hereby certified that the following persons and entities have an interest in the outcome of this case or have participated as attorneys or judges in the adjudication of this case:

Babcock, Jason, member of Rocky Branch Investments LLC;

Bavishi, Nilesh, member of Rocky Branch Investments LLC;

Beeson Jr., John W., member of Rocky Branch Investments LLC;

Beeson, John W., member of Rocky Branch Investments LLC;

Bell, John Michael, member of Rocky Branch Investments LLC;

Bennett, Rhonda C., member of Rocky Branch Investments LLC;

Bhargava, Sandeep, member of Rocky Branch Investments LLC;

Black Chip, LLC, member of Rocky Branch Investments LLC;

Blair, William C., member of Rocky Branch Investments LLC;

Blazer, Bradford H., member of Rocky Branch Investments LLC;

Brock, Duvan L., member of Rocky Branch Investments LLC;

Brown, Michael L., United States District Court Judge;

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Rocky Branch Timberlands LLC, Plaintiff-Appellant;

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Volkmann, Lee, Internal Revenue Service Manager, Defendant-Appellee;

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Whalen, Justin R., member of Rocky Branch Investments LLC;

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Williams, Shelly, member of Rocky Branch Investments LLC;

Worsham, Larry, member of Rocky Branch Investments LLC;

Young, Anthony, member of Rocky Branch Investments LLC;

Young, Forrest T., attorney for Defendants-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Appellants, pursuant to Federal Rule of Appellate Procedure 34 and Eleventh Circuit Rules 28-1(c) and 34(3)(c), respectfully request oral argument. Oral argument is warranted because this case deals with significant questions of the Court's jurisdiction. Specifically, whether the Anti-Injunction Act (“AIA”) is so broad that prohibits the judicial review of any Internal Revenue Service (“IRS”) action to collect or assess taxes, even those acts which expressly violate laws enacted by Congress for the stated purpose of codifying and protecting the due process rights of taxpayers subject to examinations by the IRS. The outcome of the case will significantly affect other taxpayers whose statutory right to due process have similarly been denied by the IRS, including at least one taxpayer who has filed a suit seeking rising the same legal and jurisdictional questions presented in this suit. Resolution of the issues raised in this suit would be facilitated if the Court had the opportunity to question the parties and hear elaboration on the briefing.

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65 Cong. Rec. H4363 (daily ed. June 10, 2019)

U.S. House, Committee on Ways and Means, Taxpayer First Act of 2019, H.R. Rep. No. 116-39 (April 9, 2019)

STATEMENT OF JURISDICTION

This is an appeal of the June 21, 2022 decision of the United States District Court for the Northern District of Georgia, which dismissed the Appellant's complaint. The District Court had subject matter jurisdiction over this action by virtue of 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2201 *et seq*. (Declaratory Judgment Act). This Court has jurisdiction under 28 U.S.C. § 1291. Venue of this appeal is proper in the Eleventh Circuit under 28 U.S.C. § 1294.

STATEMENT OF THE ISSUES

The primary question is whether the IRS must comply with the laws as enacted by Congress, or whether the scope of the IRS's authority to enforce the provisions of the Internal Revenue Code ("Code") is so broad that it exceeds the statutorily created mandates imposed by Congress and the constitutional norms of due process. More specifically, the question is whether the IRS can ignore Code § 7803(e) in an effort to hastily issue an adverse determination that has the effect of denying taxpayers their statutorily created right to an independent appeal of the IRS's proposed determinations. The issues before the Court are:

1. Whether the IRS is subject to the laws created to address taxpayer abuses identified by Congress;

2. Whether the courts have the authority to enforce laws creating a taxpayer right to due process or whether the Anti-Injunction Act ("AIA") bars a suit seeking to compel the IRS to comply with the law; and

3. Whether the IRS's violation of the law and denial of statutorily created due process rights can be reviewed under the Administrative Procedures Act ("APA").

Before wading into the technical details of this case, it may be helpful to step back and examine what the IRS argues it

may do to taxpayers. First, despite Congressional action to codify taxpayers' rights, the IRS believes it can deny taxpayers the right to independent appeal of the IRS's proposed determinations, because insufficient time, remains to assess taxes. However, if the taxpayer consents to extend the time to assess taxes, the IRS can still deny the right to independent appeal and instead can issue a proposed determination that unless litigated becomes final, in direct contravention of Congress' intent to codify the right to independent appeal before costly litigation commences. Moreover, the IRS need not comply with the very processes and procedures required by Congress to police any denial of independent review. That simply cannot be sustained, and the IRS must be reined in.

STATEMENT OF THE CASE

A. Statement of Facts

a. Taxpayer First Act

In 2019, Congress passed, and the President signed into law the Taxpayer First Act of 2019 (“Taxpayer First Act”). One aim of the Taxpayer First Act was to “restrict and provide oversight of the procedures and standards that the IRS must follow in denying requests for an independent administrative review.” H.R. Rep. No. 116-39 at 29 (2019). Another aim was “to codify the role of an independent administrative appeals function within the IRS” in an effort “to reassure taxpayers of the independence of the persons providing the administrative review.” (*Id.* at 29.)

The Taxpayer First Act was created to address concerns about the IRS abuse of taxpayer rights in enforcement. As the act's co-sponsor Rep. Kevin Brady of Texas explained: “The Constitution guarantees Americans the right to due process and protection from unreasonable search and seizures. In the hearings led by Chairman Lewis and others, we have heard stories from across the country of the IRS abusing these rights. Under this bill, that stops . . . the Taxpayer First Act recasts the IRS as our tax administrator rather than simply an enforcement agency. We will better protect taxpayers from enforcement abuses by creating an impartial review of disputes they have with the IRS.” 165 Cong. Rec. H4363 (daily ed. June 10, 2019) (statement of Rep. Brady).

One such concern was related to the lack of a truly independent administrative review process. Congress noted that prior to the Taxpayer First Act, “the Code does not currently require that all taxpayers be provided an opportunity to contest an administrative decision in Appeals.” U.S. House, Committee on Ways and Means, *Taxpayer First Act of 2019* at 29 (April 9, 2019).

Recognizing the lack of a taxpayer right to an independent administrative appeal, Congress established the IRS Independent Office of Appeals (“IOA”) and added Code § 7809(e)(4), aptly titled “Right of Appeal,” requiring the IRS to make the IOA resolution process “generally available to all taxpayers.” Consistent with the language used in the statute, in the legislative history, Congress explained that “[t]he provision seeks to ensure that generally all taxpayers are able to access the administrative review process, allowing for their cases to be heard by an independent decision maker.” U.S. Senate, Committee on Finance, *Legislative Summary of Taxpayer First Act of 2019* at 1.

Additionally, to address those situations excepted from the general rule requiring the review of all matters by the IOA, the Taxpayer First Act added Code § 7803(e)(5)(C), requiring Appellees to “prescribe procedures for protesting to the Commissioner of Internal Revenue a denial” of a request for review by the IOA. In the more than three years since the Taxpayer First Act was passed, Appellees have made no progress towards the creation and implementation of such procedures required by law.

b. Rocky Branch's 2017 Return and the IRS Examination

By a Deed of Conservation Easement recorded on December 28, 2017, Rocky Branch donated a qualified conservation easement on property owned by Rocky Branch Timberlands, LLC to a qualified tax-exempt public charity pursuant to Code § 170(h). (Doc 17–Pg. 15.) On or about September 14, 2018, Rocky Branch filed a Form 1065, U.S. Return of Partnership Income, for tax year ending December 31, 2017 on which it reported a charitable deduction resulting from

the donation of the qualified conservation easement. (*Id.*)

In 2019, the IRS opened an examination into Rocky Branch's 2017 partnership tax return, specifically the charitable contribution deduction for the qualified conservation easement. (*Id.* at 16.) Pursuant to Code § 6501, the statutory period for the assessment and collection of taxes resulting from Rocky Branch's 2017 Form 1065 expired on September 15, 2021.

In January 2021, the IRS requested that Rocky Branch extend the statutory period for the assessment and collection of taxes until December 31, 2022. To effectuate that extension, Agent Veney sent Rocky Branch a Form 872-P (Consent to Extend the Time to Assess Tax). (*Id.*) Rocky Branch signed Form 872-P, but — due to concerns about the duration and expense of an examination — Rocky Branch did not submit it to the IRS at that time. (*Id.*) Legal counsel for Rocky Branch informed the IRS that Rocky Branch had decided not to extend the statute of limitations at that time. (*Id.* at 17.)

In April 2021, the IRS sent Rocky Branch a Notice of Proposed Adjustment ("NOPA") proposing to disallow the entire charitable deduction and adjusting other deductions. (Doc. 31–Pg. 3.) After receiving the NOPA, Rocky Branch revisited the IRS's request to extend the statutory period to assess and collect and decided to extend the statute of limitations and submitted the signed Form 872-P previously issued by the IRS. (Doc. 17–Pg. 3.) On May 7, 2021, Rocky Branch's legal counsel informed the IRS that Rocky Branch disagreed with the proposed findings in the NOPA and that it intended to file a written protest and avail itself of its right to appeal. (*Id.*) To allow for sufficient time for review by the IOA, Rocky Branch's legal counsel provided Agent Veney with the signed Form 872-P and requested that the IRS provide a counter signed Form 872-P. (Doc. 17–Pg. 18.) In the email dated May 7, 2021, Rocky Branch's counsel acknowledged that since "additional time may be required in order to submit this case to the IRS Appeals Division, Rocky Branch [will] sign another Form 872-P providing any such additional time required by the Independent Appeals Office." (*Id.*) By submitting the Form 872-P, Rocky Branch took every available action necessary to protect its rights provided by the Code, and also undertook the steps necessary to preserve the IRS's ability to assess and collect any potential tax deficiencies until after the conclusion of the administrative due process.

At any time since Rocky Branch submitted the executed Form 872-P, the IRS could have extended the statute of limitations by undertaking the merely ministerial act of counter signing the Form 872-P. However, the IRS deliberately and unilaterally chose not to do so.

In May 2021, the IRS informed Rocky Branch's legal counsel that it received the signed Form 872-P and the offer to further extend the statute of limitations for any additional amount of time necessary. (*Id.* at 19.) However, the IRS refused to accept Rocky Branch's signed Form 872-P because in February 2021 Rocky Branch's legal counsel informed Agent Veney that Rocky Branch did not, at that time, intend to sign the Form 872-P sent by the IRS. (*Id.*) The IRS informed Rocky Branch's legal counsel that the IRS was not going to provide Rocky Branch with the administrative review processes that it is required to provide to taxpayers pursuant to Code § 7803. Instead, the IRS was going to process the case and issue the Final Partnership Administrative Adjustment ("FPAA") notice based solely on the NOPA's proposed adjustments. (*Id.*)

In June 2021, in an effort to preserve and protect their due process rights, Appellants filed a complaint in the Northern District of Georgia seeking to enjoin the IRS from issuing the FPAA until it complied with the legal requirements of Code § 7803(e)(4) by providing Appellants with a review of its case by the IOA. (*Id.* at 23.) Additionally, in order to preserve the right and ability of the Appellees to assess and collect any potential tax deficiencies confirmed by the IOA, Appellants requested that the court grant mandamus relief by requiring Appellees to counter sign the Form 872-P to extend the statutory period for assessment and collection until December 31, 2022. (Doc. 1 at 26.)

In May 2021, Appellees knew that Appellants intended to protest the NOPA and avail themselves of their Code § 7803(e)(4) due process rights. (*Id.* at 18.) Appellees also had a Form 872-P, signed by Rocky Branch, in their possession leaving the power to extend the statute of limitations solely within their control. However, fully aware of its own legal obligations imposed by the legislature and of the authority of the judiciary to enforce the laws enacted by the legislature, instead of undertaking the merely ministerial act of counter signing the Form 872-P, the Appellees rushed to complete its violations of the Appellants' statutory due process rights by issuing an illegal FPAA. Upon violating the Appellants' due process rights, Appellees moved to dismiss Appellants' complaint by arguing that the issue was moot because the

Court was powerless to prevent Appellees from effectuating a harm resulting from an intentional violation of the law committed after the issue had been raised with the court.

After Appellees consummated the violation of Code § 7803 by issuing the FPAA without adhering to the process required by law, Appellants filed an amended complaint with the district court seeking additional relief by requesting that the Court rescind the FPAA before granting the requested injunctive relief. (Doc. 31–Pg. 4.)

c. District Court's Decision

On June 21, 2022, the district court issued an order granting Appellee's motion to dismiss. (Doc 31.) The district court found that suit was barred under the AIA and the Declaratory Judgment Act ("DJA"), because the relief sought was mooted by Appellees' issuance of the FPAA and because Appellants' request to rescind the FPAA was an attempt to restrain the assessment of taxes for which no exceptions applied. The district court also held that the IRS's actions were not reviewable under the APA.

On August 9, 2022, Appellants filed a Notice of Appeal to this Court. (Doc 33.)

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure *de novo*, "'accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff.'" *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1243 (11th Cir. 2016) (quoting *Timson v. Sampson*, 518 F.3d 870, 872 (11th Cir. 2008) (per curiam)). "[T]o survive a motion to dismiss, a complaint need only present sufficient facts, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). The Eleventh Circuit reviews *de novo* questions of subject matter jurisdiction, including whether a complaint is barred by the AIA. Dismissal for failure to state a claim is reviewed *de novo*. *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1308 (11th Cir. 2006).

SUMMARY OF ARGUMENT

By enacting the Taxpayer First Act, Congress explicitly created guardrails against IRS abuse and guaranteed taxpayers the right to administrative review by the IOA. The issue before the Court is whether the courts have jurisdictional authority to enforce the laws enacted by Congress or whether Congress created a law which it knew and intended to be unenforceable by the courts due to the scope of the AIA and the tax exception to the DJA. Appellants believe that Congress, by creating a statutory due process right to the IOA, bestowed upon the courts jurisdictional authority to review IRS actions that violate such rights and enforce the law as enacted. The district court erred in dismissing the case because its analysis failed to focus on the IRS's violation of the law and the relief sought from those actions. Instead the court focused on the underlying tax, which is not challenged in this case. Appellants ask the Court to reaffirm the principle that "tax officials and taxpayers alike are under the law, not above it." *Brafman v. U.S.*, 384 F.2d 863 at 866 (1967).

Appellants do not seek to enjoin the assessment or collection of any tax, but rather ask the Court to enforce the laws enacted by Congress. The relief the Appellants seek is solely focused on unlawful IRS actions. In the Amended Complaint, Appellants' requested relief asks the Court to declare that: (1) they have a statutory right to the independent review of their case; (2) the IRS's refusal to grant that review was a violation of Appellants' rights; and (3) the IRS is required to comply with legal requirements imposed by Code § 7803(e). (Doc. 17–Pg. 27–28.) The Appellants also asked the court to compel the IRS to (1) rescind the FPAA issued in violation of Code § 7803(e); (2) provide Appellants review by the IOA; (3) cease abusing Appellants' due process rights; (4) *temporarily* refrain from issuing a FPAA until Appellants have been provided independent review, and (5) grant Appellants such other, further and additional relief as the Court deems just and proper. (*Id*.) Contrary to the IRS's position, the AIA does not bar this suit. None of the relief requested seeks to restrain the assessment or collection of a tax.

Likewise, the Court can review the IRS's actions under the APA. Nothing in the law precludes the court from reviewing the IRS's violations of the law. To find so would completely undermine the Congressional intent to provide taxpayers the right to administrative appeals. When the IRS denied IOA review, the IRS forever denied their due process rights codified by Congress.

Here the IRS used its procedural powers to deny Appellants their rights under the law. It cannot be that no court can review those blatant violations of the law, because, if so, the laws enacted by Congress to protect taxpayers are meaningless.

ARGUMENT

A. The issue before the Court was not rendered moot by Appellees' issuance of the FPAA in violation of Code § 7803(e)

The district court determined that the Appellants' request to for temporary injunctive relief was mooted by the fact that Appellants hastily issued the FPAA in violation of the law. (Doc. 31–Pg. 6–7.) This conclusion incorrectly ignores Appellants' amended complaint which specifically asked the court to order the IRS to rescind the illegally issued FPAA and temporarily enjoin the issuance of an FPAA until the Appellees comply with Code §7803. (Doc. 17–Pg. 27.)

The district court incorrectly relied on Appellees' unsupported assertion that it could not re-issue an FPAA if the court required Appellants to rescind the illegally issued FPAA. (Doc. 31–Pg. 7.) It is true that in 2017, the applicable Code § 6223(f) provided that "[i]f the Secretary mails a [FPAA]for a partnership's taxable year with respect to a partner, the Secretary may not mail another such notice to such partner with respect to the same taxable year of the same partnership in the absence of a showing or fraud,, malfeasance, or misrepresentation of a material fact." However, contrary to the Appellees' argument, Appellants could not identify any precedential authority holding that the issuance of a second FPAA was only permissible under Code § 6223(f) upon showing that the "first FPAA was tainted by *taxpayer* malfeasance." (Doc. 31–Pg. 7.) In fact, a plain reading of the statutory language demonstrates that an order requiring Appellees to rescind the FPAA due to Appellees' malfeasance would not preclude the issuance of a second FPAA because such a determination would necessarily invalidate the first FPAA due to malfeasance, thereby satisfying the requirements set forth in Code § 6223(f). Thus, an order requiring Appellees to rescind the FPAA issued to Rocky Branch would not be prohibited by the AIA because such an order would not foreclose the issuance of a second FPAA or the assessment or collection of any tax.

Even, assuming *arguendo*, if a finding of Appellee malfeasance is an insufficient basis for the issuance of a second FPAA, an order requiring the Appellees to rescind the FPAA is not be prohibited by the AIA even though such an order would foreclose the possibility of the future collection or assessment of any tax. In such situation, though the result of the order may foreclose the assessment or collection of tax, that result would have been caused by the Appellees' deliberate act of malfeasance, not the motivations of the Appellants' suit. Recently in *CIC Services LLC v. IRS*, 141 S.Ct. 1582 (2021), the Supreme Court held that challenges to unlawful IRS actions, rather than challenges of a specific tax liability, may fall outside the ambit of the AIA. In determining whether a suit is prohibited by the AIA, the Court looks to the suit's purpose, or "objective aim." *Id.* at 1589. Thus, the relief sought is not prohibited by the AIA.

B. Neither the Anti-Injunction Act nor the DJA bar the suit

The district court erred when it determined the AIA barred the Appellants' suit, because (1) the issue before the court was not mooted by Appellants deliberate violation of Code § 7803(e); (2) the requested relief does not seek to restrain the assessment or collection of any potential tax; and (3) the facts fall within a narrow judicially defined exception of the AIA.

The AIA provides that "no suit for the purposes of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C § 7421(a). The purpose of the AIA is "to permit the United States to assess and collect taxes alleged to be due without judicial intervention." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962). However, the term "assessment" is not "synonymous with the entire plan of taxation." *Hibbs v.*

Winn, 542 U.S. 88, 102 (2004).

a. The relief sought does not restrain the assessment or collection of taxes

The district court erred when it determined the requested relief ran afoul of the AIA, because the relief does not restrain the assessment or collection of taxes. In *Direct Marketing Association v. Brohl*, the Supreme Court explained that whether a suit is an attempt to "restrain" the assessment or collection of a tax depends on "whether the relief to some degree stops 'assessment, levy, or collection,' not whether it merely inhibits them." *Direct Marketing Association v. Brohl*, 135 S.Ct. 1124, 1133 (2015). The statute considered by the Supreme Court in *Direct Marketing Association* was the "Tax Injunction Act" not the AIA. In making its decision the Supreme Court interpreted the scope of the Tax Injunction Act by defining the term "restrain" as it is used in the AIA, explaining that whether a suit is an attempt to "restrain" the assessment or collection of a tax depends on "whether the relief to some degree stops 'assessment, levy, or collection,' not whether it merely inhibits them." *Direct Marketing Association v. Brohl*, 135 S.Ct. 1124, 1133 (2015). More recently, in *CIC Services LLC v. IRS*, the Supreme Court once again looked to its analysis in *Direct Marketing Association* noting that, the Tax Injunction Act is "a statute, 'modeled on the Anti-Injunction Act,' that limits injunctive relief against *state* tax collection. This Court has 'assume[d] that words used in both Acts,' such as 'assessment' and 'collection,' are 'generally used in the same way.'" *CIC Services LLC v. IRS*, 141 S.Ct. at fn. 1.

In *CIC Services LLC*, the Supreme Court held that challenges to unlawful IRS actions may fall outside the ambit of the AIA. In *CIC Services*, the taxpayer challenged the lawfulness of the IRS's issuance of Notice 2016-66, not a specific tax liability. The taxpayer alleged that the Notice violated the APA, because (1) the IRS failed to follow the notice-and-comment procedures and (2) the Notice was arbitrary and capricious.

The Supreme Court found that "[t]hree aspects of the regulatory scheme . . . taken in combination, refute the idea that [the case was] a tax action in disguise." *CIC Services LLC v. IRS*, 141 S.Ct. at 1590–1591. First, the Notice imposed substantial costs that are unconnected to any potential tax. *Id.* Second, the causal chain between the Notice's reporting requirements and any potential tax is attenuated. *Id.* Third, the result of the Notice's reporting requirements necessitated a pre-enforcement suit, because a violation of the Notice not only resulted in a tax but also separate criminal penalties. *Id.* Under the "the Anti-Injunction Act's familiar pay-now-sue-later procedure," irreparable harm would attach prior to the ability to challenge the IRS's unlawful action. Thus, the facts necessitated a pre-enforcement suit, rather than a refund suit.

Just as in *CIC Services*, here the three factors taken in combination show that the Appellants' suit targets the IRS's unlawful conduct, not the downstream tax. By seeking declaratory and injunctive relief, the Appellants are attempting to: (1) avoid the substantial non-tax related expenses imposed on themselves, the IRS, and the courts by having the case sent to the IOA;[1] (2) the suit does not seek to foreclose the possibility of the assessment or collection of taxes and the causal chain between the issuance of the FPAA in accordance with Code § 7803 and the downstream tax attenuated at best; and (3) unlike the taxpayer in *CIC Services*, unless the Court requires the Appellees to rescind the FPAA, the IRS will be the party that fails to comply with the law. (Doc. 17–Pg. 26.) Finally, it is notable that part of the relief requested in Appellant's initial complaint included a request for mandamus relief to compel the IRS to countersign the Form 872-P. (Doc. 1–Pg. 26.) Such relief have no bearing on the assessment of collection of any potential tax (the extension of the statue of limitations served no purpose other than extending the period within which the IRS could assess or collect any potential tax from the Appellants). Thus, part of the relief that the Appellants' suit sought was for the purpose of preserving and protecting the Appellee's ability to legally assess and collect any potential tax, relief that falls well outside of the AIA's prohibition.

First, the IRS's denial of Appellants' right to IOA review imposes added burdens that inflict additional and substantial costs that are separate from the tax. Congress established the IOA to avoid costly litigation. By breaking the law and denying Appellants'an opportunity to resolve their case with the IOA, the IRS has imposed additional and burdensome litigation expenses on the Appellants, courts, and on the IRS itself. Appellants contest the legality of the IRS's violations of the law and seek relief from the burdens caused by such violations, not any potential tax. Any impact on the assessment or collection of tax is an "after-effect, not its substance." *CIC Services LLC*, 141 S.Ct. at 1591.

Second, Appellant's requested relief is several steps removed from the assessment or collection of taxes. Appellants do

not seek to permanently enjoin the assessment of any tax; they simply seek to avail themselves of the IOA review process that the IRS is legally obligated to provide. The Appellant's request to enjoin the issuance of a FPAA specifically requests such relief be temporary — only until such time as the IRS has complied with its statutory obligation to provide independent review. Moreover, at least a portion of the relief sought, the mandamus relief, was specifically sought to protect and preserve the Appellees' ability to assess and collect any potential tax. Thus, the requested relief does not "stop[ ] dead the process for assessing taxes," to the contrary it seeks to preserve the potential assessment or collection of any tax resulting from the issuance of a legally issued FPAA.

Finally, while Appellants are not forced to break the law and subject themselves to potential criminal liability as in *CIC Services*, the IRS's violations of the law "practically necessitate a pre-enforcement, rather than a refund, suit — if there is to be a suit at all." 141 S.Ct. at 1592. Here as in *CIC Services* "only an injunction against" the IRS's violations "gives the taxpayer . . . what it wants:" relief from those violations in the form of review by the Independent Office of Appeals. *Id.* A refund suit cannot put the proverbial cat back into the bag. Just as in *CIC Services*, the requested relief can only be effectuated by this suit.

The legislative history explains that Congress implemented these laws to protect taxpayers from IRS abuses. Requiring the IRS to follow the laws that it is charged with enforcing — the specific relief the Appellants requested — is merely an effort to protect their statutory right to due process, not an attempt to "restrain" the assessment or collection of any tax for purpose of the AIA. Any other finding renders the mandated taxpayer protections meaningless and renders this law, passed by Congress and signed by the President, unenforceable by the courts.

In *Direct Marketing Association*, the Supreme Court explained whether a suit is an attempt to "restrain" the assessment or collection of a tax depends on "whether the relief to some degree stops 'assessment, levy, or collection,' not whether it merely inhibits them." 135 S.Ct. 1124, 1133 (2015). More simply, "when there is 'too attenuated a chain of connection' between an upstream duty and a 'downstream tax,' a court should not view a suit challenging the duty as aiming to 'restrain the assessment or collection of a tax.'" *CIC Serv., LLC*, 141 S. Ct. at 1591 (quoting the Government's oral argument).

The narrow relief sought by this suit — that the IRS be enjoined from violating the Appellants' due process rights — does not "block[ ] the downstream [tax] that may" arise at the conclusion of the matter. *CIC Serv., LLC*, 141 S. Ct. at 1590. Rather, the Appellants contest the legality of the IRS' actions, not the legality of any potential tax.

As the relief sought by Appellants is not prohibited by the AIA, it cannot be prohibited by the tax exception to the DJA, which courts have determined to be coextensive and coterminous with the AIA. As such, an action allowed under one statute will not be barred by the other statute. *See, e.g., Cohen v. United States*, 650 F.3d 717, 727–31 (D.C. Cir. 2011) (*en banc*); and *Mobile Republican Assembly v. United States of America*, 353 F.3d 1357, 1362 n.6 (11th Cir. 2003).

b. Even if the Anti-Injunction Act applies, the suit qualifies for an exception

Even if the AIA applies, this case falls within the very narrow judicial exception. The Supreme Court has recognized two limited judicial exceptions to the AIA. First, only upon proof of the presence of two factors can the literal terms of Code § 7421(a) be avoided: (1) collection would cause irreparable harm, the essential prerequisite for injunctive relief in any case, and (2) certainty of success on the merits. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6–7 (1962). Second, the Act does not apply to parties for whom Congress has not provided an alternative forum in which to litigate their claims. *South Carolina v. Regan*, 465 U.S. 367 (1984). Though extremely narrow, if the AIA is applicable in the present case the facts demonstrate that the judicial exception provided under *Williams Packing & Navigation* is applicable here.

In *Williams Packing & Navigation*, the court explained "if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the [AIA] is inapplicable and, under the *Nut Margarine* case, the attempted collection may be enjoined if equity jurisdiction otherwise exists." *Williams Packing & Navigation Co.*, 370 U.S. at 7.

The district court erred in concluding that (1) it is not clear that the IRS cannot prevail and (2) there exists another remedy at law. Both of these conclusions are demonstrably wrong.

First, the IRS's denial of the IOA review violated Code § 7803(e)(4). In the present situation, Congress enacted a law granting a "[r]ight of appeal" and required the IRS to provide such right to generally "all taxpayers," but the IRS deliberately chose to violate the law and Appellants' rights. The IRS violated the law by issuing the FPAA without first providing the Appellant access to IOA review as required by Code § 7803(e)(4). An FPAA issued in violation of the law cannot be upheld. Given the IRS's violation of Code § 7803(e)(4), the FPAA cannot be upheld and Appellants are certain to succeed on the merits of the case.

Appellants' position that an illegally issued FPAA is not enforceable is consistent with the case law in this Circuit. In *Romano-Murphy v. Commissioner*, the Eleventh Circuit Court of Appeals determined the administrative appeals process established prior to Taxpayer First Act "entitled" the taxpayer to a determination on a written protest seeking an administrative appeal, and the IRS erred in failing to provide the taxpayer with such an appeals conference, remanding the case to the Tax Court for a factual determination as to whether the IRS' error was harmless. *Romano-Murphy v. Commissioner*, 816 F.3d 707 (11th Cir. 2016); *see also*, *Romano-Murphy v. Commissioner*, 152 TC 278 (2019) (an assessment was invalid and unsustainable because the Service failed to follow its procedures with respect to the taxpayer's written protest appealing the Service's decision).

The IRS's act of issuing an FPAA without allowing Appellants access to an independent appeals process violated the law and the Appellants' due process rights created by Code § 7803(e)(4). Pursuant to *Romano-Murphy*, an FPAA issued in violation of the law is invalid and unsustainable. Thus, the FPAA is invalid and unsustainable because it violated Code § 7803(e)(4). As the FPAA issued in this case is invalid and unsustainable, the Government cannot prevail.

Moreover, the district court erred in determining that "another remedy at law exists in connection with Appellants' challenge to the FPAA, specifically through the Tax Court." (Doc 31–Pg. 9.) That remedy does not redress the IRS's denial of Appellants' rights to IOA review. The district court's focus on the Appellants' ability to challenge the determinations in the FPAA in the Tax Court illustrates a fundamental misunderstanding of the issue at hand. In this case, Appellants are not challenging the IRS's determinations or any tax liability resulting from the FPAA. Appellants are challenging the IRS's denial of their statutorily defined right to appeal the IRS's proposed determinations at the IOA prior to litigation. More simply, here the Appellants are challenging the actions of the IRS that violate the law, not the potential tax which may result from such an illegal act.

The specific narrow relief that the Appellants seek only addresses the IRS's illegal actions, and in no way seeks to reduce or eliminate any potential tax that may result from an administrative process that comports with the Code. Thus, the right or ability to challenge the amount of the tax liability resulting from an illegally issued FPAA in court does not provide an alternative remedy for challenging the illegal act which renders the FPAA invalid and unenforceable.

In addition to failing to address the issue of the illegal act which has given rise to this case, the Appellants' ability to challenge the amount of the deficiency may itself preclude the Appellants from ever being able to challenge or remedy the illegal act itself. As a general rule, the Tax Court "will not look behind a deficiency notice to examine the evidence used or the propriety of respondent's motives or of the administrative policy or procedure involved in making his determinations." *Greenberg's Express, Inc.*, 62 TC 324, 327 (1974). Further, even if the court was willing to look behind the notice, as a court of limited jurisdiction, it lacks jurisdictional authority to offer the Appellants a remedy.

The Tax Court only has jurisdiction over matters as conferred to it by statute. *See*, Code § 7442; and *Naftel v. Comm'r*, 85 T.C. 527, 529 (1985). Jurisdiction conferred on the Tax Court by Code § 7442 does not provide for review of issues under the APA or general federal question jurisdiction. The APA provides a generic cause of action and does not contain an implied grant of subject matter jurisdiction to review agency action. *Califano v. Sanders*, 430 U.S. 99, 107 (1977). As such, the Tax Court lacks general equitable powers. *Comm'r v. McCoy*, 484 U.S. 3 (1987); and *Martin v. Comm'r*, 38 Fed. Appx. 980 (4th Cir. 2002). The Court has no authority to apply equitable principles to assume jurisdiction over a matter not authorized by statute. *Calvert Anesthesia Assoc.-Pricha Phattiyakul, M.D., P.A., v. Comm'r*, 110 T.C. 285, 287 (1998). Therefore, the Tax Court lacks the jurisdictional authority to address the issues raised in the Appellants' complaint. As such, the Court's review over such issues cannot infringe on the Tax Court's jurisdiction over the FPAA because such issues, as a matter of law, cannot be considered by the Tax Court.

Thus, Appellants' ability to challenge the amount of the deficiency in Tax Court, as it has done in this case, cannot be

construed as an alternative remedy for addressing and resolving the illegal act. The limited jurisdiction of the Tax Court — the only prepayment forum for addressing potential deficiencies resulting from the illegal act — precludes the court from actually considering the illegal act. Thus, the Appellants have no alternative remedies at law.

C. The IRS's actions are subject to judicial review under the APA

The APA provides a means for judicial review for persons who suffer legal wrong because of agency action or who have been adversely affected or aggrieved by an unlawful agency action and have no other legal method for challenging that unlawful action. 5 U.S.C. §§ 702–703. To obtain relief under the APA, the moving party must show (1) it suffered "a legal wrong because of an agency action," (2) it is not seeking money damages, and (3) the relief sought is not forbidden by another statute. 5 U.S.C. § 702. Here, Appellants have suffered a legal wrong due to the IRS's failure to comply with Code § 7803(e)(4). The Appellants are not seeking money damages. The relief is not forbidden by another statute. Appellants will suffer "a legal wrong because of agency action" because the IRS's issuance of the FPAA without providing IOA review forever precludes the Appellants from availing itself of its administrative remedies prior to litigation.

The district court erred in determining that the APA provides for judicial review of the IRS's action here, because the actions were committed to agency discretion or were not final within the meaning of 5 U.S.C. § 704.

a. The IRS's actions are not precluded from judicial review under 5 U.C.S. § 701(a)

According to section 701(a)(2) of the APA, agency actions "committed to agency discretion by law" are not subject to the APA. However, the Supreme Court has consistently held that there is a strong presumption in favor of judicial review of agency action. *Bowen v Michigan Academy of Family Physicians*, 476 US 667, 670 (1986). *See also Lincoln v Vigil*, 508 US 182, 190 (1993) (recognizing a basic presumption of judicial review); *Abbott Laboratories v Gardner*, 387 US 136,140–41 (1967) (noting that judicial review of administrative actions is favored by the Supreme Court). In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), the Court emphasized that 5 U.S.C. § 701(a)(2) provides a "very narrow" exception to the presumptive reviewability of agency action under the APA.

Section 701(a)(2) must be read in conjunction with Section 706 of the APA, which gives courts the power to review agency actions for "abuse of discretion." The Supreme Court has found that "[i]n order to give effect to the command that courts set aside agency action that is an abuse of discretion, and to honor the presumption of judicial review" courts must "read the § 701(a)(2) exception for action committed to agency discretion 'quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Dep't of Commerce v. N.Y.*, 139 S. Ct. 2551, 2568 (2019) (quoting *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U. S. —, —, 139 S.Ct. 361, 370, 202 L.Ed.2d 269 (2018) (*quoting Lincoln v. Vigil*, 508 U.S. 182, 191, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993)).

In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), the Court stated that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review." The Court later clarified that statutory language phrased in permissible terms was not clear and convincing evidence of congressional intent to limit review and instead inferred a right of judicial review in plaintiffs who are members of a class whose interests Congress intended to protect. *Barlow v. Collins*, 397 U.S. 159, 165–167 (1970) (the Court explained that "[t]he right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized.").

When denying administrative review by the IOA, Code § 7803(e)(5)(A) requires the IRS to provide in writing a detailed description of the basis for the denial and describe the procedures for protesting the decision to deny the request. Code §7803(e)(5)(C) requires the IRS to "prescribe procedures for protesting to the Commissioner of Internal Revenue a denial" of a request for review by the IOA. In enacting these safeguards Congress intended "to restrict and provide oversight of the procedures and standards that the IRS must follow in denying requests for an independent administrative review." H.R. Rep. No. 116-39 at 29–30.

Accordingly, the IRS's decision not to refer Rocky Branch's case to the IOA is subject to judicial review under the APA and not excluded under Section 701(a)(2) of the APA. First, there is no evidence of legislative intent to prevent judicial review of the IRS's actions. While the district court and Appellees focus heavily on the modifier "generally" rather than the directive "shall," the legislative history illustrates that Congress intended to protect taxpayers from arbitrary actions by the IRS. Congress went so far as to require the IRS to detail in writing the basis of any denial. Second, as explained in the Supreme Court's decision in *Barlow*, in the present situation, if courts lack the authority to review and enforce Code § 7803(e)(4), then the objectives of the statute will never be realized and, despite the existence of a law to the contrary, there will be not limit on ability of the IRS to arbitrarily violate and deny taxpayers the rights created by the Taxpayer First Act. Thus, no evidence supports the district court's finding that Section 701(a)(2) of the APA bars judicial review. There is no evidence to support the court's imputed determination that Congress intended to create a law without any possible method of enforcement by the courts. Code § 7803(e)(4) provides taxpayers with the "right of appeal" stating that review by the IOA "shall be generally available to all taxpayers." While the IRS can under certain circumstances decline to refer cases, it must comply with standards and processes outlined by Congress in doing so. The IRS failed to do so here. Since the IRS failed to comply with Code §7803(e)(5), the IRS has abused its discretion.

b. The IRS's actions are final actions within the meaning of 5 U.S.C. §704

The Supreme Court has articulated two requirements for an agency's action to qualify as final. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). First, the action may not be tentative or interlocutory in nature but must represent the "'consummation' of the agency's decision making process." *Id.* Second, it must be an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.*

The district court erred in concluding that "the refusal to refer Rocky Branch's case to Appeals before the issuance of the FPAA was interlocutory in nature, not final." (Doc 31–Pg. 13.) The decision to deny review by the IOA was final, because it consummated the IRS's decision to cut off any pre-litigation administrative review, which was based at least in part on some arbitrary non-published "requirement" that 20 months must remain on the statute. Moreover, the decision adversely affects Appellants, because Appellants were denied their statutorily proscribed right of administrative review by the IOA prior to instituting litigation.

D. The IRS cannot be allowed to unilaterally deny taxpayers their statutory rights

The district court's decision in effect gives the IRS carte blanche to trample taxpayer rights. In direct violation of clear requirements of Code § 7803(e)(4), the IRS has repeatedly abused its administrative authority and broken the law, by refusing to grant Appellants their right to have their case reviewed by the IRS IOA and by refusing to inform them of their rights regarding the protest of such a denial. The district court granted the Appellee's Motion to Dismiss on the assumption that the IRS's continued malfeasance made the suit moot.

Essentially, the district court said that since the IRS already issued the FPAA, the relief sought by Appellees is moot. However, the IRS never should have issued the FPAA without first providing Appellants review by the IOA. Under that logic, no court will ever have the authority to require the IRS to adhere to the law, so long as the IRS violates the law quickly enough to do so before the taxpayer can ask the Court to enjoin the IRS from violating the law. This logic essentially gives the IRS the ability to violate, avoid, and evade the law at will, forever thwarting the efforts of Congress to create and protect the due process rights of taxpayers by foreclosing any judicial review of such violations. More specific to the Appellants in this case, if the FPAA is allowed stand, the IRS will be able to immediately assess a tax, forever depriving the Appellants of their right to an independent and impartial preassessment review of their administrative case outside of litigation — it is a harm that cannot be fixed, resulting from an abuse that cannot be remedied.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the district court's order and remand the case.

FOOTNOTES

[1]Though not all cases are settled by the IRS IOA, the IOA often distills the issues in a case to only those that are truly in controversy thereby significantly reducing the costs and length of litigating tax deficiency cases. This is a significant issue for taxpayers, that bear the expense of such litigation; the U.S. Tax Court, which it has been estimated to be currently handling more than 400 conservation easement deduction cases alone; and the Internal Revenue Service whose Office of Chief Counsel has the burden of trying each of the cases docketed in the Tax Court. As such, Appellees' rush to issue a FPAA without first allowing Appellants to have the case reviewed by the Independent Office of Appeals imposes significant non-tax expenses on each of the parties potentially involved in litigating the issues raised in the illegally issued FPAA.

END FOOTNOTES

Document Attributes
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