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September 27, 2021

Christopher M. Wolpert, Esquire *By CM/ECF*
United States Court of Appeals for the Tenth Circuit
Office of the Clerk
Byron White Court House
1823 Stout Street
Denver, CO 80257

Re: Reserve Mechanical Corp. v. Commissioner (10th Cir. - No. 18-9011)
Supplemental Authority Letter Under Rule 28(j)

Dear Mr. Wolpert:

Reserve advises the Court of the unanimous U.S. Supreme Court decision in *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582 (2021) (copy attached). In this case arising out of the IRS targeting of small captive insurance companies, the Supreme Court held that a suit to enjoin Notice 2016-66, which requires taxpayers to report information about "micro-captive transactions," does not trigger the Anti-Injunction Act or block suit against the IRS challenging a reporting requirement improperly imposed.

The Supreme Court discussed ***congressional intent*** in its Opinion:

"The Code provides the parties to such an agreement with tax advantages. The insured party can deduct its premium payments as business expenses. See §162(a). And the insurer can exclude up to $2.2

> million of those premiums from its own taxable income, under a *tax break for small insurance companies*. See §831(b). The result is that the money does not get taxed at all. *That much, for better or worse, is a congressional choice*."

Id. at 1587.

On remand, the District Court for the Eastern District of Tennessee issued an order enjoining the IRS' enforcing Notice 2016-66 against CIC (copy attached), stating that CIC is "likely to succeed" on its claim that Notice 2016-66 is an invalid legislative rule.

The courts in the *CIC* case have understandably expressed concern over the IRS' aggressive campaign against captive insurance arrangements despite the Congressional mandate set forth in two separate Code sections (IRC 501(c)(15) and 831(b)) to encourage small businesses, like Peak Mechanical, to form captive insurers. While these provisions have existed for decades, as the facts in Reserve demonstrate, the IRS' efforts have been to ignore federal legislation expressly authorizing the establishment and operations of captive insurance arrangements.

Notice 2016-66 is a core element of the IRS' aggressive campaign against captives. The Government argues in its brief that small captives have a significant potential for abuse, simply citing to this invalid notice (Gov't Br. 3-5.) for this proposition. As Reserve's briefs demonstrate, the IRS' assumption that all captives are inherently abusive simply cannot withstand scrutiny.

Kindly distribute this letter to the panel assigned to this case.

Sincerely,

/s/ Coby M. Hyman

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Certificate of Compliance

This letter complies with the type-volume limitation of Federal Rule of Appellate Procedure 28(j) because it contains 350 words, excluding the case caption, certificates of compliance, digital submission, and service, and signature blocks. This motion complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) because it was prepared in a proportionally spaced typeface using Corel WordPerfect Office, Version 16 in 14-point Book Antiqua font.

/s/ Coby M. Hyman

Coby M. Hyman

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/s/ Coby M. Hyman
_____
Coby M. Hyman

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I certify that a copy of this document was served by delivering it to counsel listed below on September 27, 2021, via this Court's CM/ECF system:

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/s/ Coby M. Hyman

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141 S.Ct. 1582
Supreme Court of the United States.

CIC SERVICES, LLC, Petitioner

v.

INTERNAL REVENUE SERVICE, et al.

No. 19-930
|
Argued December 1, 2020
|
Decided May 17, 2021

Synopsis

Background: Material advisor to taxpayers participating in insurance agreements known as "micro-captive transactions" brought pre-enforcement action against the Internal Revenue Service (IRS), seeking to enjoin, as violative of the Administrative Procedure Act (APA), enforcement of IRS notice requiring taxpayers and material advisors to report information about certain micro-captive transactions and subjecting them to tax penalties for noncompliance. The United States District Court for the Eastern District of Tennessee, Travis R. McDonough, J., 2017 WL 5015510, dismissed for lack of subject matter jurisdiction. Material advisor appealed. The Court of Appeals for the Sixth Circuit, Clay, Circuit Judge, 925 F.3d 247, affirmed, and subsequently denied petition for rehearing en banc, 936 F.3d 501. Certiorari was granted.

The Supreme Court, Justice Kagan, held that the Anti-Injunction Act (AIA) did not prohibit material advisor's suit to enjoin the IRS notice, even though a violation of the notice might result in a tax penalty.

Reversed and remanded.

Justice Sotomayor filed a concurring opinion.

Justice Kavanaugh filed a concurring opinion.

***1584** *Syllabus*[*]

Internal Revenue Service (IRS) Notice 2016–66 requires taxpayers and "material advisors" like petitioner CIC to report information about certain insurance agreements called micro-captive transactions. The consequences for noncompliance include both civil tax penalties and criminal prosecution. Prior to the Notice's first reporting deadline, CIC filed a complaint challenging the Notice as invalid under the Administrative Procedure Act and asking the District Court to grant injunctive relief setting the Notice aside. The District Court dismissed the action as barred by the Anti-Injunction Act, which generally requires those contesting a tax's validity to pay the tax prior to filing a legal challenge. A divided panel of the Sixth Circuit affirmed.

Held: A suit to enjoin Notice 2016–66 does not trigger the Anti-Injunction Act even though a violation of the Notice may result in a tax penalty. Pp. 1588 – 1594.

(a) The Anti-Injunction Act, 26 U.S.C. § 7421(a), provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." Absent the tax penalty, this case would be easy: the Anti-Injunction Act would pose no barrier. A suit to enjoin a requirement to report information is not an action to restrain the "assessment or collection" of a tax, even if the information will help the IRS collect future tax revenue. See *Direct Marketing Assn. v. Brohl*, 575 U.S. 1, 9–10, 135 S.Ct. 1124, 191 L.Ed.2d 97. The addition of a tax penalty complicates matters, but it does not ultimately change the answer. Under the AntiInjunction Act, a "suit['s] purpose" depends on the action's objective purpose, *i.e.*, the relief the suit requests. *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 761, 94 S.Ct. 2053, 40 L.Ed.2d 518. And CIC's complaint seeks to set aside the Notice itself, not the tax penalty that may follow the Notice's breach. The Government insists that no real difference exists between a suit to invalidate the Notice and one to preclude the tax penalty. But three aspects of the regulatory scheme here refute the idea that this is a tax action in disguise. First, the Notice imposes affirmative reporting obligations, inflicting costs separate and apart from the statutory tax penalty. Second, it is hard to characterize CIC's suit as one to enjoin a tax when CIC stands nowhere near the cusp of tax liability; to owe any tax, CIC would have to first violate the Notice, the IRS would then have to find noncompliance, and the IRS would then have to exercise its discretion to levy a tax penalty. Third, the presence of criminal penalties forces CIC to bring an action in just this form, with the requested relief framed in just this manner. The Government's proposed alternative procedure—having a party like CIC disobey the Notice and pay the resulting tax penalty before bringing a suit for a refund—would risk criminal punishment. All of these facts, taken together, show that CIC's suit targets the Notice, not the downstream tax penalty. Thus, the Anti-Injunction Act imposes no bar. Pp. 1588 – 1593.

(b) Allowing CIC's suit to proceed will not open the floodgates to pre-enforcement tax litigation. When taxpayers challenge ordinary taxes, assessed on earning income, or selling stock, or entering into a business transaction, the underlying activity is legal, and the sole target for an injunction is the command to pay a tax. In that scenario, the Anti-Injunction Act will always bar pre-enforcement review. And the analysis is the same for a challenge to a so-called regulatory tax—that is, a tax designed mainly to influence private conduct, rather than to raise revenue. The Anti-Injunction Act draws no distinction between regulatory and revenue-raising tax laws, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 743, 94 S.Ct. 2038, 40 L.Ed.2d 496, and the Anti-Injunction Act kicks in even if a plaintiff's true objection is to a regulatory tax's regulatory effect. By contrast, CIC's suit targets neither a regulatory tax nor a revenue-raising one; CIC's action challenges a reporting mandate separate from any tax. Because the IRS chose to address its concern about micro-captive agreements by imposing a reporting requirement rather than a tax, suits to enjoin that requirement fall outside the Anti-Injunction Act's domain. Pp. 1592 – 1594.

925 F.3d 247, reversed and remanded.

KAGAN, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., and KAVANAUGH, J., filed concurring opinions.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Opinion

Justice KAGAN delivered the opinion of the Court.

***1586** The Anti-Injunction Act, 26 U.S.C. § 7421(a), bars any "suit for the purpose of restraining the assessment or collection of any tax." The question here is whether the Act prohibits a suit seeking to set aside an information-reporting requirement that is backed by both civil tax penalties and criminal penalties. We hold that the Act does not preclude the suit.

I

Americans have never had much enthusiasm for paying taxes. The Nation's first income taxes—adopted to finance the Civil War—met with considerable (one might even say "taxing") legal resistance. See Hickman & Kerska, Restoring the Lost Anti-Injunction Act, 103 Va. L. Rev. 1683, 1723–1725 (2017). Some taxpayers, alleging the taxes illegal, sought to enjoin collection efforts. And some courts granted the requested relief. See, *e.g.*, *Roback v. Taylor*, 20 F.Cas. 852, 854 (No. 11,877) (CC SD Ohio 1866); *Bank for Savings v. Collector*, 3 Wall. 495, 18 L.Ed. 207 (1866). Those rulings disrupted the flow of revenue to the Federal Government. As one late-19th century treatise writer described the problem, "improvident employment of the writ of injunction" threatened to "seriously embarrass" tax-dependent "operations of the government." T. Cooley, Law of Taxation 536–537 (2d ed. 1886).

Congress responded by enacting the Anti-Injunction Act. See Act of Mar. 2, 1867, § 10, 14 Stat. 475. In its current form (differing little from the original), the Act provides: "[N]o suit for the purpose 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 Act, we have stated, "protects the [Federal] Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 543, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (*NFIB*). Because of the Act, a person can typically challenge a federal tax only after he pays it, by suing for a refund. See *ibid.*

In an ordinary Anti-Injunction Act case, that short primer on the statute would naturally bring us to a description of the tax under dispute. But describing the tax implicated here will have to wait. For that tax—the thing that raises the Anti-Injunction Act question—comes into play only at the back end of a complex information-reporting scheme. The reporting scheme itself is where we must begin.

As every taxpayer knows, the Internal Revenue Service (IRS) has broad ***1587** power to require the submission of tax-related information that it believes helpful in assessing and collecting taxes. See § 6011(a). Those reporting rules may apply not just to taxpayers but also to "material advisors"—individuals or entities that earn income from providing taxpayers with certain kinds of "aid, assistance, or advice." § 6111(b)(1)(A); see § 6111(a). This case starts with requirements that taxpayers and material advisors provide detailed information about what the Internal Revenue Code calls "reportable transaction[s]." § 6707A(c)(1). The Code describes those transactions simply as ones that "hav[e] a potential for tax avoidance or evasion." *Ibid.* Rather than give further specifics, the Code delegates to the Secretary of the Treasury, acting through the IRS, the task of identifying particular transactions with the requisite risk of tax abuse. See §§ 6011, 6707A(c)(1).

Using that authority, the IRS determined that so-called micro-captive transactions must be reported because of their potential for tax evasion. A micro-captive transaction is typically an insurance agreement between a parent company and a "captive" insurer under its control. The Code provides the parties to such an agreement with tax advantages. The insured party can deduct its premium payments as business expenses. See § 162(a). And the insurer can exclude up to $2.2 million of those premiums from its own taxable income, under a tax break for small insurance companies. See § 831(b). The result is that the money does not get taxed at all. That much, for better or worse, is a congressional choice. But no tax benefit should accrue if the money is not really for insurance—if the insurance contract is a sham, which the affiliated companies have entered into only to escape tax liability. And according to the IRS, some micro-captive transactions are of that kind. So the IRS issued Notice 2016–66 identifying certain micro-captive agreements as reportable transactions. See 2016–47 Cum. Bull. 745. That Notice compels taxpayers and material advisors associated with such an agreement to (among other things) "describe the transaction in sufficient detail for the IRS to be able to understand [its] tax structure." *Id.*, at 748. With that information, the IRS can check for facts—like coverage

for an "implausible risk" or premiums that "significantly exceed" prevailing rates—suggesting that the taxpayer is not entitled to the tax benefit it claims. *Id.,* at 745–746.

Noncompliance with Notice 2016–66 subjects a taxpayer or material advisor to stiff penalties—at last bringing us to the tax involved in this case, as well as to non-tax criminal consequences. By statutory provision, all failures to supply required information on reportable transactions, including the micro-captive transactions specified in the Notice, are punishable by civil monetary penalties—$50,000 for advisors and up to that amount (depending on the amount of tax gain realized) for taxpayers. See §§ 6707(b), 6707A(b). In addition, an advisor may incur a daily $10,000 penalty for failing to furnish, on request, a list of the people it advised on a reportable transaction. See §§ 6708(a), 6112(a). And critically here, all those penalties are "deemed" to be "tax[es]" for purposes of the Code—including the AntiInjunction Act. § 6671(a). So, again, the civil penalties for violating Notice 2016–66 are *tax* penalties, and must be treated as such. But no sooner do we find the tax appended to the Notice's reporting scheme than we encounter something else. Under the Code, any person who "willfully" breaches an IRS reporting requirement is also subject to criminal penalties. § 7203. Such a violation is a misdemeanor, punishable by fines and up to one year in prison. ***1588** And, unsurprisingly, that criminal liability is not "deemed" a tax.

This suit challenges the lawfulness of Notice 2016–66. The petitioner is CIC Services, a material advisor to taxpayers participating in microcaptive transactions. It brought this action before the Notice's first reporting date, rather than after a reporting violation, let alone payment of penalty. (As far as we know, CIC has still not committed a violation, instead complying with the Notice while pressing this suit.) CIC's complaint mainly asserts that the IRS violated the Administrative Procedure Act (APA) by issuing the Notice without notice-and-comment procedures. The complaint also alleges that the Notice is arbitrary and capricious under the APA because it imposes new reporting requirements without proven need. So the complaint asks the court to "set[ ] aside IRS Notice 2016–66"—more specifically, to "enjoin the enforcement of Notice 2016–66 as an unlawful IRS rule" and to "declar[e] that Notice 2016–66 is unlawful." Complaint in No. 17–CV–110 (ED Tenn., Mar. 27, 2017), Doc. 1, pp. 2, 16 (Complaint).

But the suit has not yet proceeded to the merits. The Government moved to dismiss the action based on the Anti-Injunction Act, arguing that CIC's "requested relief would prevent the IRS from assessing a tax penalty against material advisors" that disregard the Notice's reporting requirements. Motion to Dismiss in No. 17–cv–110 (ED Tenn., May 30, 2017), Doc. 25–1, p. 9. In the Government's view, the way for CIC to bring its claims is to disobey the Notice and then sue for a refund of any resulting tax penalty. The District Court agreed. It reasoned that CIC's suit sought "to restrain the IRS's assessment or collection" of the tax penalty that could be imposed for noncompliance. 2017 WL 5015510, *4 (ED Tenn., Nov. 2, 2017). The Court of Appeals for the Sixth Circuit affirmed in a divided decision. According to the majority, CIC's suit would "restrain (indeed eliminate)" the tax penalty by "invalidat[ing] the Notice, which is [that tax's] entire basis." 925 F.3d 247, 255 (2019). Judge Nalbandian dissented. "[T]his is not," he wrote, "a dispute over taxes": "[A] suit to enjoin the enforcement of a *reporting requirement* is not" one to restrain a tax's collection. *Id.*, at 259–260. Under the majority's view, the dissent also objected, CIC could challenge the reporting scheme only by "violat[ing] the law" and risking "criminal prosecution." *Id.*, at 263. The Sixth Circuit denied a petition for rehearing en banc, over a dissent from seven judges.

We granted certiorari, 590 U.S. ——, 140 S.Ct. 2737, 206 L.Ed.2d 916 (2020), and now reverse.

II

A

The issue here, most concretely stated, is whether the Anti-Injunction Act bars CIC's suit complaining that Notice 2016–66's reporting requirements violate the APA. Once again, the Anti-Injunction Act provides, with exceptions not relevant here, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." §

7421(a). If CIC's suit is not for that purpose, it can go forward. If the suit is for that purpose, it must be dismissed. In that event, CIC could contest the legality of the reporting rules only by violating them and suing for a refund of a later tax penalty.

If that downstream tax penalty did not exist, this case would be a cinch: The Anti-Injunction Act would not apply and the suit could proceed. A reporting requirement is not a tax; and a suit brought to set aside such a rule is not one ***1589** to enjoin a tax's assessment or collection. That is so even if the reporting rule will help the IRS bring in future tax revenue—here, by identifying sham insurance transactions. See *supra,* at 1587. We said as much in *Direct Marketing Assn. v. Brohl,* 575 U.S. 1, 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015).[1] In that case, out-of-state retailers wanted to invalidate a Colorado law requiring them to report to the State's Department of Revenue any sale to a state resident on which they had not collected tax. We allowed the suit to proceed, explaining that a suit about reporting requirements is not about the "assessment" or "collection" of taxes. *Id.*, at 9–10, 135 S.Ct. 1124. "Information gathering," we stated, is "a phase of tax administration procedure that occurs before assessment [or] collection." *Id.*, at 8, 135 S.Ct. 1124. And it did not matter that the reporting requirements would "facilitate collection of taxes"—there, by identifying residents who owed sales taxes. *Id.*, at 12, 135 S.Ct. 1124. The statute's limit on injunctions, we said, is "not keyed to all activities that may improve a State's ability to assess and collect taxes." *Id.*, at 11, 135 S.Ct. 1124. It is instead "keyed to the acts of assessment [and] collection themselves." *Id.,* at 12, 135 S.Ct. 1124. That means a suit directed at ordinary reporting duties can go forward, unimpeded by the Anti-Injunction Act. On this much, even the Government agrees. See Brief for Respondents 27.

The complication here is that Notice 2016–66's reporting obligations (unlike those in *Direct Marketing*) are backed up by a statutory tax penalty. As earlier described, the Code provides that a taxpayer who violates a demand for information about a reportable transaction—including those specified in the Notice—is subject to civil monetary penalties. See *supra,* at 1587 – 1588. And the Code "deem[s]" those civil penalties to be "tax[es]" as the Anti-Injunction Act uses that term. § 6671(a); see *NFIB,* 567 U.S. at 544, 132 S.Ct. 2566 ("Congress can, of course," direct that a penalty "be treated as a tax for purposes of the Anti-Injunction Act"). The question thus becomes whether that added tax penalty changes the analysis. Does its presence—as a sanction for flouting the Notice—mean that CIC's suit is, as the Anti-Injunction Act provides, "for the purpose of restraining the assessment or collection of any tax"?

In considering a "suit['s] purpose," we inquire not into a taxpayer's subjective motive, but into the action's objective aim—essentially, the relief the suit requests. The parties agree on that interpretation, as both consistent with the Act's ordinary meaning and necessary for the Act's administration. See Brief for Respondents 40; Reply Brief 4; Tr. of Oral Arg. 15, 34. The purpose of a measure is "the end or aim to which [it] is directed." N. Webster, An American Dictionary of the English Language (rev. ed. 1844); see Webster's Third New International Dictionary 1847 (1976). And in this context, that aim is not best assessed by probing an individual taxpayer's innermost reasons for suing. Down that path lies too much potential for circumventing the Act. Instead, this Court has looked to the face of the taxpayer's complaint. See, *e.g.*, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 738, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974). We have asked about what the Government here calls "the substance of the suit"—the claims brought and injuries alleged—to determine ***1590** the suit's object. Brief for Respondents 40. And most especially, we have looked to the "relief requested"—the thing sought to be enjoined. *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 761, 94 S.Ct. 2053, 40 L.Ed.2d 518 (1974); see *Bob Jones*, 416 U.S. at 732, 94 S.Ct. 2038 ("[A] suit seeking [injunctive] relief " against a tax "falls squarely within the literal scope of the Act"). The Anti-Injunction Act kicks in when the target of a requested injunction is a tax obligation—or stated in the Act's language, when that injunction runs against the "collection or assessment of [a] tax."

It is in characterizing the purpose of CIC's suit that the parties' disagreement emerges. Recall that CIC's complaint avers that Notice 2016–66 violates the APA. See *supra,* at 1587 – 1588. And the complaint describes the relief requested as "setting aside IRS Notice 2016–66," "enjoin[ing] the enforcement of Notice 2016–66 as an unlawful IRS rule," and "declaring that Notice 2016–66 is unlawful." Complaint 2, 16. According to CIC, all of that reveals the suit's aim as invalidating the Notice and thereby eliminating its onerous reporting requirements—not as blocking the downstream tax penalty that may sanction the Notice's breach. See Reply Brief 6. By contrast, the Government contends that the suit's purpose is to stop the collection of the tax itself. See Brief for Respondents 12. In making that claim, the Government picks up on the word "enforcement" in CIC's request for

relief: Because the Notice is enforced through tax penalties, the Government claims, "enjoin[ing] the [Notice's] enforcement," as CIC wants, means preventing the IRS from collecting taxes. *Id.*, at 23, 37–38. And even putting aside that word, the Government insists that there is no real difference between a suit to invalidate the Notice and one to preclude the tax penalty. See *id.*, at 38; Tr. of Oral Arg. 54–56. Avoiding the burdens of compliance with the Notice and avoiding the tax that sanctions noncompliance, the Government asserts, are "two sides of the same coin." Brief for Respondents 37. The Government thus suggests that by framing this suit as an attack on the Notice, CIC is trying to "eva[de] the Anti-Injunction Act through artful pleading." *Id.*, at 38.

To begin with, we agree with CIC's reading of its complaint. The complaint contests the legality of Notice 2016–66, not of the statutory tax penalty that serves as one way to enforce it. CIC alleges that the Notice is procedurally and substantively flawed; it brings no legal claim against the separate statutory tax. And CIC's complaint asks for injunctive relief from the Notice's reporting rules, not from any impending or eventual tax obligation. Contra the Government's view, a request in an APA action to "enjoin the enforcement" of an IRS reporting rule is most naturally understood as a request to "set aside" that rule (as the complaint elsewhere says), not to block the application of a penalty that might be imposed for some yet-to-happen violation. 5 U.S.C. § 706; Complaint 2, 9, 16. Indeed, CIC's complaint barely mentions that penalty. The complaint, and particularly its request for relief, sets out this suit's purpose as enjoining the Notice.

And we reject the Government's argument that an injunction against the Notice is the same as one against the tax penalty—just "two sides of the same coin." Brief for Respondents 37. If that view were right, of course, no amount of artful pleading would avail: CIC's suit targeting the Notice would then in fact target the tax, and the Anti-Injunction Act would apply. But the Government's take is wrong. Three aspects of the regulatory scheme here, taken in combination, refute the idea that this is a tax action in disguise. They show that in addressing Notice 2016–66, ***1591** this suit (and any resulting injunction) addresses something other than the tax penalty helping to back it up.

First, the Notice imposes affirmative reporting obligations, inflicting costs separate and apart from the statutory tax penalty. As described earlier, the Notice levies no tax. Rather, it compels taxpayers and their material advisors to collect and submit detailed information about micro-captive transactions and their participants. See *supra,* at 1587. And obeying that mandate is likely to involve significant time and expense. Here, for example, CIC estimates that it will have to spend "hundreds of hours of labor and in excess of $60,000 per year" to comply with the Notice. See Complaint ¶40. Costs of that kind may well exceed, or even dwarf, the tax penalties for a violation. So in bringing this suit, CIC challenges a regulatory mandate that (1) is not a tax and (2) entails compliance costs whose amount is not tied to, and often goes beyond, any tax. Simply stated, this suit attempts to get out from under the (non-tax) burdens of a (non-tax) reporting obligation. Of course, if the suit succeeds, CIC will never have to worry about the tax penalty; once the reporting duty disappears, the sanction becomes irrelevant. But that is the suit's after-effect, not its substance. The suit still targets the reporting mandates—the independently onerous reporting mandates—of the Notice itself.

Second and relatedly, the Notice's reporting rule and the statutory tax penalty are several steps removed from each other. Consider what has to happen before CIC owes taxes to the IRS. To start, CIC has to withhold required information about a micro-captive transaction that the Notice covers. (And note, for whatever it is worth, that CIC disclaims any intent to do so while the Notice remains the law. See Brief for Petitioner 29.) Next, the IRS must determine (often no small matter) that a violation of the Notice has in fact occurred. And finally, the IRS must make the—entirely discretionary—decision to impose a tax penalty. See § 6707A(d). If and only if all those things occur does tax liability attach. That threefold contingency matters in assessing whether the Anti-Injunction Act applies. Even the Government concedes that 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." Tr. of Oral Arg. 38–39.[2] That principle favors CIC here. CIC stands nowhere near the cusp of tax liability: Between the upstream Notice and the downstream tax, the river runs long. So it is again hard to characterize this suit's purpose as enjoining a tax.

Third, violation of the Notice is punishable not only by a tax, but by separate ***1592** criminal penalties. As noted above, any "[w]illful failure" to comply with the Notice's reporting rules can lead to as much as a year in prison. § 7203; see *supra,* at 1587

– 1588. That fact clinches the case for treating a suit brought to set aside the Notice as different from one brought to restrain its back-up tax. For the existence of criminal penalties explains why an entity like CIC must bring an action in just this form, framing its requested relief in just this way. Recall what the Government would have such a party do: disobey the Notice, pay a resulting tax penalty, and then bring a refund suit. See Brief for Respondents 16–17; *supra,* at 1588. That approach—not the Anti-Injunction Act's familiar pay-now-sue-later procedure, but one with lawbreaking at the start—subjects the party to criminal punishment.[3] And that is not the kind of thing an ordinary person risks, even to contest the most burdensome regulation. So the criminal penalties here practically necessitate a pre-enforcement, rather than a refund, suit—if there is to be a suit at all. And so too, those penalties necessitate a suit aimed at eliminating the Notice, rather than the statutory tax penalty. Only an injunction against the Notice gives the taxpayer or advisor what it wants: relief from the obligation to report transactions. An injunction against the tax penalty would not do so. Because such an injunction would leave both the reporting duty and the criminal penalty untouched, the taxpayer or advisor would still have to accede to the Notice's demands on pain of prison time. Small wonder that CIC's complaint asks for an injunction against the Notice, not one against the tax penalty helping to enforce it. Contrary to the Government's assertion, those injunctions are not two sides of one coin.

For all these reasons, the purpose of CIC's suit is not to "restrain[ ] the assessment or collection of [a] tax." § 7421(a). The complaint, and particularly the relief sought, targets the Notice's reporting rule, asking that it be set aside as a violation of the APA. And nothing in that request smacks of artful pleading. To the contrary. That the Notice imposes an affirmative duty independent of the tax, entailing its own substantial costs; that the Notice and tax may remain forever divorced, depending on both CIC's and the IRS's choices; that not only the tax but also criminal penalties backstop the Notice—these facts, when combined, readily explain why CIC's suit targets the upstream reporting mandate, not the downstream tax. And because that is the suit's aim, the Anti-Injunction Act imposes no bar.

B

The Government worries that a ruling for CIC will enfeeble the Anti-Injunction Act. If CIC can bring this suit now, the Government claims, a wave of pre-enforcement actions will follow. Canny plaintiffs will assert non-tax reasons (including objections ***1593** to regulatory demands) for contesting the imposition of taxes. See Brief for Respondents 32, 38. And in that way, taxpayers will obtain just what the Anti-Injunction Act is meant to foreclose—orders "preemptively shield[ing]" their activities or transactions from "tax consequences." *Id.*, at 13. More and more, the Government warns, tax litigation will shift from refund actions to pre-enforcement suits. And the IRS's ability to assess and collect taxes will decline in proportion.

The Government, however, much overstates the possible consequences of today's ruling. As we have explained, this suit falls outside the Anti-Injunction Act because the injunction it requests does not run against a tax at all. See *supra,* at 1590 – 1593. The suit contests, and seeks relief from, a separate legal mandate; the tax appears on the scene—as criminal penalties do too —only to sanction that mandate's violation. Or as Judge Nalbandian put the point below: "[T]his is not a dispute over taxes." 925 F.3d at 259; see *supra,* at 1588. By contrast, the kind of case the Government invokes in making its floodgates claim is a conflict over taxes, whether on earning income, or selling stock, or entering into a business transaction. In such a case, the legal rule at issue is a tax provision. The tax does not backstop the violation of another law that independently prohibits or commands an action. Instead, the tax imposes a cost on perfectly legal behavior. So there is no target for an injunction other than the command to pay the tax; there is no non-tax legal obligation to restrain. Given that fact, the Anti-Injunction Act bars pre-enforcement review, prohibiting a taxpayer from bringing (as the Government fears) a "preemptive[ ]" suit to foreclose tax liability. Brief for Respondents 13. And it does so always—whatever the taxpayer's subjective reason for contesting the tax at issue. If the dispute is about a tax rule—as it is in the run-of-the-mine suits the Government raises—the sole recourse is to pay the tax and seek a refund.

That is just as true when the tax in question is a so-called regulatory tax—that is, a tax designed mainly to influence private conduct, rather than to raise revenue. This Court has long since "abandoned the view that brightline distinctions exist between regulatory and revenue-raising taxes." *Bob Jones*, 416 U.S. at 743, n. 17, 94 S.Ct. 2038; see *id.*, at 741, n. 12, 94 S.Ct. 2038;

Sonzinsky v. United States, 300 U.S. 506, 513, 57 S.Ct. 554, 81 L.Ed. 772 (1937) ("Every tax is in some measure regulatory"). And for just as long, we have rejected the view that regulatory tax cases have a special pass from the Anti-Injunction Act. A century ago, the Court in *Bailey v. George*, 259 U.S. 16, 42 S.Ct. 419, 66 L.Ed. 816 (1922), held that the Act barred a pre-enforcement suit challenging a tax intended to discourage the (then lawful) use of child labor. Some 50 years later, the Court in *Bob Jones* and *Americans United* similarly held that the Act barred preenforcement suits challenging IRS decisions to revoke the tax-exempt status of entities that had engaged in, respectively, discriminatory conduct and lobbying activity—conduct that was legal but disfavored for tax purposes. See 416 U.S. at 735, 94 S.Ct. 2038; 416 U.S. at 755, 94 S.Ct. 2053. In doing so, the Court made clear that the plaintiffs' reasons for suing did not matter: It was, for example, irrelevant that Bob Jones University objected to the IRS's "attempt to regulate the admissions policies of private universities." 416 U.S. at 739, 94 S.Ct. 2038. Nor did it matter that the tax ruling was in truth an effort to change those policies. Regardless of those facts, the suits sought to prevent the levying of taxes, and so could not go forward. The Anti-Injunction Act, we said ***1594** then and say again now, draws no distinction between regulatory and revenue-raising tax rules. It applies whenever a suit calls for enjoining the IRS's assessment and collection of taxes—of whatever kind.

What sets this suit apart is that it no more targets a regulatory tax than a revenue-raising one. One last time: CIC's action challenges, in both its substantive allegations and its request for an injunction, a regulatory mandate—a reporting requirement—separate from any tax. Or said otherwise, the suit targets not a regulatory tax, but instead a regulation that is not a tax. Here, the tax functions, alongside criminal penalties, only as a sanction for noncompliance with the reporting obligation. Had Congress, or the IRS acting through a delegation, imposed a tax on micro-captive transactions themselves—and had CIC then brought a pre-enforcement suit to prevent the IRS from applying that tax—the Anti-Injunction Act would have kicked in. Then, CIC would have had to pay the tax and seek a refund. But Congress and the IRS chose a different path. They imposed a non-tax, reporting obligation to address their concerns about micro-captive agreements. And by that choice, they took suits to enjoin their regulatory response outside the Anti-Injunction Act's domain.

III

CIC's suit aims to enjoin a standalone reporting requirement, whose violation may result in both tax penalties and criminal punishment. That 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. We reverse the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, concurring.

I concur because I agree that CIC Services, a material advisor to taxpayers engaged in micro-captive transactions, does not bring this suit "for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a), but rather for the purpose of avoiding the regulatory burdens imposed by Notice 2016-66 (Notice). The three factors identified by the majority, taken in combination, show that this suit falls outside the ambit of the Anti-Injunction Act (AIA): The Notice imposes substantial compliance costs that are unconnected to (and possibly far greater than) CIC Services' potential tax liability; the causal chain connecting the Notice's reporting requirement to any tax is attenuated; and the Notice is enforced by criminal as well as tax penalties. See *ante,* at 1590 – 1593.

I write separately to highlight that the answer might be different if CIC Services were a taxpayer instead of a tax advisor. Taxpayers who are subject to reporting requirements backed by tax penalties face a choice: (1) provide information about their own finances to the Internal Revenue Service (IRS), which may in turn use that information to calculate the taxpayers' liability more accurately, or (2) refuse to provide such information and pay a noncompliance penalty, which Congress has deemed a tax. For a given taxpayer, then, a tax on noncompliance may operate as a rough substitute for the tax liability she has evaded by

withholding required information. Moreover, compared with their tax advisors, taxpayers may incur less expense in collecting and reporting their own financial information. Such information, after all, is about those taxpayers' own activities and is likely to be in their possession. Hence, while it will often be correct to conclude that a tax advisor challenging an IRS reporting requirement is not doing so ***1595** "for the purpose of restraining" a tax on noncompliance, the analysis may be different when it comes to taxpayers.

This case provides no occasion for the Court to inquire into the full quantity or variety of IRS reporting requirements that are backed by tax penalties, nor to predetermine whether the AIA would allow hypothetical taxpayers to challenge those requirements in court. Whether such suits may proceed will depend on a context-specific inquiry into "the relief the suit requests" and the "aspects of the regulatory scheme" at issue. *Ante,* at 1589, 1590 – 1591. On that understanding, I concur.

Justice KAVANAUGH, concurring.

I join the Court's opinion in full. I write separately to underscore what remains (and does not remain) of *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 94 S.Ct. 2053, 40 L.Ed.2d 518 (1974), and *Bob Jones Univ. v. Simon*, 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974), in the wake of the Court's decision today.

In *Americans United* and *Bob Jones,* this Court adopted a straightforward and broad rule for determining whether a pre-enforcement suit is barred by the Anti-Injunction Act. Under that rule, if a pre-enforcement suit would "necessarily preclude" the assessment or collection of a tax, that suit is barred by the Act and the taxpayer needs to bring a refund suit *after* paying the tax. *Bob Jones*, 416 U.S. at 732, 94 S.Ct. 2038; see also *Americans United*, 416 U.S. at 760–761, 94 S.Ct. 2053. In other words, *Americans United* and *Bob Jones* instruct courts to look to the *effects* of a suit. And if a pre-enforcement suit would have the effect of preventing the assessment or collection of a tax, then that suit is barred by the Anti-Injunction Act.

Many courts have taken *Americans United* and *Bob Jones* at their word. And the Sixth Circuit did so here. In this case, CIC challenged a regulation that was backed by tax penalties—more specifically, penalties that the Tax Code labels as "taxes" for purposes of the Anti-Injunction Act. See 26 U.S.C. § 6671(a). Because invalidating the regulation at issue would "necessarily preclude" the collection of tax penalties (labeled as "taxes" by the Tax Code) stemming from an individual's violation of that regulation, the Sixth Circuit concluded that CIC's pre-enforcement suit was barred by the Anti-Injunction Act under *Americans United* and *Bob Jones*. That was a reasonable conclusion to reach, especially given that CIC's primary argument here is the same basic argument that this Court rejected in both *Americans United* and *Bob Jones*. Compare Brief for Respondent in *Alexander v. "Americans United" Inc.*, O. T. 1973, No. 72– 1371, p. 25 (It "is clear that the 'purpose' of this law suit" "is not to restrain the assessment or collection of any tax but to challenge the constitutionality of an essentially regulatory Act of Congress"), with Brief for Petitioner 17 ("The purpose of CIC's suit" "is to avoid the burdens of the reporting requirement—not to avoid or dispute any tax liability").

The Court today holds, however, that CIC's pre-enforcement suit is not barred by the Anti-Injunction Act. In so holding, the Court in effect carves out a new exception to *Americans United* and *Bob Jones* for pre-enforcement suits challenging regulations backed by tax penalties. I agree with the Court's decision to narrow *Americans United* and *Bob Jones* because the broad "effects" rule articulated in those decisions is hard to square with the text of the Anti-Injunction Act, which bars only a pre-enforcement "suit for the purpose of restraining the assessment or collection of any tax." § 7421(a). Contrary to some sweeping language in *Americans United* and *Bob Jones*, the Anti-Injunction Act is ***1596** best read as directing courts to look at the stated *object* of a suit rather than the suit's downstream effects. See *ante,* at 1589 – 1590. And for that reason, as the Court explains, the text of the Anti-Injunction Act is best read as distinguishing (i) pre-enforcement suits challenging the regulatory component of a regulatory tax, which remain prohibited because the requested relief necessarily runs against the assessment or collection of a tax, from (ii) pre-enforcement suits challenging a regulation backed by a tax penalty, which may proceed because the requested relief runs against an independent legal obligation.

In short, as I understand the Court's opinion today, the rule going forward is that pre-enforcement suits challenging regulatory taxes or traditional revenue-raising taxes are still ordinarily barred by the Anti-Injunction Act. But pre-enforcement suits

challenging regulations backed by tax penalties are ordinarily not barred, even though those suits, if successful, would necessarily preclude the collection or assessment of what the Tax Code refers to as a tax.

With those observations, I join the Court's opinion in full.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 *Direct Marketing* construed the Tax Injunction Act—a statute, "modeled on the Anti-Injunction Act," that limits injunctive relief against *state* tax collection. 575 U.S. at 8, 135 S.Ct. 1124. This Court has "assume[d] that words used in both Acts," such as "assessment" and "collection," are "generally used in the same way." *Ibid.*

2 The Government's own example proves our point. Environmental Protection Agency (EPA) regulations governing the resale of diesel fuel are enforced in part through a penalty that Congress has deemed a tax, in just the way it has the penalty here. See §§ 6720A(a), 6671(a). The Government concedes that "a court might well conclude" that a suit to enjoin the enforcement of the EPA regulations is "not one 'for the purpose of restraining' tax assessment or collection, even if " a ruling for the plaintiff would "have an eventual downstream impact on the IRS's collection of the [tax] penalty." Brief for Respondents 44. But that example is no different from this case, save that here the IRS, not the EPA, administers the regulatory mandate. And that one variance should not matter. As explained above, an IRS reporting requirement absent a tax penalty no more triggers the Anti-Injunction Act than an EPA rule does. See *Direct Marketing Assn. v. Brohl*, 575 U.S. 1, 11–12, 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015); *supra,* at 1588 – 1589. So adding an identical tax penalty to each of those regulatory schemes should affect the Anti-Injunction Act analysis in the same way—which is to say, not at all.

3 The Government suggests that criminal liability would not attach to a taxpayer or advisor who refuses to comply with the Notice out of a "good faith" objection to its validity. Brief for Respondents 46. It is easy to see why the Government wishes that were true: In none of our Anti-Injunction Act cases has postponing a taxpayer's suit until after payment exposed him to criminal penalties —because in no other case has that approach required a taxpayer to break a law in the first instance. But this Court's precedent precludes the Government's effort to erase the criminal penalties from this case. We have held in no uncertain terms that "a defendant's views about the validity" of a tax provision—even if held "in good faith"—do not "negate[ ] willfulness or provide[ ] a defense to criminal prosecution." *Cheek v. United States*, 498 U.S. 192, 204, 206, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). So in failing to report transactions as the Notice requires, an advisor like CIC would risk criminal punishment.

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Attachment 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

CIC SERVICES, LLC and RYAN, LLC, *Plaintiffs*, v. INTERNAL REVENUE SERVICE, DEPARTMENT OF TREASURY, and THE UNITED STATES OF AMERICA, *Defendants*.	)	Case No. 3:17-cv-110 Judge Travis R. McDonough Magistrate Judge H. Bruce Guyton

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MEMORANDUM OPINION AND ORDER

Before the Court is a renewed motion for preliminary injunction filed by Plaintiff CIC Services, LLC ("CIC").[1] (Doc. 59.) For the reasons stated hereafter, CIC's motion for preliminary injunction will be **GRANTED**.

I. BACKGROUND

A. Statutory and Regulatory Background

Through the Internal Revenue Code, Congress requires that certain taxpayers provide the Internal Revenue Service ("IRS") with information regarding "reportable transaction[s]." 26 U.S.C. § 6707A(c)(1). Congress defines a "reportable transaction" as "any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011, such transaction is of a type which

[1] CIC and Ryan, LLC ("Ryan") initiated the present action in 2017. During the appellate process, Ryan was dismissed as a party to the appeal. (Doc. 39.) Although Ryan remains a party to this action, the present motion was filed on behalf of CIC only. (*See* Doc. 59.)

the Secretary determines as having a potential for tax avoidance or evasion." *Id*. Consistent with this requirement, Congress delegated to the Secretary of the Department of Treasury (the "Secretary") the authority to "prescribe regulations which . . . provide such rules as may be necessary to carry out the purposes of this section." 26 U.S.C. § 6111(c)(3). Congress also authorized the IRS to assess penalties to taxpayers and material advisors[2] who fail to make required disclosures regarding reportable transactions. 26 U.S.C. §§ 6707(a), 6708(a). Taxpayers and material advisors who willfully fail to make required disclosures are potentially subject to criminal prosecution. *See* 26 U.S.C. § 7203.

Consistent with the authority delegated by Congress, the Secretary has promulgated regulations specifying that taxpayers and material advisors must provide to the IRS information about defined types of reportable transactions, including:

- "Listed transactions" – "a transaction that is the same or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction";
- "Confidential transactions" – "a transaction that is offered to a taxpayer under conditions of confidentiality and for which the taxpayer has paid an advisor a minimum fee";
- "Transactions with contractual protection" – "a transaction for which the taxpayer or a related party . . . has the right to a full or partial refund of fees . . . if all or part of the intended tax consequences from the transaction are not sustained, or a transaction for which fees . . . are contingent on the taxpayer's realization of tax benefits from the transaction";
- "Loss transactions" – "any transaction resulting in the taxpayer claiming a loss under section 165" at certain specified amounts; and

[2] A material advisor is any person "who provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction," and who receives gross income for such activities in excess of certain thresholds. 26 U.S.C. § 6111(b)(1).

- "Transactions of interest" – "a transaction that is the same or substantially similar to one of the types of transactions that the IRS has identified by notice, regulation, or other form of published guidance as a transaction of interest."

26 C.F.R. § 1.6011-4(b)(1)–(6).

On November 1, 2016, the IRS issued Notice 2016-66 (the "Notice"). In the Notice, the IRS expressed concern that "micro-captive transactions"[3] had the potential for tax avoidance or evasion and classified these transactions as "transactions of interest" for the purposes of 26 C.F.R. § 1.6011-4 and 26 U.S.C. §§ 6011 and 6012 (Doc. 1-1, at 2–3.) Based on this classification, the Notice directs that: (1) "[p]ersons entering into these transactions on or after November 2, 2006, must disclose the transaction" to the IRS; and (2)"[m]aterial advisors who make a tax statement on or after November 2, 2006, with respect to transactions entered into on or after November 2, 2006, have disclosure and maintenance obligations under §§ 6111 and 6112" of the Internal Revenue Code. (*Id*. at 12.) The Notice further provides that taxpayers and material advisors are required to file a disclosure statement regarding these transactions prior to January 30, 2017, and that persons who fail to make required disclosures "may be subject to [ ] penalty" under 26 U.S.C. §§ 6707(a), 6707A, and 6708(a). (*Id*. at 13, 15.) Finally, the Notice requests comment "on how the transaction might be addressed in published guidance." (*Id*. at 16.) On December 30, 2016, the IRS issued Notice 2017-08, which extended the deadline for required disclosure of the transactions at issue to May 1, 2017. (Doc. 1-2.)

B. Procedural History

On March 27, 2017, CIC and Ryan initiated the present action. (Doc. 1.) According to the verified complaint, CIC is "a manager of captive insurance companies," and Ryan is a "broad-based accounting, consulting, and tax services corporation, which also manages captive

[3] For a definition of the transactions at issue, see Doc. 1-1, at 9–11.

insurance companies." (*Id*. at 3.) In these capacities, CIC and Ryan assert that they are subject to the Notice's disclosure requirements for material advisors and that complying with the Notice's disclosure requirements will force them to incur significant costs. (*Id*. at 10.) CIC and Ryan assert, however, that the Notice: (1) constitutes a "legislative-type rule" that fails to comply with mandatory notice-and-comment requirements under the Administrative Procedures Act ("APA"), 5 U.S.C. § 533, *et seq*.; (2) is "arbitrary and capricious and *ultra vires* in nature"; and (3) fails to comply with the requirements of the Congressional Review of Agency Rule-Making Act, 5 U.S.C. § 801, because the IRS failed to submit to Congress and the Comptroller General. (*Id*. at 2.) Based on these allegations, CIC and Ryan's verified complaint seeks, among other things, a preliminary injunction prohibiting the IRS from enforcing the disclosure requirements set forth in the Notice based on the IRS's failure to comply with the APA's notice-and-comment requirements.

On April 19, 2017, the Court held a hearing on the initial motion for preliminary injunction. At the hearing, the Court heard testimony from Sean King, principal and founder of CIC. King primarily testified regarding the harm he expected CIC to suffer if forced to comply with the Notice's reporting requirements. Specifically, King testified that: (1) he expected CIC to incur significant fees and costs to comply with the Notice's reporting requirements; and (2) the Notice's designation of certain micro-captive transactions as reportable transactions has undermined the market value of CIC and caused reputational damage to CIC. During his cross-examination, King testified that captive insurance agreements can "most definitely" be used for tax avoidance or evasion purposes.

On April 21, 2017, the Court denied the initial motion for preliminary injunction, finding that CIC and Ryan were unlikely to succeed on the merits of their claims, because their claims

were foreclosed by Anti-Injunction Act ("AIA"). (Doc. 24.) Then, on November 2, 2017, the Court dismissed CIC and Ryan's claims finding it lacked subject-matter jurisdiction because they were barred by the AIA. (Docs. 35, 36.) CIC and Ryan appealed the Court's dismissal of their claims, and, ultimately, on May 19, 2021, the Supreme Court of the United States held that the AIA did not deprive the Court of subject-matter jurisdiction over CIC and Ryan's claims against the IRS.

On July 27, 2021, after the mandate was returned to this Court, CIC filed a renewed motion for preliminary injunction, again seeking to enjoin the IRS's enforcement of Notice 2016-66. In its motion, CIC again asserts that the Notice is a legislative rule within the meaning of the APA and that the IRS failed to comply with notice-and-comment rulemaking requirements. (Doc. 59.) CIC's renewed motion incorporates its previously filed verified complaint, as well as the arguments it made in its initial motion for preliminary injunction. Additionally, CIC notes that, on June 8, 2020, the IRS notified it that it was under audit as a potential tax shelter promoter and served it with a request for production of documents. (*Id*. at 3; Doc. 59-1) CIC also notes that, to date, it has complied with the Notice's requirements, expending hundreds of hours of employee labor and thousands of dollars in costs per year. (Doc. 59-3, at 1–2.)

On September 17, 2021, the Court held a hearing on CIC's renewed motion for preliminary injunction. At the hearing, the Court heard additional testimony from King regarding harm realized by CIC in complying with the IRS's notice. The Court also heard testimony from Michael Corbitt, former Director of Captive Insurance for the State of Tennessee, who testified generally about micro-captive insurers in Tennessee and CIC's

reputation within the micro-captive insurance industry.[4] CIC's renewed motion for preliminary injunction is ripe for the Court's review.

II. STANDARD OF LAW

When reviewing motions for preliminary injunctions, courts must consider the following: (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable injury without an injunction; (3) whether granting the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting the injunction. *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012) (citing *Am. Imaging Servs., Inc. v. Eagle-Picher Indus.*, *Inc*., 963 F.2d 855, 858 (6th Cir. 1992)); *Midwest Retailer Associated, Ltd. v. City of Toledo*, 563 F. Supp. 2d 796, 802 (N.D. Ohio 2008) ("The same standard generally applies to the issuance of temporary restraining orders and preliminary injunctions."). These considerations are factors to be balanced; they are not prerequisites that must each be satisfied before relief may issue. *Eagle-Picher*, 963 F.2d at 859. Nor are they "rigid and unbending requirements[;]" rather, "[t]hese factors simply guide the discretion of the court." *Id*. The party seeking injunctive relief bears the burden of justifying such relief. *Id*.

III. ANALYSIS

A. Likelihood of Success of the Merits

In its first cause of action, CIC asserts that the IRS unlawfully promulgated Notice 2016-66 because it is a "rule" under the APA, and the IRS failed to observe notice-and-comment procedures required by the APA. (Doc. 1 at 9–10.)

[4] The Court notes that Corbitt's testimony did not impact its decision as it relates to CIC's renewed motion for preliminary injunction.

"The APA establishes the procedures federal administrative agencies use for 'rule making,' defined as the process of 'formulating, amending, or repealing a rule." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95 (2015) (quoting 5 U.S.C. § 551(5)). A "rule" is defined as a "statement of general or particular applicability and future effect" that is designed to "implement, interpret, or prescribe law or policy." *Id*. (quoting 5 U.S.C. § 551(4). Section 4 of the APA sets forth a three-step process for "notice and comment rulemaking": (1) an agency must issue a "[g]eneral notice of proposed rulemaking," ordinarily by publication in the Federal Register"; (2) if "notice [is] required," the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments"; and (3) when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." *Id*. "Rules" issued by agencies without abiding by the APA's notice-and-comment procedural requirements are invalid. *Tenn. Hosp. Assoc. v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018).

The APA, however, distinguishes between "legislative rules," which are subject to the APA's notice-and-comment requirements, and "interpretive rules," which are not. *Perez*, 575 U.S. at 96–97. "The line between interpretive rules and legislative rules is fuzzy and enshrouded in considerable smog." *NRDC v. Wheeler*, 955 F.3d 68, 83 (D.C. Cir. 2020) (internal quotations omitted). The Supreme Court recently acknowledged that the precise meaning of the term interpretive rule is the "source of much scholarly and judicial debate." *Perez*, 575 U.S. at 96. Generally, however, "legislative rules" have the "force and effect of law." *Id*.; *see also Wheeler*, 955 F.3d at 83 ("A legislative rule is one that has legal effect or, alternately, one that an agency promulgates with the intent to exercise its delegated legislative power by speaking with the force of law."); *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 620 (4th Cir.

2018) ("[A] substantive or legislative rule . . . has the force of law, and creates new law or imposes new rights or duties . . . . [A] rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy. . . . Likewise, a rule is legislative if it expands the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created" (internal quotations omitted)).

Conversely, "interpretive rules" are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez*, 575 U.S. at 96. "Interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Id.*; *see also Wheeler*, 955 F.3d at 83 ("An interpretive rule . . . is one that derives a proposition from an existing document, such as a statute, regulation, or judicial decision, whose meaning compels or logically justifies the proposition.") "An interpretive rule, thus, puts the public on notice of pre-existing legal obligations or rights." *Wheeler*, 955 F.3d at 83. "Courts are in general agreement that interpretive rules simply state what the administrative agency thinks the statute means, or only remind affected parties of existing duties." *Azar,* 896 F.3d at 620.

In this case, the parties do not dispute that Congress delegated to the Secretary the authority to define reportable transactions or that the Secretary promulgated 26 C.F.R. § 1.6011-4, which sets forth the types of transactions that qualify as reportable transactions, through required notice-and-comment procedures. The crux of this dispute is whether the IRS can classify specific transactions as "transactions of interest" under 26 C.F.R. § 1.6011-4(b)(6), thereby making them "reportable transactions" and triggering reporting requirements, through an agency-issued notice that did not go through notice and comment.

CIC has demonstrated that it is likely to succeed on its claim that Notice 2016-66 constitutes a legislative rule and that it is invalid because the Secretary failed to comply with required notice-and-comment procedures under the APA. In 26 C.F.R. § 1.6011-4(b)(6), "transaction of interest" is nebulously defined as "a transaction that is the same or substantially similar to one of the types of transactions that the IRS has identified by notice, regulation, or other form of published guidance as a transaction of interest." Effectively, a "transaction of interest" is any transaction the IRS believes is the same or similar to any other transaction it has previously deemed a transaction of interest. Such a circular definition amounts to a catch-all that seemingly grants the IRS unlimited discretion to label any transaction a "transaction of interest," and, thus, a "reportable transaction," if it believes the transaction has the potential for tax avoidance or evasion.[5] As a result, classifying a transaction as a "transaction of interest" through an agency-issued notice like Notice 2016-66 likely constitutes a legislative rule because it expands the footprint of 26 C.F.R. § 1.6011-4(b) by creating new rights and duties regarding reporting requirements related to "reportable transactions." Indeed, prior to the Notice, the micro-captive transactions at issue were not considered transactions of interest, and entities like CIC were under no obligation to provide information regarding those transactions to the IRS. The Notice, therefore, creates new duties and obligations and has the "force of law," especially considering that failure to comply with the newly applicable reporting requirements exposes

[5] That unlimited discretion stands in contrast to the more clearly defined types of reportable transactions identified by the Secretary in 26 C.F.R. § 1.6011-4(b)(1)–(5). This appears to be a conscious decision by the IRS given its representation that it expressly declined to provide a more specific definition of "transaction of interest" during the notice-and-comment process undertaken in connection with promulgating 26 C.F.R. § 1.0611-4. *See* 72 F.R. 43147 (noting that "providing a specific definition for the transactions of interest category in the regulations would unduly limit the IRS and Treasury Department's ability to identify transactions that have the potential for tax avoidance or evasion").

material advisors, like CIC, to monetary fines and criminal prosecution. *See* 26 U.S.C. §§ 6707, 6708; *see also* 26 U.S.C. § 7203 (providing that any person who "willfully" fails to supply information at the time or times required by law shall be "guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned for not more than 1 year . . . ."). Alternatively stated, the Notice is not an interpretive rule, because it goes beyond putting the public on notice of pre-existing legal obligations and beyond reminding affected parties of existing duties. Accordingly, CIC has demonstrated that it is likely to succeed on its claim that Notice 2016-66 is a legislative rule that is invalid because the IRS failed observe notice-and-comment procedures required by the APA.[6]

B. Irreparable Harm

CIC has also demonstrated that it is has suffered, and will likely continue to suffer, at least some irreparable harm in the absence of the requested injunction. Specifically, when CIC first moved for a preliminary injunction, its principal represented that it expected to incur substantial economic costs to achieve compliance with the Notice, estimating that they would spend in excess of $60,000 per year to comply with the Notice's reporting requirements. (Doc. 1, at 11.) In a supplemental declaration filed with the renewed motion for preliminary

[6] The Court finds the IRS's argument that Congress has expressed a clear intent that APA notice and comment procedure need not be followed unpersuasive. *See Mann Constr. v. United States*, __ F. Supp. 3d __, 2021 WL 1923412 (E.D. Mich. May 13, 2021). Congress delegated to the Secretary the authority to "prescribe ***regulations*** which . . . provide ***such rules*** as may be necessary to carry out the purposes of this section." 26 U.S.C. § 6111(c)(3) (emphasis added). The Secretary followed this directive when it promulgated 26 C.F.R. § 1.6011-4 and attempted to define the scope of transactions that qualified as reportable transactions, which included the vaguely-defined "transactions of interest" at issue in this case. What specifically qualifies as a "transaction of interest," however, has not been subject to notice-and-comment procedures that are consistent with Congress's delegated authority. To the contrary, Congress's delegation of authority appears to expressly contemplate that the Secretary be subject to notice-and-comment requirements when "prescribing regulations" and "such rules" as necessary to carry out the purposes of the Internal Revenue Code.

injunction, Sean King, CIC's principal and co-founder, avers, among other things, that CIC has expended "at least $400,000" over the past four years in out-of-pocket costs and expenses associated with complying with the Notice's reporting requirements. (Doc. 59-3, at 2.) The Court remains unaware of any mechanism by which Plaintiffs can ever recover these expenditures in the event it ultimately finds the Notice invalid. Accordingly, Plaintiffs have made at least some showing that they are likely to suffer from irreparable harm in the absence of an injunction.[7] *Welch v. Brown*, 551 F. App'x 804, 813 (6th Cir. 2014) ("This court has held that harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." (internal quotations omitted)).

C. Harm to Others

Neither party has discussed harm that is likely to result to third parties if the Court issues the injunction Plaintiffs request. Ultimately, the Court finds that this factor does not weigh in favor of or against the preliminary injunction and is significantly less important than the other factors considered in ruling on Plaintiffs' motion.

D. Public Interest

As set forth in 26 U.S.C. §§ 6707A and 6111, Congress gave the IRS the authority to designate certain transactions as "reportable transactions" to identify transactions that have the potential for tax avoidance or evasion. Although Plaintiffs may take issue with the IRS's interest in their industry, the public interest in identifying transactions potentially aimed at tax avoidance

[7] The Court notes, however, that CIC's arguments regarding irreparable harm are somewhat undercut by its failure to press its need for injunctive relief while this case worked its way through the appellate process. CIC did not appeal the Court's denial of its initial motion for preliminary injunction and did not move for an injunction pending appeal. While such considerations militate against a finding of irreparable harm, those considerations are outweighed by the evidence indicating that CIC has incurred and continues to incur out-of-pocket costs that it cannot recover in complying with the Notice.

or evasion generally serves the overarching public interest. This interest, however, must be weighed against the public interest in agencies promulgating rules that have the effect of law through procedures mandated by Congress through the APA. Accordingly, the Court finds that this factor is neutral.

IV. CONCLUSION

For the reasons stated herein, CIC's motion for preliminary injunction (Doc. 59) is **GRANTED**. The IRS is hereby **ENJOINED** from enforcing Notice 2016-66 against CIC.

SO ORDERED.

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE