CIC Services v. IRS: the Supreme Court Hands the IRS a Major Loss

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ABSTRACT

The Anti-Injunction Act ("AIA") is an important part of administrative procedure law and a crucial piece of the United States tax system. Enacted to help expedite the tax revenue process, the Act works to invalidate any lawsuit to restrict the assessment or collection of taxes. Nonetheless, having the power to bar standing and having the right to do so are two completely different things. For instance, while the AIA gives the power to bar suits brought against administrative rule-making processes, the Act does not give this right unless the suit was brought with the purpose of restraining the assessment of a tax.

Courts have long used the Act to avoid hearing certain tax disputes. However, according to the Act itself, the courts are only meant to apply the Act to avoid suits brought with the purpose of avoiding a tax. Unfortunately, whether a suit's purpose is to avoid a tax is not often clear; thus, situations arise in which a court must determine both the purpose of a lawsuit and the applicability of the Anti-Injunction Act. That situation is precisely at issue in *CIC Services v. Internal Revenue Service* ("IRS"), a case in which a company's potential Administrative Procedure Act ("APA") claim was barred by the application of the Anti-Injunction Act. First, this article gives a brief overview of the two legislative acts at issue, in that case, the APA and the AIA. Next, this article provides an extensive look at the arguments made by each of the parties in the case and provides a comprehensive discussion of the Supreme Court's opinion, including the opinion's two separate concurrences. Lastly, this article contains a brief conversation regarding the possible future repercussions of the Court's holding in CIC Services.

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I. INTRODUCTION

Typically, general administrative procedure laws allow for pre-enforcement challenges to statutes, but not when the law relates to a tax. In the mid-nineteenth century, Congress enacted the Anti-Injunction Act ("AIA") to promote judicial scheduling and the use of the executive tax refund procedure. The AIA works to restrict the ability of courts to hear tax payment refusal cases until after the tax is paid. Specifically, the AIA requires that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."[3] For decades following the AIA's passage, federal courts used the AIA as a tool to avoid deciding any tax-related cases. However, since the AIA gives no clear definition regarding what constitutes a tax, there has been much confusion about how broad a variety of cases to which the AIA may be applied. One such instance of an AIA application dispute is the case discussed in this article, *CIC Services LLC v. IRS*. In this case, the Supreme Court determined whether an APA challenge of a reporting regulation imposing tax penalties for non-compliance was barred from a pre-enforcement challenge due to the AIA's application.

First, this article examines the legislative acts at play in this case. Second, this article provides the facts of the case and the case's procedural history. Third, this article analyses the arguments made by each of the parties in the case. Fourth, this article gives an overview of the Court's opinion and the concurrence authored by Justices Sotomayor and Kavanaugh. Finally, this article looks at the holding's potential future effects and whether CIC's initial claim had merits.

II. LEGISLATIVE ACTS

The crux of *CIC Services v. IRS* revolves heavily around two major federal acts, the APA and the AIA. While the acts do not appear to be heavily linked to one another, a closer look reveals that a claim under one act can certainly lead to a claim under the other. This is because the majority of all administrative law claims fall within the APA.[4] Specifically, administrative law claims, typically made in hopes of changing or striking down a law, revolve around some sort of improper conduct in the enactment of a certain law or regulation.[5] However, while the APA does give a judicial route for solving these administrative law claims, the route can sometimes be encumbered by the AIA. The AIA works to disallow any suit that may restrain the collecting or assessment of taxes.[6] Hence, in *CIC Services v. IRS*, the federal acts are intertwined because CIC Services' initial APA claim is impeded by the tax restriction portion of the AIA.

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3. 26 U.S.C. § 7421(a).

4. *See generally* EPA, *Summary of the Administrative Procedure Act* (last visited Aug. 25, 2021)., https://www.epa.gov/laws-regulations/summary-administrative-procedure-act; *See Administrative Procedure Act*, BALLOTPEDIA (Aug 25, 2021), https://ballotpedia.org/Administrative_Procedure_Act.

5. *Id.*

6. 26 U.S.C. § 7421.

A. *APA*

Passed in 1946 in response to the heightened scrutiny of federal agency adjudication and unfairness, the APA was created to provide some continuity and clarity amongst federal administrative agencies.[7] This extended scrutiny and heightened awareness around administrative agencies began with an increase in the number of administrative agencies stemming from President Franklin Delano Roosevelt's New Deal economic recovery plan.[8] The plan, passed in hopes of jump-starting the United States economy out of The Great Depression, called for the creation of new administrative agencies such as the Federal Emergency Relief Administration and the Works Progress Administration.[9] With the new agencies' potential to enact boundless regulations on the American people, opponents of the New Deal desired some sort of administrative oversight of these various agencies.[10] Essentially, in an effort to limit the reach of government agencies, opponents to extensive government regulation passed the APA.

Although formally under the executive branch, administrative agencies often interact with other federal branches.[11] Thus, the APA provides a structure to ensure that administrative agencies perform their duties without violating the separation of powers, as defined by the Constitution.[12] Before the APA was enacted, the Attorney General's Committee on Administrative Procedure in Government Agencies thoroughly researched basic administrative law procedures and published a report outlining how to improve administrative law procedures. [13] Many of the procedures that would later be formally adopted in the APA, such as using official-led hearings before administrative agencies.[14]

Following the APA's unanimous passage in 1946, the Attorney General's Office produced an outline listing the basic purposes of the APA as: "(1) to require agencies to keep the public informed of procedures and rules; (2) to allow for participation in the rulemaking process; (3) to establish standards of conduct for adjudication and rulemaking; and (4) to determine the scope of judicial review."[15] The creation of the APA greatly changed the administrative agency landscape. For instance, the APA divided the basic functions of agencies into two categories: adjudication and rulemaking.[16] Adjudication consists of informal adjudication (negotiation-like dispute resolution) and formal adjudication (Trial-like proce-

7. Cynthia Scheopner, *Administrative Procedure Act*, BRITANNICA (last modified Dec. 1, 2018), https://www.britannica.com/topic/Administrative-Procedures-Act.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Administrative Agency*, LAW SHELF (Aug. 27, 2021), https://lawshelf.com/shortvideoscontentview/administrative-agency/; *Administrative Agencies Explained*, THE BUSINESS PROFESSOR (Aug. 27, 2021), https://thebusinessprofessor.com/en_US/us-legal-system/what-are-administrative-agencies.

12. *See generally* Emily Bremer, *Deliberate and Serendipitous Separation of Powers in the Administrative State*, YALE J. OF REG., https://www.yalejreg.com/nc/deliberate-and-serendipitous-separation-of-powers-in-the-administrative-state/; *See* Joanna Grisinger, The Attorney General's Committee on Administrative Procedure, J. OF POLICY HISTORY, https://muse.jhu.edu/article/246825.

13. Scheopner, *supra* note 7.

14. Scheopner, *supra* note 7.

15. *Id.*

16. *Id.*

dure).[17] Since only formal adjudication provides a record of proceedings and final resolution, it is the only adjudication method subject to judicial review.[18]

One of the most critical portions of the APA, and the focus of the CIC Services case, is the judicial review function. Although informal adjudication proceedings are not technically subject to judicial review, agency decisions made through informal adjudication can be reversed if a court determines an agency's decision was arbitrary and capricious or an abuse of discretion.[19] Under the APA, formal adjudication cases are subject to judicial review. Courts may question an agency's decision by evaluating the formal record and requiring agency decisions be supported by substantial evidence.[20] This substantial evidence requirement gives reviewing courts rather broad authority to overturn an agency's decision based on case facts or the motives behind an agency's policymaking.[21] So even though a reviewing court's primary focus is to ensure an agency decision complies with constitutional and separation of powers requirements, the Article III court hearing the case has significant freedom to determine whether an agency decision was made with "substantial evidence."

B. *AIA and Its Relation to Tax*

Originally enacted as part of the Judiciary Act of 1867, the AIA's origin is centered on the desire for clarity in the enforcement and collection of taxes.[22] According to the AIA, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[23] Thus, under this reading, the AIA effectively works to invalidate pre-enforcement challenges to a tax. Consequently, taxpayers hoping to challenge a tax have only one primary option – they must pay the tax and pursue a refund.[24] Clearly, this judicial bar imposes a significant burden on the taxpayer, who must pay the tax and undertake the often-expensive process of attempting to receive a refund.

The basis behind the AIA heavily mirrors the Supreme Court's holding in *Flora v. United States*. In that case, the Court ruled that a taxpayer must pay a tax's full amount before challenging an IRS tax assessment.[25] This full payment requirement rule works similarly to the AIA in that the taxpayer's only options are to either file for a refund or to undergo an assessment deficiency proceeding in tax court.[26] However, while the AIA and subsequent Supreme Court rulings appear to

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17. TOFF GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW, at 3 (2017), https://sgp.fas.org/crs/misc/R41546.pdf.

18. *Id.*

19. *Id.* at 3.

20. *Id.*

21. *The Administrative Procedure Act (APA)*, EPIC.ORG, https://epic.org/open_gov/Administrative-Procedure-Act.html.

22. Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 NOTRE DAME L. REV. 81, 94 (2014).

23. 26 U.S.C. § 7421(b).

24. *See Case: Having Adequate Remedies, AIA Prevents Suit Against Collection of Taxes (6th Cir.) (IRC §7421)*, BLOOMBERG TAX, (Aug. 27, 2021,12:00 AM), https://news.bloombergtax.com/daily-tax-report/case-having-adequate-remedies-aia-prevents-suit-against-collection-of-taxes-6th-cir-irc-7421?context=search&index=5.

25. Flora v. U.S., 357 U.S. 63, 75-76 (1958).

26. *Id.* at 73-74.

make it difficult for taxpayers to obtain standing for judicial tax relief, this is not always the case.

Additionally, in a variety of recent high-profile cases, such as *NFIB v. Sebelius*, courts continuously allow taxpayers to circumvent the AIA by categorizing potential taxes as penalties rather than taxes.[27] This categorization loophole is precisely the issue in *CIC Services v. IRS*. Specifically, the issue is whether the reporting requirement penalties are entirely different than a tax assessment itself.[28]

III. BACKGROUND

A. *Facts*

The *CIC Services v. IRS* case primarily deals with the IRS goal to regulate captive insurance. Captive insurance differs from regular insurance in that, while typical business insurance is used to cover a variety of risks, captive insurance is a form of insurance aimed at filling gaps in the coverage of a typical business policy.[29] Captive insurance can be very attractive, as it can be more affordable and more customizable than traditional insurance policies.[30] A common form of captive insurance is provided through the creation of a subsidiary company by the parent. The sole purpose of the subsidiary is to insure the parent company against things not covered in the parent's business insurance policy.[31] This type of insurance not only allows the subsidiary to produce an insurance policy that more accurately reflects the business risks involved but also streamlines the claims process because both businesses are incentivized to pay claims timely.[32]

Congress has long been aware of the benefits of captive insurance. In 1986, Congress enacted a law stating that, in the case of certain small companies, third-party insurers do not have to pay taxes on their underwriting income if they receive less than $1.2 million in premiums.[33] This tax deduction played a large role in increasing the prevalence of captive insurance companies. In 2015, Congress went a step further and increased the $1.2 million limit to $2.2 million.[34] Despite Congress's seemingly avid support for the use of captive insurance, the IRS has "long been hostile" to the concept.[35] This hostility became crystal clear in the IRS's decision to add captive insurance to its 2017 Dirty Dozen list.[36]

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27. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012).

28. CIC Servs., LLC v. IRS, 2017 WL 5015510, at*3 (E.D. Tenn. Nov. 02, 2017), *aff'd*, 925 F.3d 247 (6th Cir. 2019), *rev'd and remanded*, 141 S. Ct. 1582, 209 L. Ed. 2d 615 (2021), and *vacated and remanded*, No. 18-5019, 2021 WL 447660 (6th Cir. 2021).

29. Julia Kagan, *Captive Insurance Company*, INVESTOPEDIA (Oct. 10, 2021), https://www.investopedia.com/terms/c/captive-insurance-company.asp.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Captive Insurance Companies – New Law Passed by Congress*, ALIANT LAW (Feb. 1, 2016), https://www.aliantlaw.com/blog/captive-insurance-companies-new-law-passed-by-congress/.

34. *Id.*

35. *Is the IRS Targeting Captive Insurance Arrangements?*, CPA PRACTICE ADVISOR (Apr. 22, 2020), https://www.cpapracticeadvisor.com/tax-compliance/news/21135173/is-the-irs-targeting-captive-insurance-arrangements.

36. IRS, *IRS warns of Abusive Tax Shelters on 2017 "Dirty Dozen" List of Tax Scams*, (Feb. 14, 2017), https://www.irs.gov/newsroom/irs-warns-of-abusive-tax-shelters-on-2017-dirty-dozen-list-of-tax-scams (Annual list of the most common scams taxpayers may encounter).

The *CIC Services* dispute started in 2004 when Congress began requiring taxpayers and their material advisors (CIC Services is a material advisor for captive insurance transactions) to include information regarding "reportable transactions" on their tax returns.[37] Not only did these new reporting requirements impose a high burden on the taxpayers and advisors, but they also included heavy penalties of up to $200,000 for taxpayers who do not report the required information and a penalty of at least $50,000 for advisors who fail to report.[38] However, while the punishment for failure to report was unambiguously set out by Congress, The IRS was given the responsibility of determining what transactions are "reportable transactions." Specifically, Congress designated reportable transactions as those the IRS recognizes as having potential for tax evasion.[39] The IRS promptly promulgated rules designating any "transaction of interest" as a reportable transaction based on this guidance.[40] In 2016, the IRS acted with its Congressional authority and issued Notice 2016-66 identifying captive insurance transactions as transactions of interest.[41] The Notice, which retroactively applied to the tax years 2006 to 2015, required taxpayers and their advisors to report each of their captive insurance transactions for the last ten years.[42] The Notice imposed heavy reporting requirements on the company and permanently changed the captive insurance market, which led to CIC Services challenging the Notice under the APA as it had gone through neither notice-and-comment rulemaking nor Federal Register publishing.[43]

B. *Lower Court Decision*

In March of 2017, CIC Services filed its initial lawsuit in the Eastern District of Tennessee, arguing that, although deemed as guidance by the IRS, Notice 2016-66 was actually an IRS-created rule, and must go through notice-and-comment rulemaking to be valid.[44] According to the company, CIC Services' pre-enforcement action was not based on any tax liability claim by the company. Instead, the action centered on the hundreds of hours and millions of dollars compliance with the new IRS reporting requirements would likely cost CIC Services.[45] In its motion to dismiss the suit, the IRS argued the district court lacked subject matter jurisdiction as the suit was barred by the AIA and the suit's potential effect of restraining taxes.[46]

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37. Nicole M. Eilliot, James Dawson, Joshua David Odintz & Chad M. Vanderhoef, *U.S. Supreme Court Decision May Pave Way for Future IRS Laws*, HOLLAND & KNIGHT (June 2, 2021), https://www.hklaw.com/en/insights/publications/2021/06/us-supreme-court-decision-may-pave-way-for-future-irs-lawsuits.

38. *Id.*

39. IRS, *Transactions of Interest*, (June 26, 2021), https://www.irs.gov/businesses/corporations/transactions-of-interest.

40. *Id.*

41. I.R.S. Notice 2016-66, 2016-47 I.R.B. 745 (Nov. 2, 2016).

42. *Id.*

43. CONG. RSCH. SERV., CIC SERVICES V. INTERNAL REVENUE SERVICE: INTERPRETING THE TAX ANTI-INJUNCTION ACT, (Feb. 23. 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10576/2.

44. *CIC Services*, 2017 WL 5015510 at *1.

45. *Id.*

46. *Id.* at *2.

The district court agreed with IRS, with the Sixth Circuit later affirming the judgment.[47] The Sixth Circuit reasoned that because a tax penalty supports the Notice's reporting regulations, any claim against the reporting regulations would have the effect of restraining the IRS from collecting tax penalties, thus violating the AIA.[48] Following the Sixth Circuit's decision, CIC Services unsuccessfully petitioned the Circuit for a rehearing en banc.[49] After narrowly failing the rehearing request by a 9-7 vote, CIC Services was left with no other choice but to petition the U.S. Supreme Court.[50] Certiorari was granted on May 4, 2020.[51]

IV. ARGUMENTS BEFORE THE COURT

A. *The Government's Arguments*

Arguing in support of the Sixth Circuit ruling that the AIA bars this suit, the government first cited the portion of the act which states "no suit for the purpose of restraining the assessment or collection of any tax may be maintained."[52] According to the government, this language in the AIA explicitly bars CIC Services' suit and precludes any form of preemptive litigation.[53] However, the government argued that while preemptive litigation was disallowed in this situation, there were still appropriate avenues for resolution available to CIC Services, such as the IRS's tax refund system.[54] The government also argued that CIC Services' suit would restrain the assessment and collection of taxes, thus violating the AIA.[55] Citing the Court's reasoning in *Sebelius*, the government stated that Subchapter 68B penalties are indeed taxes.[56] This was extremely important in arguing against CIC Services because Subchapter 68B also contains the penalties stated in Notice 2016-66.[57] However, according to the government, attempting to permanently enjoin the enforcement of a Notice calling for tax penalties directly conflicts with assessment and collection of taxes; thus, the AIA should bar the suit.

The next government argument attacked CIC Services' heavy reliance on the Supreme Court's holding in *Direct Marketing Ass'n v. Brohl*. There, the Court held that pre-enforcement challenges of tax reporting rules are not barred by the AIA when reporting requirements do not involve the collection of taxes, an injunction would not restrain the collection of taxes[58]. A reading of the reporting requirements would not violate the rule that jurisdictional rules should be clear.[59] While CIC Services' argued that Direct Marketing provided binding precedential value, the government countered that the injunctive relief sought by CIC Services would do more than just inhibit the collection of taxes (as was the case of *Direct*

47. CIC Services, LLC v. IRS, 925 F.3d 247 (6th Cir. 2019).
48. *CIC Servs.*, 2017 WL 5015510 at *4.
49. *CIC Servs*., 936 F.3d at 502.
50. *Id.*
51. CIC Servs., LLC v. IRS, 140 S. Ct. 2737 (2020).
52. 26 U.S.C. § 7421.
53. *See generally* 26 U.S.C. § 7421.
54. Brief for Respondents at 16, CIC Servs., LLC v. IRS, 141 S. Ct. 1582 (2021) (No. 19-930).
55. *Id.* at 15.
56. Sebelius, 567 U.S. at 544.
57. Brief for the Respondents, *supra* note 5 at 21.
58. Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 16 (2015).
59. *Id.* at 15.

Marketing).[60] Additionally, the government attempted to further minimize *Direct Marketing* by showing that the case does not directly speak to whether the AIA bars a suit aimed at preventing the collection of tax penalties.[61]

Lastly, in response to CIC Services' statement that the AIA would undermine the APA, the government argued that the APA stands to offer judicial review when there is no other alternative.[62] However, with Notice 2016-66, there are other remedies available to CIC Services, such as using a post-payment refund suit. Thus, in the eyes of the government, there is no requirement for judicial review.[63] Additionally, while the government admitted that the APA contains a presumption favoring judicial review, like all presumptions, this presumption is not binding and can easily be overcome by statutes.[64] Supporting this, the government reasoned that since the APA expressly incorporates statutory limitations (such as the AIA) into its judicial review requirements, the creators of the APA must have intended for it to be limited in some instances.[65]

B. *CIC's Arguments*

The first of CIC Service's arguments addressed the text of the AIA. Specifically, CIC Services took issue with the AIA's wording that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained."[66] Citing the act's legislative history, CIC Services argued that the clear purpose of the act was to prevent individuals from avoiding the payment of lawful tax revenue.[67] As a result, CIC Services argued the AIA should not be applicable because the purpose of CIC Services' suit was not to restrain tax collection.[68] Instead, CIC Services' suit only challenged Notice 2016-66, not the separate portion of the statute containing the tax penalties.[69] CIC Services further argued that its claimed injuries from the pleadings of its suit were the costs of complying with the reporting requirements, not any form of tax liability.[70] Hence, according to CIC Services, even if the tax penalties were repealed, the company's interest in maintaining the lawsuit would remain unchanged.[71]

CIC Services relied heavily on the Supreme Court's holding in *Direct Marketing Ass'n v. Brohl in its next argument.* According to CIC Services, the Court's reasoning effectively resolved the question at issue in this suit and set out a framework for determining when tax assessment or collection has suffered interference.[72] However, while there was a tangential connection, the *Direct Marketing* case did not involve any form of tax penalty.[73] Basically, in citing *Direct Market-*

60. Brief for the Respondents, *supra* note 5 at 27.
61. *Id.* at 26.
62. *Id.* at 41.
63. *See generally* IRS, Notice 2016-66 (Nov. 1, 2016).
64. Brief for the Respondents, *supra* note 5 at 41.
65. *Id.*
66. 26 U.S.C. § 7421.
67. Brief for the Respondents, *supra* note 5 at 16).
68. *Id.* at 30.
69. *Id.*
70. *Id.*
71. *Id.*
72. *See generally* Direct Mktg., 575 U.S. at 1 (Holding that an enforcement of notice and reporting requirements was assessment, levy, or collection under the TIA).
73. *Id.*

ing, CIC Services hoped to show that an injunction against reporting requirements does not stop the collection of taxes, even if the injunction keeps the IRS from obtaining the necessary information for tax purposes.[74]

The third of CIC Service's arguments centered around the connection between the reporting requirements of Notice 2016-66 and its tax penalties. Specifically, CIC Services argued that there must be a reporting violation detected by the IRS before any collection or tax assessment can occur. Then, the IRS must make the conscious decision to impose a tax penalty.[75] Thus, based on CIC Service's line of reasoning, the steps between violating the reporting requirements and the IRS assessing a tax are too far removed from one another to be considered one and the same.[76] Additionally, CIC Services claimed that because its suit is a pre-enforcement injunction, there has been no reporting regulation violation; hence no tax penalty has even been assessed.[77] Therefore, the company claims that there should be no reason for any court to believe that the company's suit affects the assessment or collection of taxes.[78]

Lastly, CIC Services argued that the Sixth Circuit's ruling was counterproductive to the purposes of both the APA and the AIA because the ruling disallows pre-enforcement review while falling outside the intended scope of the AIA.[79] Usually, pre-enforcement review is the only avenue for judicial review of unlawful agency action, hence the APA's strong support.[80] But, according to CIC Services, this support was incorrectly counteracted by the Sixth Circuit's ruling. By taking away the company's only pre-enforcement judicial cause of action, the court effectively made it so that CIC Services must first violate the Notice to obtain standing in court.[81] Additionally, CIC Services further warned that if the Sixth Circuit's decision is upheld, a slippery slope could be created in which agencies can avoid pre-enforcement review simply by attaching a tax penalty to their new regulations.[82]

V. OPINION

A. *Court Draws Fine Line Between Potential Penalties and a Tax*

In an opinion authored by Justice Kagan, the U.S. Supreme Court reversed and remanded the Sixth Circuit's decision in *CIC Services v. IRS*. The Supreme Court instead held that the AIA did not bar the company's suit challenging Notice 2016-66.[83] In reaching this conclusion, the Court chose to wholly extend its holding in *Direct Marketing* despite the differences in the *CIC Services* case.[84] According to the Court, its holding in *Direct Marketing* clearly stands to show that information gathering is a part of tax administration that happens exclusively be-

74. Brief for the Petitioner at 24, CIC Servs., LLC v. IRS, 141 S. Ct. 1582 (2021) (No. 19-930).
75. *Id.* at 25.
76. *Id.* at 18-19.
77. *Id.* at 25.
78. *Id.* at 29.
79. *Id.* at 32.
80. *Id.*
81. *Id.* at 34.
82. *Id.* at 32.
83. *CIC Servs.*, 141 S. Ct. at 1592.
84. *Id.* at 1589.

fore the collection or assessment of taxes; thus, since no tax has been assessed or collected, the AIA should not be implicated.[85]

Additionally, the AIA only bars suits made for the purpose of restraining taxation. The Court ruled that the AIA should not apply because the purpose of CIC Services' suit was not to avoid tax assessment or collection. Rather, the suit's purpose was simply to invalidate Notice 2016-66 in the hopes of abolishing its reporting requirements.[86] In agreeing with the company, the Court listed three main characteristics that "refute the idea that this is a tax action in disguise."[87] The first of these characteristics was that Notice 2016-66 created extensive reporting costs and obligations. The Court agreed with CIC Services when it estimated "it will have to spend 'hundreds of hours of labor' and in excess of $60,000 per year" to fulfill the Notice's requirements."[88] Therefore, because these costs were completely separate from any civil tax penalties, the Court found them distinguishable from any claim related to tax penalties.[89]

The second characteristic demonstrating the purpose of the suit was that the reporting regulations required by Notice 2016-66 were extremely far removed from any tax penalties.[90] Specifically, under Notice 2016-66, the IRS may assess tax penalties against a party when the following events have occurred: (1) the party failed to report the transaction; (2) IRS determined that violation occurred; and (3) IRS imposed a civil tax penalty.[91] Thus, because many administrative and discretionary actions must be taken before CIC Services would even incur a tax liability, the Court felt that "[b]etween the upstream Notice and the downstream tax, the river runs long."[92]

The third characteristic showing the suit's sole purpose was to set aside Notice 2016-66 is the potential for criminal penalties upon those who violate the Notice. Specifically, the Court explained that since the Notice can result in criminal penalties, it "clinches the case [as] . . . a suit brought to set aside the Notice."[93] The Court further reasoned that "the criminal penalties here practically necessitate a pre-enforcement, rather than a refund, suit."[94] Lastly, in summing up its belief that this pre-enforcement suit was CIC Services' only feasible option, the Court stated, "the existence of criminal penalties explains why an entity like CIC must bring an action in this form."[95]

B. *Party Status Might Influence the Outcome*

While all taxpayers may initially champion *CIC Services v. IRS* as a win in their fight against excessive taxes, this may not actually be true. In her concurrence, Justice Sotomayor agreed with the Court's holding in the case but chose to write separately in hopes of distinguishing between tax advisors (CIC Services)

85. *Id.*
86. *Id.* at 1588.
87. *Id.* at 1590.
88. *Id.* at 1591.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 1592.
94. *Id.*
95. *Id.*

and taxpayers when it comes to reporting requirements.[96] The text of Justice Sotomayor's concurrence shows that she believes pre-enforcement actions undertaken by taxpayers themselves would not be able to avoid the AIA's bar against standing.[97] In her concurrence, she reasons that the Court's decision may have been different if CIC Services were a "taxpayer instead of a tax advisor."[98] In sum, while Justice Sotomayor appears to close the door on taxpayers when it comes to avoiding taxes on their own behalf, she leaves the window open by stating that such suits may proceed, dependent on a context-specific inquiry into the issue.[99]

C. *Effect on Previous Precedent*

Despite the Supreme Court's decision being somewhat in line with its previous holdings, there are a few contradictions between the current holding in *CIC Services* and some of the Court's older decisions. The decisions at issue, *Alexander v. Americans United* and *Bob Jones Univ. Simon*, come from two 1974 cases that created an unequivocal rule in determining whether the AIA barred a suit.[100] According to the rule, any suit was barred by the AIA if that suit would prevent the assessment or collection of a tax.[101] Following the creation of this rule, courts across the country began to view the AIA's scope in extremely broad terms.[102] The Supreme Court's recent holding in CIC Services unexpectedly and significantly narrowed the scope of that previously very broadly interpreted rule.

To help address this, Justice Kavanaugh also wrote a separate concurrence to help highlight the differences between the CIC Services case and the other two cases. Justice Kavanaugh reasoned that the rule promulgated by the *Americans United* and *Bob Jones* cases incorrectly required courts to look to the "effects of suits."[103] Later in his concurrence, Justice Kavanaugh explained that rather than consider the "downstream effects" of a suit, courts should only determine the objective of a suit.[104] In total, the CIC Services holding and concurrences do not entirely extinguish the rule set out by *Americans United* and *Bob Jones*. And to this point, Justice Kavanaugh's concurrence works to clarify the new limitation to the scope of the rule initially created by the two cases.

D. *Applicability of Holding*

Though the Supreme Court's holding in the CIC Services case seems like a win for all those currently participating in captive insurance transactions, in reality, the Court's ruling changes nothing about the captive insurance market for the time being. For instance, now that the Supreme Court has handled the procedural

96. CIC Servs., LLC v. IRS, 141 S. Ct. 1582, 1594 (2021) (Sotomayor, J., concurring).
97. *Id.* at 1594-95.
98. *Id.* at 1594.
99. *Id.* at 1595.
100. *See generally* Alexander v. "Americans United" Inc., 416 U.S. 752, 759 (1974); *See generally* Bob Jones Univ. v. Simon, 416 U.S. 725, 727 (1974).
101. *See generally Alexander*, 416 U.S. at 760; *See generally Bob Jones Univ.*, 416 U.S. at 727.
102. *CIC Servs.*, 141 S. Ct. at 1595; *See generally* U.S. v. Am. Friends Serv. Comm., 419 U.S. 7, (1974) (Prohibiting court-ordered injunction against the collection of taxes).
103. CIC Servs., LLC v. IRS, 141 S. Ct. 1582, 1596 (2021) (Kavanaugh, J., concurring).
104. *Id.* at 1595-96.

standing portion of CIC Services' case, it is now up to the federal district court to determine the true outcome of the Notice 2016-66.[105] But until that decision is rendered, the companies profiting through captive insurance transactions must continue to comply with the Notice in its current state.[106] Thus for the foreseeable future, and likely for a couple of years following that, CIC Services and its competitors will have no choice but to comply with the reporting requirements of Notice 2016-66 when processing any transaction of interest.

Yet, while the Court's holding in the CIC Services case may appear to signal sweeping changes to the tax pre-enforcement landscape, it is possible that the holding will not apply very broadly beyond the case's particular facts. Specifically, though the case may make it easier for taxpayers and tax advisors to initiate pre-enforcement challenges against certain agency regulations, any claim will still be required to be a substantial challenge, per the requirements of the APA.[107] Furthermore, due in part to Justice Sotomayor's concurrence, any taxpayer seeking relief under the APA will likely have a difficult time even obtaining standing for his or her pre-enforcement suit.[108] In the end, only time will tell how broadly federal courts decide to interpret the Supreme Court's holding in *CIC Services*.

VI. OUTCOMES

A. *What's Next for CIC's APA Claim*

The Supreme Court's ruling in *CIC Services v. IRS* is likely just the beginning of the litigation between the company and the IRS. Despite being a slight afterthought in the Supreme Court case, the CIC Services' claim began with an APA suit against the IRS for supposed improper rulemaking.[109] This claim, after quite some delay, is now due to be heard by the Sixth Circuit.[110] Though it remains to be seen whether CIC Services will have success through judicial review, it appears likely that the company will spend much of its time in court over the coming years.

B. *Increased Likelihood of Future Reporting Disputes*

While the Court's holding in CIC Services will almost certainly lead to an onslaught of pre-enforcement challenges to agency regulations, it remains to be seen how far courts will extend the case. To some agencies, such as the IRS, the CIC Services decision could likely cause the majority of tax pre-enforcement actions to

105. *See generally* Andrew Rennick, *CIC Services, LLC v. Internal Revenue Service: Captive Insurance Wins a Battle, but the War Continues*, JD SUPRA, https://www.jdsupra.com/legalnews/cic-services-llc-v-internal-revenue-4115320/ (last visited Aug. 29, 2021).
106. *Id.*
107. Andrew Velarde, *IRS Sees CIC Services' Applicability as 'Rather Narrow'*, TAX NOTES, https://www.taxnotes.com/tax-notes-federal/litigation-and-appeals/irs-sees-cic-services-applicability-rather-narrow/2021/06/07/76k5l.
108. *CIC Servs.*, 141 S. Ct. at 1594.
109. *CIC Servs.*, 2017 WL 5015510 at *1..
110. *CIC Servs.*, 925 F.3d at 247.

shift from refunds suits to pre-enforcement suits.[111] But to others, including Justice Kagan, the government's worries are overstated because the holding in *CIC Services* is only applicable to certain narrow situations.[112] In her eyes, relying on the *CIC Services* holding may not be as useful when dealing with regulatory taxes and regulatory mandates, as it would be for the third-party reporting requirements at issue in *CIC Services*.[113] Either way, it will be very interesting to see the long-term implications of the Supreme Court's decision in *CIC Services v. IRS*.

VII. CONCLUSION

With the implementation of Notice 2016-66 and its requirement of captive insurance transaction reporting, the IRS hoped to expand its regulations into an area of business known for being ripe with tax avoidance transactions.[114] However, in expediting the rulemaking process to rapidly allow Notice 2016-66's enactment, CIC Services believed that the IRS may have potentially violated the APA by foregoing the required formal rulemaking procedures.[115]

But, before giving any decision regarding an APA violation, the Supreme Court first had to rule that CIC Services had the standing to bring a pre-enforcement claim. While the Supreme Court's ruling in favor of CIC Services was a large boost for the company's case against Notice 2016-66, there is still much work to be done by CIC Services and its legal team. With the District Court for the Eastern District of Tennessee now tasked with hearing CIC Service's Notice 2016-66 claim on the merits, both the IRS and CIC Services will have an opportunity to demonstrate their interpretations of the APA and to possibly change how the IRS declares its rules going forward.

Though the actual outcome of CIC Service's claim is not yet determined, the CIC Services case already provides extremely useful precedent to those attempting to challenge agency regulations because, by seemingly allowing pre-enforcement challenges to stand, the Supreme Court has potentially opened the door for not only pre-enforcement challenges to tax notices, but pre-enforcement challenges to all agency regulations.

111. Lee A. Sheppard, *Successful Challenges to IRS Guidance After CIC Services*, TAX NOTES, https://www.taxnotes.com/tax-notes-federal/information-reporting/successful-challenges-irs-guidance-after-cic-services/2021/05/31/67zmx (last visited Aug. 29, 2021).
112. *Id.*
113. *Id.*
114. IRS, *supra* note 39.
115. CONG. RSCH. SERV., *supra* note 43.