

Corporate Inversions

## Chamber Doesn't Oppose Briefing Delay in Inversion Rules Case

### BNA Snapshot

- IRS asks court for time to finalize disputed regulations, reconsider appeal
- Says notice-and-comment period completed, draft submitted for approval



By Matthew Beddingfield

The U.S. Chamber of Commerce has agreed to an IRS request for more time to consider its appeal of a ruling that tossed out regulations intended to inhibit corporate inversions.

The Chamber of Commerce said in a March 13 motion that the IRS's extension request "should give the Government sufficient time while still moving the case toward final resolution."

The Internal Revenue Service asked the U.S. Court of Appeals for the Fifth Circuit to halt the briefing schedule in its case because the temporary rules at issue are set to become final, calling the transition an "imminent administrative action." The agency said in its March 9 motion that it plans to finalize Treasury Regulations Section 1.7874-8T (T.D. 9761, REG-135734-14, issued in April 2016), and has already sent a draft of the final anti-inversion regulations to the Office of Management and Budget for review.

"Accordingly, we respectfully request that briefing of this case be stayed until a final regulation is published in the Federal Register, during which time the Government will evaluate whether it should proceed with this appeal or dismiss it," the motion said.

### Invalid Regulations

The U.S. District Court for the Western District of Texas ruled in favor of the U.S. Chamber of Commerce on Oct. 6, 2017, finding that the temporary regulations were invalid because the IRS failed to allow for a notice-and-comment period as required by the Administrative Procedure Act (APA). The agency filed a notice stating its intent to appeal the decision in November 2017.

The notice-and-comment period has been completed, and the final regulations would replace the court-rejected temporary regulations if approved, the IRS said in its motion.

Robert Kovacev, a partner at Steptoe & Johnson LLP in Washington, told Bloomberg Tax that it was noteworthy that the solicitor general hasn't yet authorized the IRS's appeal in the case.

"Often the IRS will file a notice of appeal while the Solicitor General review is pending to preserve its rights, then dismiss the appeal if the Solicitor General does not agree," Kovacev said. "It is unusual for the process to take this long, however. This may mean the Solicitor General believes there is a real risk that the IRS could lose on appeal, creating an unfavorable precedent, and is weighing not authorizing an appeal."

### Government Claims Imminent Finalization

The temporary regulations in question don't "sunset" for at least another year, Gary Wilcox, a tax partner at Mayer Brown told Bloomberg Tax. "Yet the government is claiming that finalization of the regulation is imminent."

Wilcox said if the government supersedes the temporary regulations with final regulations that are "retroactively effective" to

the date of the temporary regulations,"it will be interesting to see what impact that has on the district court's decision or the status of the appeal."

Kovacev said if the IRS does issue a final regulation, it doesn't necessarily mean the appeal should be dismissed, and that the issue of the validity of temporary tax regulations is important for both tax and administrative law.

### **An Unfair Setup**

"It would be unfair if the IRS could violate the APA with a temporary regulation, tie up any challenges in court long enough to issue a final regulation, then shut down any judicial review of the temporary regulation by claiming the issue is moot, all the while enforcing the temporary regulation as if it had the force of law," he said.

Jones Day and the U.S. Chamber Litigation Center represent the Chamber of Commerce, and didn't respond to a request for comment. The Department of Justice Tax Division represents the IRS and declined to comment.

The case is *Chamber of Commerce of the U.S. v. IRS*, 5th Cir., No. 17-51063, response filed 3/13/18.

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