ENJOINING THE IRS—USING LITIGATION TO STOP A REVOCATION

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For many tax-exempt organizations and the practitioners who represent them, the prospect of litigating a tax issue against the IRS is possibly the scariest thing in the world. Tax litigation is therefore often viewed as a tactic to be used only when all hope is lost. Basically, most organizations and many tax advisors will not seriously consider the prospect of engaging in litigation over an organization's tax-exempt status until the IRS has already revoked the organization's exempt status and dissolution has become inevitable. This is the worst time to engage in tax litigation.

Background

To avoid litigation, most organizations facing the prospect of having their tax-exempt status revoked will have spent several years, possibly more than a decade, and expended a substantial portion of the organization's resources attempting to resolve their case administratively in a non-adverse manner. By the time that the IRS issues a final adverse determination letter revoking an organization's tax-exempt status, the organization will have incurred expenses related to an IRS examination; filing a protest to a proposed revocation; responding to the IRS rebuttal to the protest; at least one and possibly several meetings with an IRS appeals officer; requesting technical advice from the IRS National Office regarding issues about which the law is unclear, including whether the proposed revocation should be applied retroactively; seeking assistance from members of Congress (which rarely has any tangible benefit); and participating in meetings with various officers in the Exempt Organizations Division.

In addition to exhausting all avenues for a resolution within the IRS, many organizations will spend substantial time attempting to obtain a favorable resolution by seeking support from media sources and politicians, in the often misguided belief that this will compel the Service to reconsider its proposed revocation. All told, organizations will spend many thousands of dollars, or more, and countless hours floundering in the Service's administrative review process, and this does not even take into account the immeasurable costs of the institutional pressures of working under the prospect of a proposed revocation, which may include the loss of grant funding, questions from the media and others within the exempt community, and problems recruiting and retaining talented leadership—people who may well be concerned about the long-term viability of an

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organization that has already received a proposed revocation letter.

Often, by the time the IRS has revoked an organization's tax-exempt status and litigation has become the only remaining option, an organization will have exhausted its assets, ceased a substantial portion of its operations, significantly reduced its work force, and no longer have the ability to generate additional revenue. Basically, by the time that most organizations decide to litigate, all that remains of a once viable charity is an empty shell that lacks the assets to mount a sufficient legal defense. More significantly, many organizations will not consider engaging in litigation until circumstances are so dire that dissolution has become inevitable, irrespective of the outcome of the litigation. The worst time to attempt to litigate an organization's tax exemption is when the outcome of the litigation is no longer relevant to the organization's continued existence and the organization lacks the resources to challenge the Service's position in a meaningful way.

A review of prior case law provides multiple examples of organizations that filed a Tax Court petition but lacked sufficient funds to participate in any aspect of the case after the initial filing, and organizations that filed a petition after having dissolved—unsurprisingly, none of the organizations in these cases were ultimately successful in their litigation.[1] However, it is only at this point that many organizations decide to enter into litigation against the IRS.

The time to challenge a proposed revocation letter in litigation is not after the IRS has revoked the organization's tax-exempt status and the ultimate fate of the organization has already been decided. Instead, an organization should litigate its exempt status before it is revoked, when it still has the ability to accept charitable contributions and can engage in operational activities that require it to be recognized as exempt under Section 501(c)(3). It is then that a favorable ruling by the court will actually benefit the organization, ensuring its continued existence. Litigating an exemption issue prior to the issuance of a final revocation letter provides several additional benefits. Among them:

- By litigating a case as a charitable entity, the organization preserves its ability to receive deductible contributions and avoid paying tax on these contributions throughout the litigation.[2]
- As a charitable entity, the organization will be allowed to continue to engage in its operational activities that require, or are substantially benefited by, recognition as a Section 501(c)(3) entity.
- More funds will be available to present the case in court, both because fewer resources will have been wasted on the administrative process and because the continuation of existing revenue streams will prevent the organization from simply depleting its funds.
- The burden of proof will be on the IRS, not the organization.
- Restrictions on the admissibility of evidence in U.S. Tax Court will be reduced.
- The organization will be able to take greater control over its tax-exempt status by obtaining an injunction prohibiting the IRS from revoking that status until the court rules on whether the organization should be recognized as exempt.

Regardless of the outcome, litigation will be a drain on an organization's resources. However, organizations that seek a judicial review of their tax-exempt status will be better able both to withstand the financial burdens of the litigation—which, based on the author's experience, are unlikely to significantly exceed the expense associated with the IRS administrative process—and, if a favorable ruling is obtained, emerge

[1] See *Solutions Plus, Inc.*, TCM 2008-21 ("Petitioner's only involvement in this case has been to file the petition and a designation of place of submission"); *National Republican Foundation*, TCM 1988-336; *Abraham Lincoln Opportunity Foundation*, TCM 2000-261.

[2] Note that Section 7428(c)(1) allows organizations to receive tax-deductible charitable contributions during the pendency of a case seeking a declaratory judgment under Section 7428. However, pursuant to Section 7428(c)(2), the total amount of such contributions is limited to $1,000 per individual for the duration of the litigation.

[3] *Gladstone Foundation*, 77 TC 221, 226 (1981).

[4] *AHW Corp.*, 79 TC 390, 397 (1982).

[5] *Id.* See also *High Adventure Ministries*, 80 TC 292 (1983) (mere threat of notice of proposed revocation does not give rise to actual controversy); *Founding Church of Scientology of Washington, D.C.*, 69 AFTR2d 92-1385 (Cls. Ct., 1992) (no actual controversy when organization sought declaratory judgment after IRS issued "no change" letter on completion of its examination).

[6] *Urantia Foundation*, 77 TC 507, 513 (1981).

[7] *AHW Corp.*, 79 TC 390, 397 (1982). See also *Founding Church of Scientology, supra* note 5 ("An actual controversy may exist when the IRS fails to make a determination, see I.R.C. Section 7428(a)(2), so long as the petitioner/plaintiff waits 270 days after the date on which the request for such determination was made.").

[8] Note 3, *supra* at 229, citing Staff of the Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1976* (Blue Book), page 403.

[9] *Id.*

[10] 98 TC 374 (1992).

[11] *Id.* at 378.

[12] For a more substantial analysis of judicial authority to issue declaratory judgment prior to the Service's issuance of a final adverse determination letter, see Journy, "Using Section 7428 to Resolve Exempt Status Controversies," 24 Exempts 5 (March/April 2013), page 8.

from litigation in a better position to continue their operations as seamlessly as possible.

There are two hurdles to implementing the strategy of litigating a case as early as possible to obtain the benefits discussed above. First, this strategy requires an organization to challenge the Service's final adverse determination before the Service issues it. Second, many of the benefits described above will benefit the organization only until the IRS actually revokes its tax-exempt status, and so depend on the organization's ability to enjoin the IRS from issuing the final adverse determination letter during the pendency of the litigation.

Obtaining a declaratory judgment before a revocation

Pursuant to Section 7428, the U.S. Tax Court, the U.S. district court for the District of Columbia, and the U.S. Court of Federal Claims have concurrent jurisdiction to issue a declaratory judgment in the case of an actual controversy with respect to a determination, or the Service's failure to make a determination, regarding the continued qualification of an organization described in Section 501(c)(3). To meet the jurisdictional requirements necessary to obtain a declaratory judgment, Section 7428(a) "requires (1) an actual controversy (2) involving a determination or a failure to make a determination by the Secretary (3) with respect to an organization's initial or continuing qualification or classification as an exempt organization...."[3]

Courts have generally interpreted the "actual controversy" requirement to mean that "the power to issue declaratory judgments does not extend to advisory opinions on abstract or hypothetical facts, which do not involve any case or controversy."[4] As such, courts have determined that they lack jurisdiction over cases in which the Service has "not spoken finally with regard to [the] petitioner's status."[5] Therefore, when the Service recognizes an organization as exempt, as a general rule, "there is no actual controversy which gives rise to judicial review unless the IRS directly determines that the organization is no longer exempt."[6]

While a final adverse determination is generally required for an actual controversy to exist, courts have noted that an "exception to this requirement that the organization actually obtain an adverse final ruling exists when jurisdiction is invoked under Code § 7428(a)(2) on the ground that respondent has failed to make a determination as to initial or continuing qualification."[7] Further, in *Gladstone*,[8] the Tax Court specifically found that the Section 7428(a)(2) exception applied both to organizations seeking a determination regarding initial qualification for exempt status and to those seeking a determination regarding continued qualification of exempt status. "Congress clearly intended that declaratory judgment actions as to tax-exempt status ... be available remedies for revocation cases where final determinations were made and where there has been a failure to make a determination."[9]

In *Anclote Psychiatric Center*,[10] the Tax Court determined that when the organization received notice that the Service's National Office had reviewed and approved the Service's proposed adverse determination through the issuance of a technical advice memorandum, the final revocation was inevitable. Once the issuance of the final adverse determination became inevitable, the court said that "[t]here can be no other conclusion but that an actual controversy existed."[11]

The author's experience has been consistent with the rulings in *Gladstone* and *Anclote*. In the past four years, the author's firm has filed four Tax Court petitions and one district court complaint seeking a declaratory judgment pursuant to Section 501(c)(3) prior to the issuance of a final adverse determination. Although the parties settled each of these cases on the Service's withdrawal of the revocation before the courts ruled on their jurisdiction over any of these cases, it is telling that the Service did not challenge the courts' jurisdictional authority to issue a declaratory judgment in any of the cases. Thus, it seems fairly settled that courts have jurisdiction over declaratory judgment cases that petitioners file prior to the issuance of a final adverse determination letter.[12]

Jurisdiction to enjoin the IRS in Section 7428 cases

The question of whether a court that has jurisdiction to enjoin the IRS from issuing a final adverse determination letter while an organization is seeking a declaratory judgment is less clear, but no less important. The most significant reason why an injunction is so important is that it appears to be the Service's usual practice in these situations to issue a final adverse determination letter to an organization shortly after the organization files a suit for declaratory judgment, even when it has not completed the administrative process.[13] If the Service is

able to revoke an organization's tax-exempt status while litigation is pending, it will effectively be able to eliminate several of the benefits that make the pre-revocation filing attractive—i.e., the ability to (1) receive charitable contributions throughout the litigation, (2) continue to engage in all activities requiring recognition as a Section 501(c)(3) organization, and (3) delay the adverse effect of a revocation for the duration of the litigation.

Another significant problem resulting from the issuance of a revocation letter during litigation was that it complicated the litigation by requiring the organization to file a second, "protective" petition to challenge the revocation letter. While, in the author's experience, the protective petition has never advanced beyond the initial pleadings, it is an additional obstacle and expense, both for the parties and the courts, which would be unnecessary if the courts have authority to enjoin the IRS from revoking an organization's tax-exempt status during litigation.

Hurdles to obtaining an injunction. As discussed above, Section 7428 expressly permits a tax-exempt organization to seek a declaratory judgment concerning its tax-exempt status. Therefore, by filing a suit seeking a declaratory judgment, a taxpayer will have properly invoked its statutory right under Section 7428 to have a court—not the Service—decide its tax-exempt status. In these circumstances, if the Service issues a final adverse determination letter before the court hears and adjudicates the taxpayer's claims, potentially making the financial burdens of litigating the case too large for the organization to fully litigate its claim, the Service will have effectively stripped the taxpayer of its statutory right to be heard by the court. Thus, it is reasonable to believe that a court of competent jurisdiction over a declaratory judgment case would also have the authority to protect its jurisdiction by issuing a narrow order restraining the Service from issuing a final adverse determination letter while the suit for a declaratory judgment is pending. This may be a reasonable assumption but, as with many things in tax law, the interpretation necessary to accomplish that apparently simple result is long and complex.

There are several obstacles to obtaining the seemingly reasonable injunction, the first and most significant of which is the limitation on a court's authority to restrain the assessment or collection of any tax through the issuance of an injunction or declaratory judgment by the Anti-Injunction Act (AIA),[14] and the federal tax exception to the Declaratory Judgment Act (DJA).[15] The AIA 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, whether or not such person is the person against whom the tax was assessed."[16] In addition to and consistent with the AIA, suits to restrain tax assessment or collection are prohibited by the exception to the DJA, which permits individuals to obtain declaratory relief in cases of actual controversy "except with respect to Federal taxes."[17] If the AIA and the DJA are applicable in cases filed under Section 7428, absent a statutory exception from the DJA and the AIA specifically authorizing the court to grant the requested relief, the court will lack the jurisdictional authority to grant either the injunctive or declaratory relief requested in the taxpayer's filing.

The limitations that the federal tax exception to the DJA imposes are significant. They are, however, largely irrelevant to a taxpayer's timely request for declaratory judgment pursuant to Section 7428 because Section 7428 is expressly excluded from this limitation. Thus, if a court has the authority to grant declaratory

[13] In four of the five cases that the author's firm filed under this theory, the Service issued a final adverse determination letter that was eventually withdrawn in each case, shortly after the petition was filed.

[14] Section 7421(a).

[15] 28 U.S.C. section 2201.

[16] Section 7421(a).

[17] 28 U.S.C. section 2201(a).

[18] 416 U.S. 725, 33 AFTR2d 74-1279 (1974).

[19] *Id.* at 416 U.S. 732.

[20] This article analyzes whether a court of competent jurisdiction to issue a declaratory judgment under Section 7428 has the authority to enjoin the IRS from issuing a final adverse determination during the pendency of litigation. It does not analyze the particular common law requirements for obtaining such injunctive relief in each circuit. However, a taxpayer intending to seek the injunctive relief discussed in this article should consider, before deciding where to file a suit for declaratory judgment, the relevant case law in the taxpayer's circuit as well as in the D.C. circuit to determine the most favorable venue for obtaining injunctive relief.

[21] 370 U.S. 1, 9 AFTR2d 1594 (1962).

[22] *Id.* at 370 U.S. 7.

[23] In addition to the statutory exceptions to the AIA, there is a narrow equitable exception that allows courts to grant an injunction when the taxpayer demonstrates both that (1) because of the assessment or collection of a tax, "the taxpayer would suffer irreparable injury" and (2) "that under no circumstances could the Government ultimately prevail." *Enochs v. Williams Packing & Navigation Co, supra*. note 21.

[24] *Bob Jones University, supra* note 18 at fn. 7.

[25] See, e.g., *Cohen*, 650 F.3d 717, 108 AFTR2d 2011-5046 (CA-D.C., 2011) (*en banc*).

[26] S. Rep't No. 1240, 74th Cong., 1st Sess. 11 (1935). Note that "Rev. Stat. 3224 is the lineal ancestor of the present 26 U.S.C. Section 7421(a)." *McGlotten v. Connally*, 338 F. Supp. 448, 29 AFTR2d 72-378 fn. 22 (DC-D.C.1972).

relief under Section 7428, such relief will not be prohibited by the DJA.

While the limitations imposed by the DJA are easily avoided by the very provision of the Code permitting organizations to obtain a declaratory judgment, the AIA's limitations should be of particular concern to tax-exempt organizations seeking to enjoin the IRS from issuing a final adverse determination letter. In *Bob Jones University v. Simon,*[18] the Supreme Court ruled that a court order preventing the Service from issuing a final adverse determination revoking its recognition of an organization's Section 501(c)(3) status "falls squarely within the literal scope of the [AIA]."[19] Thus, any attempt to enjoin the Service from issuing a final adverse determination letter will necessarily be a motion to restrain the assessment or collection of any tax, and an organization seeking to enjoin the IRS from issuing a final adverse determination will need to demonstrate that the requested relief is excluded from the limitations that the AIA imposes.

Finally, to obtain the requested injunction, a taxpayer demonstrating that its motion for injunctive relief is not prohibited by either AIA or DJA will need to prove that it satisfies the common law requirements for obtaining an injunction in its circuit. These requirements generally include showing that (1) the action to be enjoined will cause the taxpayer an irreparable injury; (2) the taxpayer lacks any adequate remedy at law; (3) the balance of the equities is in favor of granting the injunction; and (4) the taxpayer is likely to succeed on the merits of the underlying case.[20]

Federal tax exceptions to AIA and DJA. The AIA 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, whether or not such person is the person against whom the tax was assessed." Enacted in 1867, there is very little legislative history to the AIA to guide its interpretation. However, the Supreme Court discussed the purpose of the AIA in *Enochs v. Williams Packing & Navigation Co.*[21] The Court said that the "manifest purpose of Section 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require the legal right to the disputed sums be determined in a suit for refund."[22] Thus, it is clear that the AIA's language and intent prohibit any suit to restrain the assessment or collection of taxes unless it falls within a statutory exception to the AIA.[23]

In addition to and consistent with the AIA, suits to restrain the assessment or collection of any tax are prohibited by the tax exception to the DJA, which permits individuals to obtain declaratory relief in cases of actual controversy "except with respect to Federal taxes." The language of the DJA has been interpreted at times as broader than that of the AIA and in other instances has been deemed coterminous and coextensive with that of the AIA. "There is no dispute, however, that the federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act."[24] Courts considering the issue, therefore, historically held that the DJA is coextensive and coterminous with the AIA, so that an action allowed under one statute will not be barred by the other statute.[25]

Thus, an injunction may be available to a taxpayer that brings a suit seeking a declaratory judgment pursuant to Section 7428. Section 7428 is an express exception to the federal exception to the DJA and provides a court with the jurisdictional authority to grant the requested declaratory relief. As courts have ruled that the federal tax exception to the DJA is at least as broad as the AIA, a grant of jurisdictional authority to issue declaratory relief is necessarily a grant of authority to issue injunctive relief. Therefore, pursuant to the authorities cited herein, a court may grant preliminary injunctive relief notwithstanding the AIA's general prohibition on injunctions in tax cases.

DJA legislative history and precedential authority. Unlike that of the AIA, the legislative history of the federal tax exception to the DJA is very informative. The DJA was initially enacted in 1934 without the federal tax exception. Thus, taxpayers used the DJA to obtain declaratory judgments that effectively subverted the AIA by restraining the government's ability to collect and assess taxes. Congress responded in 1935 by amending the DJA to include the federal tax exception.

In discussing the purpose of the amendment, the Senate Finance Committee said that "application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes."[26] Thus, Congress's purpose in adding the federal tax exception to the DJA was to ensure that the DJA was applied consistently with the AIA; i.e., that the AIA's prohibitions on restraining the government's ability to assess and collect taxes could not be avoided by a suit for a declaratory judgment.

When applying the federal tax exception to the DJA, courts have looked to both the language of the DJA and its legislative history, noting that the federal tax exception to the DJA was added for the "explicit purpose of limiting the jurisdiction of the courts to issue declaratory judgments in the same fashion as their general jurisdiction was limited by the Tax Injunction Act."[27] Thus, on examining the DJA's legislative history, several courts have concluded "that the Declaratory Judgment Act and the Anti-Injunction Act were intended to be coterminous."[28] Under the coterminous interpretation of the AIA and the DJA, when granting injunctive relief or declaratory relief, courts have deemed an express exception to *either* the AIA or the DJA, not both, to be "determinative of jurisdiction."[29]

Applying the judicial interpretations of the federal tax exception of the DJA and the AIA, it is clear that the Section 7428 declaratory judgment exclusion from the federal tax exception to the DJA is also a statutory exception from the AIA. To hold otherwise would effectively eliminate the effect that Congress intended Section 7428 to have.

As stated above, the legislative history makes it clear that the purpose of adding the federal tax exception to the DJA was to ensure that the DJA was applied consistently with the AIA and did not provide a mechanism for circumventing the AIA prohibition on maintaining suits for the purpose of restraining the assessment or collection of any tax. Thus, if the declaratory judgment provision of Section 7428 is not also interpreted as an exception to the limitations of the AIA, courts—including the Court of Claims and the D.C. district court—would be precluded from issuing or enforcing the declaratory judgments that Congress has expressly delegated to them. As the court said in *Cohen*, "Congress did not intend to provide declaratory relief for litigants when the AIA barred injunctive relief. Holding to the contrary, as the IRS urges, would vitiate the structural design of the DJA."[30] In other words, if the court lacks the authority to grant injunctive relief, it will necessarily lack the authority to issue enforceable declaratory judgments. Further, if the court lacks the power to enforce its declarations made pursuant to Section 7428, it would find itself in the paradoxical situation of having the statutory authority to declare the rights of the parties but lacking the jurisdictional authority necessary to enforce those rights, thereby undermining the authority that Congress expressly granted.

In that situation, after obtaining a declaratory judgment by a court under Section 7428, taxpayers would either be forced to file a separate action for injunctive relief in another court that has the authority to grant such relief, or run the risk that the Service will disregard the court's unenforceable declaration and re-revoke the taxpayer's tax-exempt status. This could potentially result in a perpetual cycle through which the Service revokes a taxpayer's exempt status, then a court issues an unen-

[27] *McGlotten v. Connally*, 338 F. Supp. 448, 453, 29 AFTR2d 72-378 (DC-D.C.1972).

[28] *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278, 34 AFTR2d 74-5985 (CA-D.C., 1974), *vacated on other grounds*, 426 U.S. 26 (1976).

[29] *"Americans United," Inc. v. Walters*, 477 F.2d 1169, 31 AFTR2d 73-582 (CA-D.C., 1973), *rev'd on other grounds sub nom. Alexander v. "Americans United" Inc.*, 416 U.S. 752, 33 AFTR 2d 74-1289 (1974) ("The breadth of the tax exception of [the DJA] is co-extensive with the effect of [the AIA], and so the applicability of the latter to our situation is determinative of jurisdiction.").

[30] *Cohen, supra* note 25 at 650 F.3d 729.

[31] 128 F.2d 808, 811, 29 AFTR 720 (CA-7, 1942).

[32] *Cohen, supra* note 25 at 650 F.3d 729.

[33] *Id.*

[34] *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (CA-4, 1996) ("Though the [AIA] concerns federal courts' subject matter jurisdiction and the tax-exclusion of the [DJA] concerns the issuance of a particular remedy, the two statutory texts are, in underlying intent and practical effect, coextensive"); *Perlowin v. Sassi*, 711 F.2d 910, 52 AFTR2d 83-5654 (CA-9, 1983) ("The [DJA] is coextensive with the [AIA]"); *Wyo. Trucking Ass'n v. Bentsen*, 82 F.3d 930, 77 AFTR2d 96-2098 (CA-10, 1996) (reach of the DJA and the AIA "is coextensive").

[35] *Bob Jones University*, *supra* note 18 at fn. 8 (no dispute "that the federal tax exception to the [DJA] is at least as broad as the [AIA]"); *Alexander v. "Americans United," Inc.*, *supra* note 29 at fn. 10 (while the court did not take a position on whether the DJA and the AIA are coterminous, "it is in any event clear that the federal tax exception to the [DJA] is at least as broad as the prohibition of the [AIA]"); *McCarthy v. Marshall*, 723 F.2d 1034 (CA-1, 1983) (citing *Bob Jones University* in determining that "there is no dispute that 'the federal tax exception to the [DJA] is at least as broad as the [AIA]'"); *McCabe v. Alexander*, 526 F.2d 963, 965, 37 AFTR2d 76-750 (CA-5, 1976) (where the AIA applies, declaratory relief is necessarily unavailable because "the federal tax exception to the [DJA] is at least as broad as the [AIA]"); *Ecclesiastical Order of the ISM of AM, Inc.*, 725 F.2d 398, 53 AFTR2d 84-654 (CA-6, 1984) (citing *Bob Jones University* in determining that "the federal tax exception to the [DJA] is at least as broad as the prohibition of the [AIA]"); *Mobile Republican Assembly*, 353 F.3d 1357, fn. 6, 93 AFTR 2d 2004-335 (CA-11, 2003) ("the federal tax exception to the [DJA] is at least as broad as the prohibition of the [AIA]"); *Bufkin*, 111 AFTR2d 2013-2349, 2013-2350 (CA-11, 2013) (Eleventh Circuit has "noted that 'the federal tax exception to the [DJA] is at least as broad as the prohibition of the [AIA]'").

[36] *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979).

[37] *Id.* at 699.

[38] See Blue Book, *supra* note 9, page 402.

forceable declaration under Section 7428 that the taxpayer is exempt, after which the Service re-revokes the taxpayer's tax-exempt status, restarting the cycle. The Seventh Circuit identified the reverse of this paradox in *Tomlinson v. Smith*. "It is unreasonable to think that a court with authority to issue a restraining order is without power to declare the rights of the parties in connection therewith. In other words, it is our view that the language which excepts federal taxes from the Declaratory Judgment Act is co-extensive with that which precludes the maintenance of a suit for the purpose of restraining assessment or collection of a tax."[31]

The unreasonable result of a non-coterminous interpretation of the federal tax exception to the DJA and the AIA is particularly problematic because, as the court in *Cohen* noted, "an injunction of a tax and a judicial declaration that a tax is illegal have the same prohibitory effect on the federal government's ability to assess and collect taxes."[32] Thus, when a party seeks an injunction and declaratory relief, the relief sought is "singular, as equitable relief, and not separate, as an injunction and declaratory judgment." "A non-coterminous reading of the two statutes thus poses an insurmountable obstacle. The court would not have jurisdiction to provide declaratory relief but could effectively do so anyway." [33]

Cohen and *Tomlinson* are not alone in their interpretation that the federal tax exception of the DJA is coterminous and coextensive with the AIA. These decisions are consistent with the rule in the majority of the circuits that have examined the scope of the AIA and the DJA.[34] Moreover, following the Supreme Court's rulings in *Bob Jones University* and *Americans United*, the circuits that have not deemed the AIA and the federal tax exception to the DJA to be coterminous have each determined that the federal tax exception to the DJA is "at least as broad as" the AIA.[35] As the AIA is no broader than the DJA, there can be no circumstance in which the DJA permits declaratory relief but the AIA prohibits injunctive relief. Therefore, a statutory exception to DJA, such as Section 7428, must also be interpreted as a statutory exception to the AIA.

Standard statutory interpretation. While it is clear that the DJA is at least as broad as the AIA, meaning that a statutory exception to the DJA must also be an exception to the AIA, such an interpretation is also consistent with standard rules of statutory interpretation. As the Supreme Court has stated in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), when interpreting a statutory provision "it is always appropriate to assume that our elected representatives, like other citizens, know the law."[36] Thus, when interpreting the breadth of the statutes, even in districts in which the courts have not interpreted the AIA and DJA to be coterminous, it is appropriate to assume that Congress was familiar with the precedents of the federal courts and that it "expected its enactment to be interpreted in conformity with them."[37]

Because the case law interpreting the federal tax exception to the DJA as being coterminous with the AIA stretches back to *Tomlinson* in 1942, it is reasonable to assume that, when drafting Section 7428 in 1976, Congress was aware that numerous courts had adopted the coterminous interpretation of those statutes. Moreover, because the legislative history extensively quoted the Supreme Court's decisions in *Bob Jones University* and *Americans United,* it is a near certainty that Congress was aware that the Supreme Court had determined that the federal tax exception to the DJA was "at least as broad as" the AIA.[38] Thus, Section 7428 should be interpreted in light of the Supreme Court's explanation that the federal tax exception to the DJA is at least as broad as the AIA. The exemption from the federal tax exception of the DJA that confers on a court the authority to grant declaratory relief must also be interpreted as an exception to the general prohibition on a court's ability to issue injunctions pursuant to the AIA.

Section 7428 is an exception to the DJA and the AIA. The mere fact that the relief that a taxpayer seeks is an injunction does not foreclose the possibility that the court has the authority to grant that relief. Rather, it means that, to obtain the relief, the taxpayer must make its request pursuant to statutory authority granting the court jurisdiction to provide the relief. When an organization seeks a declaratory judgment under Section 7428, such statutory authority can be found in Section 7428, which confers on a court the statutory authority to grant declaratory relief that, as discussed above, has the same prohibitory effect as an injunction. Thus, consistent with the legislative history, precedential authority, and tenets of statutory interpretation, the Section 7428 statutory grant of authority to issue a declaratory judgment must also be interpreted as the statutory conferring of jurisdictional authority to issue the injunctive relief.

Venue considerations. An analysis of the law demonstrates that a court with the appropriate jurisdiction to issue a declaratory judgment also has

authority to enjoin the Service from issuing a final adverse determination letter during the pendency of litigation filed under Section 7428. To obtain such relief, however, the court must believe that it has the jurisdiction to grant the relief. As Section 7428 grants the authority to issue a declaratory judgment to both the D.C. district court and the Tax Court, a decision about the best venue to seek injunctive relief requires an analysis of the general scope of each court's jurisdictional authority.[39]

Tax Court considerations. The author's firm has filed three motions for preliminary injunction in declaratory judgment cases in the Tax Court. The court ruled on two of the three motions, denying them for a lack of jurisdiction to grant the requested equitable relief without reaching a decision on the merits of the taxpayer's argument in either case. In denying the petitioners' requests for injunctive relief, the Tax Court said that injunctive relief is an exercise of a court's equitable authority and that, as the court lacked general equitable powers, its authority to grant equitable relief is constrained by specifically detailed statutory language. As the language of Section 7428 expressly permits courts only to grant declaratory relief, the court determined that it lacked the authority to grant injunctive relief under Section 7428.

The author disagrees with the Tax Court's ruling on these motions. First, in ruling that the authority to issue a declaratory judgment does not also carry the authority to enjoin parties from violating such declaration, the Tax Court's orders effectively hold that the court lacks the authority to enforce its own declaratory rulings issued pursuant to Section 7428. Also, the court's interpretation of the scope of Section 7428 failed to properly apply the *Golsen* rule, which caused the court to misinterpret the scope of its authority.[40] Had the court properly applied the *Golsen* rule, under which the AIA and the DJA were deemed to be coterminous in the circuits subject to the court's orders, it would have interpreted Section 7428 to be an exception to the AIA as well as the DJA. This would have given the court the authority to issue the injunctive relief requested by the taxpayers.

Although the author disagrees with the Tax Court's interpretation of the scope of its own authority to grant injunctive relief, that disagreement should be of little comfort to a taxpayer seeking to enjoin the Service from issuing a final adverse determination letter in Tax Court—the court's position on the matter is clear. The Tax Court believes that it lacks the statutory authority necessary to enjoin the IRS from issuing a final adverse determination while a petition for declaratory judgment is pending before the court. Therefore, it is extremely unlikely that the Tax Court will grant injunctive relief under such circumstances anytime in the near future. This should be considered as an important factor when selecting a venue for taxpayers who would like to enjoin the IRS from issuing a final adverse determination during the pendency of the litigation.

D.C. district court. The author's firm has filed only one motion for preliminary injunction in the D.C. district court using theory discussed above and, unfortunately for this analysis, the court did not rule on that motion because the government conceded the revocation issue before the court had the opportunity to do so. The D.C. district court therefore has never ruled on the specific question of whether it has the authority to enjoin the Service from issuing a final adverse determination while a declaratory judgment case is pending. However, the D.C. circuit has a substantial number of precedential cases holding that the AIA and the DJA are coterminous.

Precedent in the D.C. circuit provides that, although the AIA and the DJA use different language, "well-documented history behind the tax exception to the DJA and its relationship to the AIA has led numerous courts, including the D.C. circuit, to conclude that the scope of the DJA's tax exception is 'coterminous' or 'coextensive' with the AIA's prohibition."[41] Therefore,

[39] Pursuant to Section 7428(a), the Court of Federal Claims also has jurisdiction to issue a declaratory judgment under Section 7428. However, the author's firm has not sought injunctive relief from the Court of Federal Claims and is unaware of any cases in which such relief has been requested. Thus, this article will not discuss that court's interpretation of its authority to grant such relief.

[40] Pursuant to the *Golsen* rule, for purposes of "efficient and harmonious judicial administration," the Tax Court is constrained by the precedent in the Court of Appeals that is responsible for reviewing the court's opinion. *Golsen*, 54 TC 742 (1970).

[41] *Z Street, Inc. v. Koskinen*, 113 AFTR2d 2014-2217, 2014-2221 (DC D.C., 2014); see also *The Church of Scientology of Celebrity Centre, L.A. v. Egger*, 539 F. Supp. 491, 50 AFTR2d 82-5072 (DC, D.C., 1982) ("Although the two acts are not similarly worded, in this Circuit the two acts are interpreted conterminously.").

[42] *Cohen*, *supra* note 25 at 650 F.3d 727; see also *"Americans United," Inc. v. Walters*, *supra* note 29 at 477 F.2d 1176 ("The breadth of the tax exception of [the DJA] is co-extensive with the effect of [the AIA]"); *Eastern Kentucky Welfare Rights Organization*, *supra* note 28 at 506 F.2d 1284 ("A re-examination of the legislative history of the tax exemption provision leads this court to conclude, as it did in Americans United, that the [DJA] and the [AIA] were intended to be coterminous.").

when choosing a venue for filing a suit for declaratory judgment, practitioners should consider that in the D.C. circuit, "precedent interprets the DJA and AIA as coterminous" such that relief available under one statute will not bar relief available under the other.[42]

In addition to the favorable precedent in the D.C. circuit, and unlike the Tax Court, the D.C. district court has general federal question jurisdiction under 28 U.S.C. section 1331. Thus, the Tax Court's narrow interpretation of its authority to grant equitable relief will not be an obstacle in the D.C. district court and, if obtaining an injunction is a significant motivation for the timing of a suit for declaratory judgment, the D.C. district court may be a better venue for the organization's suit.

Conclusion

Currently, no court has expressly ruled that an organization seeking a declaratory judgment under Section 7428 can enjoin the Service from issuing a final adverse determination letter during the pendency of litigation. However, under a coterminous interpretation of the AIA and the DJA, it is clear that the Section 7428 exception to the DJA must also be considered an exception to the limitations imposed by the AIA. Thus, organizations that are located in circuits, such as the D.C. circuit, where precedent holds that AIA and the DJA are coterminous, and that properly seek a declaratory judgment under Section 7428 prior to receiving a final adverse determination letter, should be able to enjoin the IRS from issuing a final adverse determination during pendency of the litigation. ■