

Pat Smith Quoted in Tax Notes on Starr International Case

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Ivins attorney Pat Smith was quoted in a *Tax Notes* article on the *Starr International* case in the D.C. district court, *Starr Forgoes Appeal, Opts to Pursue Claim Under APA*.

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said an interesting detail included in the amended complaint is an allegation that the IRS acted in bad faith because the former deputy commissioner with the IRS Large Business and International Division responsible for denying the treaty benefits request told a Starr representative that "he intended to find a basis for denying" the company's request.

Smith said the allegation that the deputy commissioner reached a decision without rationale and then found a basis to defend it "doesn't sound like an appropriate position for an IRS official to be taking." That assertion appears "to be pretty powerful evidence in favor of the taxpayer's position that the IRS acted arbitrarily and capriciously," he said.

According to Smith, the court clearly encouraged Starr to amend its complaint to pursue the APA claim when it granted the government's motion for reconsideration. "It would seem to me that a motion for reconsideration wasn't going to be successful and an immediate appeal seemed unlikely to achieve anything better from the court of appeals than they got from the district court," he said, adding that "they might have got

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something worse." "Filing an amended complaint going the APA route was the only reasonable thing to do," Smith said.

Smith said that the approach the Justice Department is taking in *Starr* to the APA appears inconsistent with its approach in *QinetiQ U.S. Holdings Inc. v. Commissioner*, No. 15-2192 (4th Cir. 2016). The Justice Department in *Starr* appears to accept the idea that the company can bring a claim under the APA arguing that the IRS's decision on the treaty benefits request is arbitrary and capricious, he said, adding that the Justice Department in *QinetiQ* is asserting that an IRS notice of deficiency is not reviewable in court under the APA.

The notice of deficiency in *QinetiQ* is similar procedurally to the refund claim in *Starr*, so "it seems to me that the Justice Department is taking clearly inconsistent positions" in the two cases, Smith said.