2017 WL 727938 (C.A.D.C.) (Appellate Brief)
United States Court of Appeals,
District of Columbia Circuit.

Eva MAZE, Suzanne Batra, Margot Lichtenstein, Marie M. Green, May F. & Kevin A. Muench, and Nancy R. & Harold D. Blumenkrantz, Plaintiffs-Appellants,

v.

INTERNAL REVENUE SERVICE, John Koskinen, Commissioner of Internal Revenue, and The United States of America, Defendants-Appellees.

No. 16-5265.
February 23, 2017.

On Appeal From the Order of The United States District Court For The District of Columbia
(Oral Argument Not Yet Scheduled)

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***1** STATEMENT OF JURISDICTION

Plaintiffs Eva Maze, Suzanne Batra, and Margot Lichenstein brought this suit against the Internal Revenue Service ("IRS"), John A. Koskinen, in his capacity as the Commissioner of Internal Revenue, and the United States (together, the "Government"). (Doc. 1 ¶¶ 7, 10-15, ***2** JA___.)[1] Plaintiffs are participants in an IRS Offshore Voluntary Disclosure Program ("OVDP"), which was designed to encourage taxpayers who failed to report or pay tax on foreign assets and income to come forward and become compliant. Plaintiffs would prefer, however, to use a more recently announced compliance option, the Streamlined Filing Compliance Procedures ("Streamlined Procedures"), for which OVDP participants are not eligible. Plaintiffs brought this suit, alleging that their exclusion from the Streamlined Procedures violates the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559 and 701-706. (*Id.,* Request for Relief ¶¶ A-C, JA___.) Plaintiffs also sought an injunction against the enforcement of the prohibition, so as to allow them to withdraw from the OVDP and enter the Streamlined Procedures. (*Id.,* Request for Relief ¶¶ D-E, JA___.)

Plaintiffs invoked the District Court's jurisdiction under 28 U.S.C. § 1331. As is explained in the Argument, *infra,* however, the Anti-Injunction Act ("AIA"), § 7421(a) of the Internal Revenue Code of 1986 ***3** (26 U.S.C.) ("I.R.C."), and the tax exception to the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, deprived the court of subject matter jurisdiction to entertain plaintiffs' claims for declaratory and injunctive relief.

On July 25, 2016, the District Court ordered the plaintiffs' complaint dismissed. (Doc. 19, JA___.) At the same time, the District Court ordered that the case be consolidated with *Green v. Internal Revenue Service,* D.D.C. Case No. 16-cv-1085, involving a nearly identical complaint by Marie M. Green, May F. and Kevin A. Muench, and Nancy R. and Harold D. Blumenkrantz, in which the parties had agreed to be bound by the District Court's ruling on the Government's motion to dismiss the complaint in *Maze.*[2] The District Court made it clear that its order of dismissal applies in the *Green* case as well. (*Id.*)

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The District Court's order of dismissal is final and appealable, resolving all claims of all parties. On September 20, 2016, plaintiffs, including the plaintiffs in *Green,* filed a notice of appeal (Doc. 21), which ***4** was timely under 28 U.S.C. § 2107(b) and Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether plaintiffs' claims for declaratory and injunctive relief against the prohibition on their using the Streamlined Procedures are barred by the Anti-Injunction Act, I.R.C. § 7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum, *infra.*

STATEMENT OF THE CASE

A. The nature of the dispute and summary of the proceedings

Plaintiffs were U.S. taxpayers with reportable foreign assets and income who failed to disclose or pay tax on them. The IRS announced disclosure initiatives to encourage taxpayers in plaintiffs' situation to come forward voluntarily. These programs bring taxpayers into compliance with the tax law by resolving their liabilities for prior years on beneficial terms. Plaintiffs entered one such program, the OVDP, ***5** prior to 2014. In 2014, the IRS announced an expansion of a different offshore compliance initiative, the Streamlined Procedures, but prohibited taxpayers in an OVDP from participating in the Streamlined Procedures. At the same time, however, the IRS announced transitional treatment under OVDP in "Transition Rules: Frequently Asked Questions (FAQs)" ("Transitional Treatment" or "Transition Rules"), allowing taxpayers in an OVDP to apply for the more favorable penalty structure offered by the Streamlined Procedures. (Doc. 12 at IRS-Maze-291-94, JA___.)

Plaintiffs brought this suit seeking (1) a declaration that the Transition Rules are invalid under the APA and (2) an injunction prohibiting their enforcement. (Doc. 1, Request for Relief ¶¶ A-E, JA___.) At bottom, plaintiffs requested a judgment allowing them to withdraw from the OVDP and enter the Streamlined Procedures without complying with the Transition Rules. (*Id.,* Request for Relief ¶ D, JA___.)

The Government moved to dismiss plaintiffs' suit for lack of subject matter jurisdiction. It argued that plaintiffs' bid for injunctive and declaratory relief is barred by the AIA and the tax exception to the ***6** DJA. (Doc. 20 at 2, JA___.) The District Court (Judge Colleen KollarKotelly) issued an opinion in which it agreed with the Government that plaintiffs' suit is barred by those statutes. [3] (*Id.* at 12, JA___.) The court accordingly ordered that plaintiffs' case be dismissed. Plaintiffs now appeal.

B. The facts relevant to this appeal

U.S. citizens and residents are generally required to pay federal income tax on "all income from whatever source derived," I.R.C. § 61(a)(4); *see* I.R.C. §§ 1, 63(a), including income from sources outside the United States. *Filler v. Commissioner,* 74 T.C. 406, 410 (1980). The United States relies on "a system of self-reporting." *United States v. Bisceglia,* 420 U.S. 141, 145 (1975). A mosaic of penalties exists to encourage compliance and punish wrongdoing regarding foreign assets ***7**

and income. There are general accuracy-related and fraud penalties, I.R.C. §§ 6662, 6663, general failure-to-pay penalties, I.R.C. § 6651, failure-to-file penalties concerning foreign entities or transactions, *e.g.,* I.R.C. §§ 6038, 6038A, 6038B, 6038C, 6046, 6046A, 6048, 6677, 6679, and a non-tax penalty for failing to file a Report of Foreign Bank and Foreign Accounts, or "FBAR," up to the greater of $100,000 per violation or 50 percent of the value of each account balance at the time of violation, 31 U.S.C. §§ 5314, 5321. There are also criminal penalties for taxpayers who willfully fail to meet their legal obligations. I.R.C. §§ 7201, 7202, 7203, 7206; 31 U.S.C. § 5322. Still, tens of thousands of taxpayers avoid paying billions of dollars of tax every year by hiding assets offshore. *See* "Tax Haven Banks and U.S. Tax Compliance," S. Hrg. 110-614 at 1 (July 17 and 25, 2008) ("Each year, the U.S. Treasury loses up to $100 billion in tax revenues from offshore tax abuse.") (statement of Senator Carl Levin).

Considering the scale of the noncompliance and the IRS's limited enforcement resources, the IRS has a strong interest in taxpayers voluntarily disclosing their foreign assets, resolving as many cases as possible without examination. (Doc. 12 at IRS-Maze-005 (Q&A 1), ***8** JA___.) Towards that end, the IRS has announced several offshore compliance options, including, at issue here, versions of the OVDP and the Streamlined Procedures.

1. Offshore Voluntary Disclosure Programs

A powerful incentive for taxpayers to come forward is the promise of avoiding criminal prosecution. The Criminal Investigation Division of the IRS has a longstanding voluntary disclosure practice that encourages disclosure as a way to minimize risk that the IRS will recommend criminal prosecution to the Department of Justice. Int. Rev. Man. 9.5.11.9 (last updated Aug. 18, 2012). That benefit was incorporated into the ODVPs, such that taxpayers who made voluntary disclosures through one of these programs that were accepted by the Criminal Investigation Division would receive a "criminal non-prosecution letter." (Doc. 12 at IRS-Maze-006 (Q&A 3), JA___.) These programs acted as "a counterpart to Criminal Investigation's Voluntary Disclosure Practice ... address[ing] the civil side of a taxpayer's voluntary disclosure of foreign accounts and assets by defining the number of tax years covered and setting the civil penalties that will apply." (Doc. 12 at IRS-Maze-006 (Q&A 3), JA___.)

***9** The IRS ran the first ODVP from March 23, 2009, through October 15, 2009, and the Offshore Voluntary Disclosure Initiative from February 8, 2011, through September 9, 2011. The latter responded to various criticisms of the first OVDP and made other improvements. (*Id.* at IRS-Maze-359-63, JA___.) These temporary programs resulted in approximately 33,000 disclosures and more than $5.5 billion in collections. (*Id.* at IRS-Maze-460, JA___; *id.* at IRS-Maze-003, JA___.) But it was well understood that many taxpayers were still not compliant with U.S. tax law. (*Id.* at IRS-Maze-461, JA___; *id.* at IRS-Maze-316, JA___.)

On January 9, 2012, the IRS announced the second OVDP. In contrast to the preceding programs, the second OVDP was opened for an indefinite period, but was "subject to change at any time going forward." (*Id.* at IRS-Maze-001, JA___; *id.* at IRS-Maze-006 (Q&A 3), JA___.) The IRS explained, "[f]or example," that it "may increase penalties or limit eligibility in the program for all or some taxpayers or defined classes of taxpayers - or decide to end the program entirely at any point." (*Id.* at IRS-Maze-006 (Q&A 3), JA___.) The terms of participation include, among other things, that taxpayers (1) file ***10** accurate tax returns and FBARs for the eight most recent years for which the filing deadline has passed, (2) pay the corresponding taxes and interest, (3) pay a 20-percent accuracy-related penalty and a penalty for failure to file a tax return, if applicable, for each of the eight years, and (4) pay "a miscellaneous Title 26 offshore penalty" in the amount of 27.5 percent (or, in some instances, 12.5 or five percent) of the highest aggregate value of the foreign assets, in lieu of all other taxes and penalties. (*Id.* at IRS-Maze-011-12 & -015 (Q&A 7 & 9), JA ___ & ___.) In return, the IRS would issue taxpayers a non-prosecution letter upon acceptance of their filings by the IRS Criminal Investigation Division and execute a closing agreement resolving taxpayers' outstanding liability once and for all regarding the disclosed assets. (*Id.* at IRS-Maze-006 & -012 (Q&A 3 & 7), JA ___ & ___.) In short, the OVDP is an opportunity for taxpayers to wipe the slate clean.

The IRS made it clear that the terms of the OVDP were non-negotiable and could change at any time going forward. (*Id.* at IRS-Maze-005 & -036 (Q&A 1 & 50), JA ___ & ___.) That being said, one of those terms is that "[u]nder no circumstances will taxpayers be required to pay a penalty greater than what they would otherwise be liable for ***11** under the maximum penalties imposed under existing statutes." (*Id.* at IRS-Maze-036 (Q&A 50), JA ___.) Taxpayers may show that their total liability, including taxes, interest and penalties (without regard to affirmative defenses) for all open years is less than what their liability would be under the OVDP, using the miscellaneous penalty as a proxy for most statutory penalties. In that case, taxpayers would pay the lesser amount. (*Id.*)

For taxpayers who enter the OVDP but disagree with the result, disputing, for example, the amount of the miscellaneous offshore penalty, they are free to opt out of the program and have their cases handled under the standard audit process. (*Id.* at IRS-Maze-036-37 (Q&A 51), JA ___.) The IRS recognized that for some taxpayers, "the opt out option may reflect a preferred approach." (*Id.* at IRS-Maze-036-44 (Q&A 51 & 51.1), JA ___.) Importantly, taxpayers may retain the benefit of a non-prosecution letter by providing all requested information and making arrangements to pay the liability. (*Id.*)

2. The Streamlined Filing Compliance Procedures

Notwithstanding the adjustable features of the miscellaneous offshore penalty, and the opportunity to opt out without relinquishing ***12** protection from criminal liability, the OVDP was criticized for being too harsh on taxpayers who did not willfully fail to report their offshore accounts. (*Id.* at IRS-Maze-366, JA___; *id.* at IRS-Maze-319-20, JA___.) Many of these taxpayers either remained silent or opted out of the OVDP, which was inefficient for taxpayers and the IRS alike. (*Id.*)

The IRS sought to ameliorate this problem by way of the Streamlined Procedures. (*Id.* at IRS-Maze-367, JA___.) On June 26, 2012, the IRS announced Streamlined Procedures for non-resident non-filers who owed little or no back taxes, some of whom might only recently have become aware of their reporting obligations with respect to offshore accounts. (*Id.* at IRS-Maze-139, JA____.)

Then, on June 18, 2014, the IRS announced the simultaneous expansion of the Streamlined Procedures and modifications of the OVDP. (*Id.* at IRS-Maze-146, JA___.) By way of introduction, Commissioner Koskinen stated that "[i]n this rapidly changing environment, we listened to feedback from the tax community as well as the National Taxpayer Advocate about our voluntary programs," and, accordingly, "have made important adjustments to provide ***13** opportunities for all U.S. taxpayers to come in, including those who are not willfully hiding assets." (*Id.* at IRS-Maze-146-47, JA___.)

The Streamlined Procedures, like the OVDP, were opened for an indefinite period unless otherwise announced. (*Id.* at IRS-Maze-150, JA___.) As a threshold matter, they require taxpayers to certify that their failure to report and pay tax on foreign assets was non-willful. (*Id.*) For U.S. residents, the Streamlined Procedures further require that taxpayers (1) file accurate amended tax returns for each of the three most recent years for which the filing deadline has passed and pay any additional tax reflected on the returns, plus interest, (2) file FBARs for each of the six most recent years for which the filing deadline has passed, and (3) pay a miscellaneous offshore penalty equal to five percent of the highest aggregate balance of the foreign assets. (*Id.* at IRS-Maze-158 & 160-61, JA___ & ___.) Accuracy-related penalties, failure-to-file penalties and FBAR penalties are otherwise inapplicable if taxpayers meet these requirements. (*Id.* at IRS-Maze-159, JA___.) Under the Streamlined Procedures, however, taxpayers do not sign a closing agreement with the IRS or receive any assurances concerning non-prosecution. As a result, the IRS may examine ***14** amended returns submitted under the Streamlined Procedures, or returns for earlier years, and determine additional tax liabilities and penalties or recommend criminal prosecution. (*Id.* at IRS-Maze-151 & -159, JA___ & ___.)

The Streamlined Procedures are not available to taxpayers in the OVDP. For taxpayers who had not selected either compliance option as of July 1, 2014 (about two weeks after the changes were announced), a submission under the OVDP

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precludes participation in the Streamlined Procedures, and vice versa. (*Id.* at IRS-Maze-151, JA___.) Those taxpayers can make a binary choice between the two programs.

Taxpayers who entered the OVDP prior to July 1, 2014, but had not signed a closing agreement, could "request treatment under the applicable penalty terms available under the streamlined procedures." (*Id.*) They are not eligible for the Streamlined Procedures *per se.* (*Id.* at IRS-Maze-208 (Q&A 1.4), JA___.) The IRS added Transitional Treatment under the OVDP, however, to offer the same five-percent miscellaneous offshore penalty to these taxpayers, provided they can demonstrate that their conduct was non-willful.

***15 1. Transitional Treatment under OVDP**

Transitional Treatment "allow[s] taxpayers currently participating in OVDP who meet the eligibility requirements for the expanded Streamlined Procedures announced on June 18, 2014, an opportunity to remain in the OVDP while taking advantage of the favorable penalty structure of the expanded streamlined procedures." (*Id.* at IRS-Maze-291 (Q&A 1), JA___.) Taxpayers must (1) submit all documents required under the OVDP, namely, eight years of accurate tax returns and FBARs, (2) pay the taxes, interest and penalties (other than the miscellaneous offshore penalty) due under the ODVP, and (3) submit a certification of non-willfulness regarding the prior failure to report foreign assets, including a narrative specifically describing the circumstances. (*Id.* at IRS-Maze-292-93 (Q&A 6), JA___.) "Before transitional treatment is given, the IRS must agree that the taxpayer is eligible for transitional treatment and must agree that the available information is consistent with the taxpayer's certification of non-willful conduct." (*Id.* at IRS-Maze-293 (Q&A 7), JA___.) With the agreement of the IRS, a taxpayer's miscellaneous offshore penalty may be reduced from 27.5 percent to only five percent of the foreign assets' highest ***16** value.[4] (*Id.* at IRS-Maze-292 (Q&A 5), JA___.) With or without such agreement, all other terms of the OVDP still apply, including taxpayers' right to opt out. (*Id.* at IRS-Maze-293-94 (Q&A 8 & 9), JA___.)

As a general matter, Commissioner Koskinen stated that "the IRS is seeking a balanced approach" between holding taxpayers accountable and encouraging them to come forward. (*Id.* at IRS-Maze-256, JA___.) The chart below summarizes the tailored efforts to achieve this goal. In all events, they offer taxpayers significant benefits relative to otherwise applicable civil and criminal liabilities.

	OVDP	**Streamlined Procedures (for U.S. Residents)**	**Transition Treatment under the OVDP**
Non-prosecution letter from IRS	Yes	No	Yes
Filing requirements	8 years of tax returns and FBARs	3 years of tax returns and 6 years of FBARs	8 years of tax returns and FBARs
Payment of additional tax and interest	As reported on the returns filed for the past 8 years	As reported on the returns filed for the past 3 years	As reported on the returns filed for the past 8 years
Payment of accuracy-	Imposed for the past 8 years	None	Imposed for the past 8 years

related, failure-to-file and failure-to-pay penalties			
Miscellaneous offshore penalty	27.5 percent of the aggregate highest value of the foreign assets	5 percent of the aggregate highest value of the foreign assets	5 percent of the aggregate highest value of the foreign assets
Burden of proof	Taxpayers have the burden of establishing that the penalty liability is less than the amount provided for under the OVDP	IRS has the burden of establishing that taxpayers acted willfully	Taxpayers have the burden of establishing that they acted non-willfully and/or that their penalty liability is less than the amount provided under the program
Closing agreement resolving prior years' liabilities	Yes	No	Yes

***18** As of 2015, more than 54,000 taxpayers participated in these compliance options, resulting in the collection of more than $8 billion in taxes and penalties. IRS News Release, IR 2015-116 (Oct. 16, 2015).

4. Plaintiffs' complaint and the Government's motion to dismiss

Plaintiffs (who are U.S. residents) all held foreign accounts dating back to the 1980s or 1990s that they failed to report or pay taxes on. (Doc. 1 ¶¶ 81, 88, 96, JA___, ____ & ___.) They all entered the OVDP prior to 2014, and then sought to avail themselves of the terms of the Streamlined Procedures after that compliance option was announced. (*Id.* ¶¶ 82-83, 90, 92, 97-98, JA___, ____ & ___.) Plaintiffs Eva Maze and Margot Lichtenstein sought to withdraw from the OVDP and directly enter the Streamlined Procedures. (*Id.* ¶¶ 83, 98, JA___ & ___.) Plaintiff Suzanne Batra requested Transitional Treatment. (*Id.* ¶ 92, ***19** JA___.) The IRS refused these requests. It directed Ms. Maze and Ms. Lichtenstein to request Transitional Treatment and denied Ms. Batra's request for such treatment. (*Id.* ¶¶ 84, 92, 99, JA___, ____ & ___.) Plaintiffs then brought this suit.

Plaintiffs claimed that the "Transition Rules: Frequently Asked Questions," which prohibit taxpayers in the OVDP from using the Streamlined Procedures, are invalid under the APA, either because the IRS announced them without first engaging in notice-and-comment rulemaking under 5 U.S.C. § 553 (*id.* ¶ 107, JA___), or because the Transition Rules are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law under 5 U.S.C. § 706(2)(A) (*id.* ¶ 106, JA___). Plaintiffs requested (i) a declaration that the Transition Rules are unenforceable and (ii) an injunction against their operation. They further requested a judgment allowing them to withdraw from the OVDP and to use the Streamlined Procedures. (*Id.,* Request for Relief ¶ D, JA___.)

The Government moved to dismiss the complaint for lack of subject matter jurisdiction. As relevant here, the Government argued that plaintiffs' suit for declaratory and injunctive relief seeks to restrain ***20** the assessment and collection of federal income taxes and is therefore barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act. (Doc. 20 at 12-14, JA___.) Plaintiffs disagreed. (*Id.* at 15, JA___.)

5. The District Court's decision

The District Court concluded that plaintiffs' suit to enter the Streamlined Procedures seeks to restrain the assessment and collection of tax in several ways. It explained that the relief requested by plaintiffs would avoid altogether liability for three years of accuracy-related penalties that are treated as taxes for purposes of the AIA. The court also noted that the relief plaintiffs sought stood to reduce the amounts of the miscellaneous offshore penalties under the OVDP that are in turn collected in lieu of other penalties that are considered taxes for purposes of the AIA, such as failure-to-file penalties. (*Id.* at 16-18, JA___.) The court also pointed out that the requested relief would also make it drastically more difficult to collect taxes and penalties for the five additional years covered by the OVDP that are not covered by the Streamlined Procedures. The court reasoned that the suit would also restrain assessment and collection by reducing plaintiffs' filing ***21** obligation to only three years of returns, rather than the eight years called for under the OVDP. (*Id.* at 20-21, JA___.) The court further observed that the relief sought by plaintiffs would shift the burden to the IRS to find willfulness before it could levy associated taxes and penalties. (*Id.* at 22, JA___.)

Finally, the District Court rejected plaintiffs' suggestion that their suit falls within a judicial exception to the AIA, recognized in *South Carolina v. Regan,* 465 U.S. 367 (1984), when there is no alternative remedy for the alleged injury. (*Id.* at 30-31, JA___.) The court explained that plaintiffs may simply opt out of the OVDP, in which case they would be free to pursue settlements with the IRS on the same terms as the Streamlined Procedures. Failing that, the court observed, plaintiffs could pay the taxes, penalties, and interest determined in examination and bring a refund action. (*Id.* at 29-30, JA___.) The court accordingly ordered the complaint dismissed.

This appeal follows.

SUMMARY OF ARGUMENT

Plaintiffs are currently in the OVDP and, by virtue of that fact, are prohibited from using the Streamlined Procedures. Plaintiffs ***22** brought this suit seeking "[a] judgment that [they] may withdraw from the 2012 OVDP and directly enter the 2014 SFCP [Streamlined Procedures]" on the ground that the prohibition is invalid under the APA. (Doc. 1, Request for Relief ¶ D, JA___.) The intended consequences of such a judgment are that plaintiffs would pay less tax, lessen their obligation to file returns that the IRS uses to determine tax liability, and shift the burden to the IRS to rebut plaintiffs' certifications that their conduct was non-willful, which lessens their tax liability. Plaintiffs' suit, in other words, runs headlong into the Anti-Injunction Act (and the tax exception to the Declaratory Judgment Act), barring any "suit for the purpose of restraining the assessment or collection of any tax." I.R.C. § 7421(a). The District Court was therefore correct to dismiss it.

Indeed, there is no dispute that plaintiffs' suit falls within the purview of the AIA in at least one respect. Under the terms of the OVDP, plaintiffs must pay tax and accuracy-related penalties for eight years and a 27.5-percent miscellaneous offshore penalty unless plaintiffs can show that they acted non-willfully in which case the level of the penalty would be reduced to five percent. In contrast, using the ***23** Streamlined Procedures, plaintiffs would pay tax and no accuracy-related penalties for three years, a five-percent miscellaneous penalty without showing non-willfulness, and likely would pay no tax or penalties for the other five years. Plaintiffs' primary argument is that the AIA only bars suits that "stop" the assessment or collection of tax. Even under that theory, the AIA applies here because plaintiffs' suit seeks to stop the

collection of three years of accuracy-related penalties that, by statute, are treated as taxes. That alone ends the debate that plaintiffs' suit is barred unless it fits the *South Carolina* exception to the AIA, which it does not.

Plaintiffs, in any event, are wrong that the AIA only bars suits that "stop" assessment or collection, as both the case law of the Supreme Court and this Court and the language of the statute make clear. There is simply no way to read "for the purpose of restraining" in the AIA to mean "stop," as plaintiffs attempt to do. Plaintiffs also misfire on their alternative argument that their suit does not seek to "restrain" assessment or collection as the word is properly and ordinarily understood, meaning to inhibit. Plaintiffs cannot refute that the equitable relief they request would prohibit or inhibit the collection ***24** of multiple taxes for each of eight years. Finally, the *South Carolina* exception to the AIA, which applies only when there is no alternative avenue to litigate a party's claims, is inapplicable here. Far from lacking any remedy, plaintiffs may raise their claims in a refund suit - the archetypal avenue for review of tax issues.

The order of the District Court is correct and should be affirmed.

ARGUMENT

The District Court correctly held that plaintiffs' suit is barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act

Standard of review

Whether the Acts deprived the District Court of subject matter jurisdiction presents a question of law, reviewable *de novo. Cohen v. United States,* 650 F.3d 717, 722 (D.C. Cir. 2011) (*en banc*).

A. The Acts bar suits that seek to restrain the assessment and collection of tax, as plaintiffs' suit does several times over

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." I.R.C. § 7421(a). The AIA's principal purpose is the "protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial ***25** interference." *Bob Jones Univ. v. Simon,* 416 U.S. 725, 736-37 (1974) (quoting *Enochs v. Williams Packing & Navigation Co.,* 370 U.S. 1, 7 (1962)). In keeping with that purpose, courts give the AIA "almost literal effect." *Id.* at 737; *Cohen,* 650 F.3d at 724. The DJA likewise expressly bars claims for declaratory relief "with respect to Federal taxes." 28 U.S.C. § 2201. This Court has held that the Acts are coterminous. *Cohen,* 650 F.3d at 727-31. Together, the Acts generally preclude the award of declaratory and injunctive relief and confine the litigation of federal tax disputes to suits for refund. *Bob Jones Univ.,* 416 U.S. at 737.

A claim that falls within the Acts' strictures must be dismissed for lack of subject matter jurisdiction. *Gardner v. United States,* 211 F.3d 1305, 1310-11 (D.C. Cir. 2000). The AIA and DJA cannot be circumvented through an action under the APA. *See We the People Found., Inc. v. United States,* 485 F.3d 140, 142-43 (D.C. Cir. 2007) (noting that the Acts are "other limitations on judicial review" preserved by 5 U.S.C. § 702).

This Court has said that AIA "requires a careful inquiry into the remedy sought, the statutory basis for that remedy, and any implication ***26** the remedy may have on assessment and collection." *Cohen,* 650 F.3d at 727; *see Z St. v. Koskinen,* 791 F.3d 24, 30 (D.C. Cir. 2015). That inquiry leads inexorably to the conclusion that this suit falls within the scope of the Acts. [5] Plaintiffs are currently in the OVDP, under which they are obligated to report and pay eight years of taxes and interest on their previously unreported foreign assets, pay accuracy-related penalties for those years, and pay a miscellaneous offshore penalty at the 27.5-percent level - or at the reduced five-percent level, if taxpayers qualify for Transitional Treatment within OVDP by satisfying the IRS that they did not act willfully. In this action, plaintiffs seek "[a] judgment that [they] may withdraw from the 2012 OVDP and directly enter the 2014 SFCP." (Doc. 1, Request

for Relief ¶ D, JA___.) Under the Streamlined Procedures, they would report and pay three years of taxes and interest on their foreign assets, pay no accuracy-related penalties for those years, and pay a five-percent miscellaneous offshore penalty without having to establish that their conduct was non-willful.

The District Court detailed the specific ways in which plaintiffs' suit seeks to restrain the assessment and collection of taxes. Notably, any one of them, standing alone, would be sufficient to bring this suit within the scope of the AIA. As we explain below, each one of the District Court's reasons for concluding that this suit is barred by the AIA is compelling and requires dismissal.

First, the requested relief would directly prevent the IRS from collecting taxes and penalties that are treated as taxes, starting with accuracy-related penalties that are required to be paid under the OVDP that are excepted from payment under the Streamlined Procedures for the three-year period covered by that compliance option. The accuracy-related penalty is located in Subchapter 68A of the Code. I.R.C. § 6662. Section 6665(a)(2) of the same subchapter provides that "any reference in this title [the Internal Revenue Code] to 'tax' imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter." Consequently, the ***28** reference to "any tax" in the AIA, I.R.C. § 7421(a), includes the accuracy-related penalty. It follows that the AIA bars any suit for the purpose of restraining the assessment or collection of the penalty. Indeed, based on nearly identical language applicable to penalties in Subchapter 68B, I.R.C. § 6671(a), this Court held that the AIA barred a suit to restrain the assessment and collection of a penalty contained in that subchapter. *Florida Bankers Ass'n v. United States,* 799 F.3d 1065, 1067 (D.C. Cir. 2015), *cert. denied,* 136 S. Ct. 2429 (2016); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2583 (2012).

Plaintiffs' use of the Streamlined Procedures would also prevent the IRS from collecting a miscellaneous penalty at the level provided for under the OVDP, equal to 27.5 percent of the highest value of plaintiffs' foreign assets. Under the Streamlined Procedures, the penalty is only five percent of that value. The miscellaneous offshore penalty is a proxy collected in lieu of an array of statutory penalties, including the failure-to-file penalties under I.R.C. § 6677 (triggered by the reporting requirements on foreign trusts or transfers to foreign trusts) and I.R.C. § 6679 (triggered by the reporting requirements on foreign corporations or foreign partnerships). These penalties are located in Subchapter ***29** 68B, and therefore are likewise taxes for purposes of the AIA for the same reasons that the accuracy-related penalty is a tax for that purpose. *See Florida Bankers,* 799 F.3d at 1067. Accordingly, the AIA bars plaintiffs from bringing suit to eliminate the lion's share of their obligation to pay a 27.5-percent miscellaneous offshore penalty.

The IRS also likely would be precluded from assessing and collecting taxes and penalties treated as taxes for the five years that taxpayers must pay such liabilities under the OVDP, but not under the Streamlined Procedures. A condition of participation in the OVDP is that taxpayers waive the statute of limitations on making assessments for the relevant eight-year period. (Doc. 12 at IRS-Maze-199-200 (Q&A 42), JA___.) No such condition exists under the Streamlined Procedures, meaning that the IRS ordinarily must make any assessments within three years after the filing of the return for the relevant year, *see* I.R.C. § 6501(a), unless it is able to rely on an extension or exception to the limitations period in I.R.C. § 6501 that (i) contains a longer limitations period, such the six-year period applicable to returns containing substantial omissions from gross income (generally in excess of 25 percent) under ***30** I.R.C. § 6501(e)(1), (ii) postpones the time when the statute of limitations on assessment begins to run, as is true in the case of a failure to file specified information returns regarding certain foreign transfers under I.R.C. § 6501(c)(8), or (iii) lifts the bar of limitations, as is true for false or fraudulent returns, willful attempts to evade or defeat tax, and failure to file returns under I.R.C. § 6501(c)(1), (2) and (3), respectively. To reach all eight years covered by the OVDP, taxpayers likely must have failed to file returns (or timely information returns) for the earliest years or filed false or fraudulent returns with the intent to evade tax. The AIA does not bar application of the statute of limitations, of course, but it does bar suits to prohibit assessments, which is what plaintiffs' suit to leave the OVDP for the Streamlined Procedures ultimately tries to do.

Second, plaintiffs' request for a judgment affording entry into the Streamlined Procedures would also restrain the assessment and collection of taxes and penalties for the five years covered only by the OVDP by relieving plaintiffs of the

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obligation to file accurate returns for such years (and to file FBARs for two of the five years). Plaintiffs concede that they had foreign accounts during the five-year period, but ***31** did not report income from those accounts. (Doc. 1 ¶¶ 81, 88, 96, JA___, ___ & ___.) The obligation to file accurate returns for those years puts the onus on plaintiffs to report what taxes they owe after they did not meet that requirement of accurate self-reporting when they filed their original returns. Entry into the Streamlined Procedures would shift the onus to the IRS. Plaintiffs, in other words, would foreclose the least onerous means to assess and collect their unpaid taxes by eliminating their responsibility to file accurate returns for the five-year period covered by the OVDP, but not the Streamlined Procedures.

Third, plaintiffs' request for relief would shift the burden of proving willfulness or fraud to the IRS to collect penalties that are taxes for purposes of the AIA, constituting a restraint on their assessment and collection. Recall that taxpayers within the OVDP may pay a five-percent miscellaneous offshore penalty under Transitional Treatment, provided that they certify that their conduct was non-willful and that the IRS agrees. Otherwise, taxpayers are required to pay a 27.5-percent miscellaneous offshore penalty. Under the Streamlined Procedures, taxpayers qualify to pay a five-percent miscellaneous offshore penalty merely by certifying that their conduct was non-willful. ***32** The IRS may investigate taxpayers and determine that their conduct was, in fact, willful or fraudulent, disqualifying them from the beneficial terms of the Streamlined Procedures. But the presumption is that taxpayers acted non-willfully. As a result, plaintiffs' suit to use the Streamlined Procedures would shift the burden to the IRS regarding whether they qualify to pay a reduced miscellaneous offshore penalty.

Of final note, as the District Court observed (Doc. 20 at 31, JA___), plaintiffs make no bones about seeking to restrain the assessment and collection of tax. Plaintiffs request a judgment to enter the Streamlined Procedures in order to avoid the following injuries: “a greater offshore penalty, exposure to additional civil penalties, increased filing burdens, a disparate standard of review, and a longer case-review time (and thus attorneys' fees) as compared to other similarly situated applicants.” (Doc. 1 ¶ 104, JA___.) The “implication[s] the remedy may have on assessment” (*Cohen,* 650 F.3d at 727) are clear. Plaintiffs want to pay less tax and reduce their burdens associated with the collection of taxes. That goal leads unmistakably to the conclusion that plaintiffs' suit is barred.

*33 B. Plaintiffs' argument that the Acts only bar suits that “stop” assessment or collection would not save this suit and is, in any event, wrong

Plaintiffs' primarily argument (Br. 19-34) is that the AIA only bars suits that “stop” the assessment or collection of tax. That contention, as we explain below, is flawed at every turn.

1. Binding precedent of the Supreme Court and this Court disproves plaintiffs' interpretation of the Anti-Injunction Act

As an initial matter, plaintiffs' argument ignores that their suit does seek to “stop” the assessment and collection of taxes, meaning that the AIA applies even if plaintiffs are correct (which they are not). As discussed, plaintiffs' request to use the Streamlined Procedures would stop the IRS from collecting accuracy-related penalties for the three-year period covered by the Streamlined Procedures, a 27.5-percent miscellaneous offshore penalty, and, most likely, taxes and penalties for any or all of the additional five years that are covered only by the OVDP. Plaintiffs appear to recognize this point later in their brief and respond that using the Streamlined Procedures does not mean that they will secure its benefits by seeing them through to the end. (Br. 35-38.) We address this argument more fully below. For now, it suffices to say that the fact that plaintiffs might abandon their efforts to comply with ***34** the Streamlined Procedures or otherwise fall short of its terms does not alter the nature of the relief they seek. Their overarching goal is to reduce their obligations to file returns and pay taxes and associated penalties. As a result, the AIA applies because, by any definition, the suit seeks to restrain the assessment or collection of tax.

At all events, the history of the AIA is not narrowly limited to barring suits to "stop" assessment and collection. The Supreme Court and this Court have both construed it more broadly, belying plaintiffs' argument. In *United States v. American Friends Service Committee,* 419 U.S. 7 (1974), the Supreme Court held that the AIA barred a suit that would have required the IRS to collect a portion of employment tax withholdings directly from employees. Employees of the American Friends Service Committee, who were observant Quakers, requested that the Committee cease withholding 51.6 percent of the amount that should be withheld from their wages, corresponding to the portion of the federal budget that is military-related. The employees instead wanted to report that portion of their employment taxes on their individual returns and refuse to pay it in order to bear witness to their beliefs. To facilitate this religious expression, the District Court enjoined the ***35** Government from enforcing the withholding requirement. In the Supreme Court, the employees argued "that since the District Court enjoined only one method of collection, and the Government is still free to assess and levy their taxes when due, the Act does not apply." *Id.* at 10. The Court rejected this contention, responding that "[t]he District Court's injunction against the collection of the tax by withholding enjoins the collection of the tax, and is therefore contrary to the express language of the Anti-Injunction Act." *Id.*

Put another way, the AIA does not bar only suits to stop the IRS from collecting a tax. It also bars suits "for the purpose of restraining the assessment or collection" by, for example, enjoining a particular method of collection. I.R.C. § 7421(a). As this Court has explained, the AIA bars suits not only that directly restrain assessment and collection, but also those "directed at the means by which the IRS achieves those ends" or that "interfere with ancillary functions to tax collection." *Seven-Sky v. Holder,* 661 F.3d 1, 10 (D.C. Cir. 2011), *cert. denied,* 133 S Ct. 63 (2012), *abrogated on other grounds, Nat'l Fed'n of Indep. Bus., supra*; *see Inv. Annuity, Inc. v. Blumenthal,* 609 F.2d 1, 4 (D.C. Cir. 1979) (barring a challenge to a Revenue Ruling even though the suit ***36** has "no current effect on the collection of taxes" because "its 'purpose' is clearly restraint"). The result also follows from the "manifest purpose" of the AIA "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." *Williams Packing,* 370 U.S. at 7; *see Nat'l Fed'n of Indep. Bus.,* 132 S. Ct. at 2582 ("Th[e AIA] protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin *or otherwise obstruct* the collection of taxes.") (emphasis added); *see also Florida Bankers,* 799 F.3d at 1066-67 (holding that the AIA barred a suit to enjoin a regulation imposing a third-party reporting requirement). [6]

***37** In *Foodservice & Lodging Institute, Inc. v. Regan,* 809 F.2d 842 (D.C. Cir. 1987), moreover, this Court held that the AIA barred portions of a suit to enjoin the enforcement of regulations implementing tip reporting and withholding requirements. One of the regulations specified that a ten-employee rule that determined whether an employer was subject to reporting and withholding requirements included "all employees at all food or beverage operations." *Id.* at 844 (quoting Temp. Treas. Reg. § 31.6053-3T(j)(9), *available at* T.D. 8039, 1985-2 C.B. 316, 319). The regulation maximized the number of employers subject to the reporting and withholding requirements, making it easier for the IRS to assess and collect tax on employees' tips. Notably, the IRS could have collected the tax another way, by ***38** examining employees' returns and pursuing collection. The Court nevertheless concluded that because the "regulation[ ] plainly concern[s] the assessment or collection of federal taxes, the appellant's challenges to [it are] barred by the Anti-Injunction Act and the Declaratory Judgment Act." *Id.* Once again, the AIA barred a suit that would interfere with or inhibit the process of assessment or collection. This suit would do the same, only to a far greater degree than was at issue in either *American Friends Service Committee* or *Foodservice & Lodging.*

2. Plaintiffs misinterpret the language of the statute

Given the case law applying the AIA, it should come as no surprise that plaintiffs' statutory interpretation is flawed. Plaintiffs rely on the surrounding context to interpret the word "restraining" in the AIA to mean "stop" (Br. 21-28), but their argument does not add up. In fact, the context shows the opposite, that Congress used "restraining" in its broad, ordinary sense, meaning to inhibit or hold back.

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Plaintiffs contend that, because the phrase "for the purpose of restraining the assessment or collection of any tax" in the AIA modifies "suit," the word "restraining" must "refer to the legal remedy resulting ***39** from the prohibited suit." (Br. 22.) That construction, however, violates basic rules of syntax. A plaintiff does not bring a suit "for the purpose of" a legal remedy. A plaintiff, rather, brings a suit *for* a legal remedy, such as a suit for damages, or a suit for declaratory and injunctive relief. Simply put, plaintiffs attempt to read the words "for the purpose of" out of the AIA, which is no small omission. Based on the "for the purpose of" language, the Supreme Court concluded that the AIA barred the complaints in *Bob Jones University* and *Alexander v. "Americans United" Inc.,* 416 U.S. 752 (1974), to enjoin the revocation of tax-exempt status. It looked past the artful pleadings and disavowed intent to obstruct the flow of revenue to the Government and determined that the AIA applied because, in reality, the purpose of each suit was to restrain the assessment or collection of tax. *See "Americans United",* 416 U.S. at 760-61; *Bob Jones Univ.,* 416 U.S. at 738; *accord Inv. Annuity,* 609 F.2d at 4.

Ironically, plaintiffs accuse the District Court of reading a word out of the AIA by giving the word "restraining" its ordinary meaning akin to inhibiting. (Br. 23-24.) They contend that "the word 'assessment' becomes mere surplusage," because virtually any court ***40** action related to any phase of taxation can be said to inhibit the collection of tax. (Br. 24.) That is not true. As plaintiffs recognize, the words "assessment" and "collection" are terms of art in the tax world. "Assessment" constitutes "a 'recording' of the amount the taxpayer owes the Government" that "triggers levy and collection efforts." *Hibbs v. Winn,* 542 U.S. 88, 100-01 (2004) (quoting I.R.C. § 6203). "Collection" refers to the Government's authority under Chapter 64 of the Internal Revenue Code to collect taxes and, more particularly in this context, to employ the administrative enforcement methods of a tax lien or levy. I.R.C. §§ 6321-6327, 6331-6344; *see Hibbs,* 542 U.S. at 101. Relative to assessment, collection is the next distinct step in the administrative process. *See Direct Marketing Ass'n v. Brohl,* 135 S. Ct. 1124, 1130-31 (2015). Thus, it might be doubtful whether the AIA covers pre-assessment injunction actions if the statute was not explicit that any "suit for the purpose of restraining the assessment or collection of any tax" is prohibited. I.R.C. § 7421(a). At minimum, the word "assessment" "performs a significant function simply by clarifying," and therefore it is not surplusage. ***41** *United States v. Atl. Research Corp.,* 551 U.S. 128, 137 (2007); *accord Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n,* 533 F.3d 810, 818 (D.C. Cir. 2008).

Plaintiffs also look to the ordinary meaning of "restrain" when the AIA was originally enacted in 1867, *see* Pub. L. 39-169 § 10, 14 Stat. 471, 475-76 (Mar. 2, 1867), as support for interpreting "restraining" in the AIA as "stop." (Br. 24-25.) But the very definitions that plaintiffs rely on belie their point. The primary definition "to hold back" and the alternative definitions "to limit" or "to restrict" are all synonymous with inhibiting action, not prohibiting it. (Br. 24-25 (quoting *Webster's American Dictionary of the English Language* 1128 (1864)).) Indeed, the Supreme Court stated that these definitions of "restrain" "capture[ ] orders that merely *inhibit* acts." *Direct Marketing,* 135 S. Ct. at 1132 (emphasis in original). As a result, the plain meaning of "restrain" supports the District Court's conclusion.

Lastly, plaintiffs contend that the AIA prohibits only suits that stop assessment or collection in light of its listed exceptions, all of which they say concern suits that "stop" assessment or collection. (Br. 26-28.) There is, however, no rule of logic or statutory construction that limits a rule by the scope of its exceptions. In any event, plaintiffs are incorrect ***42** that the exceptions to the AIA all "stop" the assessment or collection of tax. One such exception, I.R.C. § 6212(c), generally bars the IRS from issuing a second notice of deficiency after a taxpayer has filed a petition in the Tax Court in response to the first notice. But the Commissioner may still assert in the Tax Court that the taxpayer owes more than the total on the first notice of deficiency. I.R.C. § 6214(a). He is not stopped from asserting an additional amount, although he bears the burden of proof with respect to that amount, even if the burden would ordinarily rest upon the taxpayer. In this regard, I.R.C. § 6212(c) inhibits assessment, which disproves the premise of plaintiffs' argument that no exception to the AIA does that.

3. Plaintiffs also find no support for their position in the history of the Anti-Injunction Act or *Direct Marketing*

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Defying the long-recognized purpose of the AIA "to permit the United States to assess and collect taxes alleged to be due without judicial intervention," *Williams Packing,* 370 U.S. at 7, plaintiffs insist that Congress, more narrowly, "intended the AIA to prohibit suits in *equity* that sought a 'bill to restrain' the collection or assessment of tax" (Br. 28-30 (emphasis in original)). A similar argument that the AIA ***43** should be read at less than face value based on its history was rejected by the Supreme Court in *Bob Jones University.* There, the Court recognized that "[t]he Anti-Injunction Act was written against the background of general equitable principles disfavoring the issuance of federal injunctions against taxes, absent clear proof that available remedies at law were inadequate." *Bob Jones Univ.,* 416 U.S. at 743 n.16. In light of these equitable principles, the Court believed that "it is most unlikely that Congress would have chosen the stringent language of the Act if its purpose was merely to restate existing law and not to compel litigants to make use solely of the avenues of review opened by Congress." *Id.* Consistent with the plain language of the statute, Congress's intent was not to be modest or timid in protecting the assessment and collection of tax.

In *Direct Marketing,* upon which plaintiffs rely, the Supreme Court construed the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, which provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" where a "a plain, speedy and efficient remedy" is available in the State's courts. The Supreme Court held that the TIA did not bar a suit in ***44** federal court to enjoin the enforcement of Colorado laws requiring retailers that do not collect Colorado sales or use taxes to notify Colorado customers of their tax liabilities and to report tax-related information to customers and the State. In so doing, the Court rejected the broad, ordinary meaning of the word "restrain" in the TIA, to "limit, restrict or hold back," in favor of its narrower meaning, ' 'to prohibit from action; to put compulsion upon ... to enjoin.' ' *Direct Marketing,* 135 S. Ct. at 1132 (quoting *Black's Law Dictionary* 1548 (3d ed. 1933)) (alteration by the Supreme Court). The Supreme Court looked to the company "restrain" keeps in the TIA, namely the equitable remedies "enjoin" and "suspend," as evidence of its meaning, explaining that "[t]he statutory context ... lead us to conclude that the TIA uses the word 'restrain' in its narrower sense." *Id.*

Here, by contrast, as the District Court correctly recognized (Doc. 20 at 26-29, JA___), the text of the AIA, which prohibits a suit in any court "for the purpose of restraining the assessment or collection of any tax," differs from that of the TIA in material respects. The AIA, of course, does not contain the words "enjoin" or "suspend," or prohibit district courts from granting specific forms of equitable relief. Rather, ***45** the prohibition contained in the AIA begins with the words "[n]o suit for the purpose of restraining," which, as discussed, *supra* __, puts the focus on the *purpose* of the suit, and not the relief requested. The fact that, in the AIA, "restraining" stands alone, without being coupled with the words "enjoin" or "suspend," as in the TIA, means that the AIA should not be construed in the same way.

Plaintiffs believe that the Supreme Court in *Direct Marketing* effectively short-circuited any independent analysis of the AIA, having ' 'assume[d] that words in both Acts [the TIA and the AIA] are generally used in the same way.' ' (Br. 32 (quoting *Direct Marketing,* 135 S. Ct. at 1129) (alterations by plaintiffs)).) It therefore follows, according to plaintiffs, that "the Supreme Court's interpretation of 'restrain' under the TIA applies equally to the meaning of 'restraining' for purposes of the AIA." (Br. 32.) But plaintiffs misread what the Court was saying, which is not that the Acts are synonymous or that their differences - the use of "restrain" in one "for the purpose of restraining" and in the other - should be glossed over.

The Supreme Court has assumed that words in both acts are "generally" used in the same way, *Direct Marketing,* 135 S. Ct. at 1129, ***46** an observation that is less than absolute. To be sure, the Court has applied the same meaning respecting the TIA to terms borrowed from federal tax law, even though the TIA concerns state taxes. *See Hibbs,* 542 U.S. at 100 (starting with the definition of "assessment" in federal tax law to interpret its meaning in the TIA). Justice Kennedy explained the applicable logic as follows: "The TIA was modeled on the anti-injunction provision; it incorporates the same terminology employed by the provision; and it employs that terminology for the same purpose. It is sensible, then, to interpret the TIA's terms by reference to the Code's use of the term." *Id.* at 115 (Kennedy, J., dissenting) (citation omitted). The Court in *Direct Marketing* did just that.

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Thus, when it came to the words "assessment," "levy" and "collection" in the TIA, the Court looked to federal tax law for guidance. *Direct Marketing,* 135 S. Ct. at 1129-31. But "restrain" is not a term of art borrowed from the Internal Revenue Code. In construing the word "restrain," the Court in *Direct Marketing* followed the general approach of statutory construction, focusing on the word's various definitions and assessing the influences on its meaning from the context in which it is used. *Id.* at 1132-33; *see generally* ***47** *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). Plaintiffs' attempt to equate the scope of the prohibitions of the two Acts, in contrast, ignores the differential language and context in which "restrain" and "restraining" appear.

Moreover, by arguing that that the meaning of "restrain" in the TIA informs the definition of "restraining" in the AIA, plaintiffs get the relationship backwards. The TIA was modeled on the AIA and not the other way around. *Cf. United States v. X-Citement Video,* 513 U.S. 64, 77 n.6 (1994) ("[T]he views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight."). [7] As discussed, *supra* __, the Supreme Court had long recognized in *American Friends Service Committee* that the AIA bars suits that seek to inhibit the collection of tax. For the Court in *Direct Marketing* to conclude that "a suit cannot be understood to 'restrain' the 'assessment, ***48** levy or collection' of a state tax if it merely inhibits those activities," 135 S. Ct. at 1133, without so much as citing *American Friends Service Committee* or any of its other AIA opinions, let alone overruling them, underscores the point that the AIA and the TIA are not linked in the way plaintiffs contend. [8]

In *Z Street,* another case relied on by plaintiffs (Br. 33), this Court considered whether an action to enjoin the IRS from allegedly delaying its review of an application for tax-exempt status due to viewpoint discrimination, sufficiently implicates assessment and collection to fall within the ambit of the AIA. The Court reviewed the arguments on both sides of the question, including, on the one hand, that the Supreme Court read the word "restrain" in the TIA narrowly in *Direct Marketing,* and on the other, that the TIA and the AIA "differ." ***49** *Z St.,* 791 F.3d at 31. Ultimately, this Court reserved its judgment, deciding instead that the suit fit within the *South Carolina* exception to the AIA for instances where there is no other remedy for the alleged injury. *Id.* Plaintiffs insist that *Z Street* supports interpreting the TIA and the AIA the same. But the Court itself was more circumspect and drew no conclusion either way.

Finally, plaintiffs misconstrue the principle in *Direct Marking* that " 'jurisdictional rules should be clear,' " 135 S. Ct. at 1133 (quoting *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.,* 545 U.S. 308, 321 (2005) (Thomas, J., concurring)), as support for interpreting the AIA as barring only suits that "stop" assessment or collection. (Br. 34). The plain language of the AIA and its prior treatment by the Supreme Court and this Court eschew that result. *See, e.g., Cohen,* 650 F.3d 727 (calling for the examination of "any implication the remedy may have on assessment and collection"). The Supreme Court faced starkly different circumstances in *Direct Marketing.* It did not suggest, let alone command, that jurisdictional statutes other than the TIA should be construed like the TIA.

*50 4. Interpreting the word "restraining" in the Anti-Injunction Act in its broad and proper sense, plaintiffs are incorrect that their suit does not seek to restrain assessment and collection

If plaintiffs were granted their request for a judgment allowing them to withdraw from the OVDP and use the Streamline Procedures (Doc. 1, Request for Relief ¶ D, JA___), in contrast to their current situation in the OVDP, they would (1) pay no accuracy-related penalties for the three-year period covered by the Streamlined Procedures, (2) file corrected tax returns for three instead of eight years, (3) be relieved of the obligation to pay taxes and accuracy-related penalties for five years not covered by the Streamlined Procedures, and (4) pay a reduced, five-percent miscellaneous penalty without the IRS's agreement that they acted non-willfully. In the face of these indisputable consequences, plaintiffs argue that their suit is not one "for the purpose of restraining the assessment or collection of any tax" within the meaning of the AIA. Plaintiffs' position defies reality, and none of their contentions in support of that position has the slightest merit.

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First, plaintiffs argue that their use of the Streamlined Procedures would not restrain the IRS from assessing or collecting tax "[i]f [they] acted willfully, or if [they] do[ ] not comply with the terms of ***51** the Streamlined Procedures." (Br. 35.) The fact, however, that plaintiffs might ultimately fail to qualify for the treatment accorded by the Streamlined Procedures, if allowed to pursue that compliance option in lieu of Transitional Treatment, does not make their suit any the less one to restrain assessment or collection.

Plaintiffs also misconstrue the fact that the IRS may audit returns filed by taxpayers in the Streamlined Procedures. They overstate their case in contending that "nothing in the Streamlined Procedures stops the IRS from auditing, assessing and collecting additional tax, penalties and interest" (Br. 37). The Streamlined Procedures expressly provide that taxpayers "will not be subject to accuracy-related penalties with respect to amounts reported on those returns [filed for the past three years], or to information return penalties or FBAR penalties, unless the examination results in a determination that the original return was fraudulent and/or that the FBAR violation was willful." (Doc. 12 at IRS-Maze-159, JA___.) As a result, taxpayers are only subject to penalties on any additional tax determined in examination of those returns. (*Id.*) By comparison, taxpayers in the OVDP are required to pay accuracy-related penalties on all additional taxes reported on eight ***52** years of amended returns and are not shielded from such liability to any extent. Further, although the IRS may audit taxpayers' returns for years preceding the three-year period covered by the Streamlined Procedures, the facts that taxpayers using the Streamlined Procedures, unlike the OVDP, are not required to file amended returns for such years or waive the statute of limitations makes assessment and collection more difficult, if not impossible.

Second, plaintiffs argue that the restraints on assessment and collection "are not caused by this suit; they are caused by the IRS's own program." (Br. 39.) This assertion assumes away the reason for this suit and is not true, by plaintiffs' own account. As plaintiffs acknowledge, having entered the OVDP, they are disqualified from using the Streamlined Procedures.[9] (Doc. 1 ¶ 6, JA___.) Rather, "taxpayers currently participating in OVDP who meet the eligibility requirements for the expanded Streamlined Procedures ... can seek the favorable penalty structure of the expanded Streamlined Procedures" ***53** through Transitional Treatment. (Doc. 12 at IRS-Maze-291 (Q&A 1), JA___; see id. at IRS-Maze-208 (Q&A 1.4), JA___.) Plaintiffs brought this suit to invalidate this restriction precisely because they wish to use the Streamlined Procedures, rather than the Transitional Treatment that was developed for the benefit of those already participating in the OVDP. Plainly, then, this suit seeks to restrain assessment and collection by invalidating Transitional Treatment and allowing plaintiffs to reduce their liabilities even further by using the Streamlined Procedures.

Third, plaintiffs do not deny that they are asking in this suit to be relieved of the obligation in the OVDP to file eight years of amended returns. They argue, however, to the extent that their use of the Streamlined Procedures would result in an additional " 'burden' or 'increase in difficulty' compared to voluntary disclosure," it "arises from the IRS's procedures - not from this lawsuit." (Br. 43.) By that light, a taxpayer only restrains the assessment and collection of tax by prohibiting these activities, not by making these tasks more burdensome for the IRS. Such an approach, however, as discussed, *supra* __, is contrary to the binding precedent of the Supreme Court and ***54** this Court, which stand for the proposition that the AIA bars suits that would interfere with or inhibit the process of assessment or collection. *See Am. Friends Serv. Comm.,* 419 U.S. at 10; *Foodservice & Lodging,* 809 F.2d at 844. Plaintiffs' suit to obtain a judgment allowing them to use the Streamlined Procedures - narrowing their filing obligation from eight years of amended returns under the OVDP to three years of amended returns under the Streamlined Procedures - would "substantially increase the difficulty in collecting unpaid taxes and penalties." (Doc. 20 at 17.) It follows that it is barred by the AIA.

Nor does it matter, in evaluating whether plaintiffs' suit is barred by the AIA, that they bear no obligation to file amended returns under "the normal operation of the law." (Br. 44.) Plaintiffs have always had the right to opt out of the OVDP and have their civil liabilities determined in the normal course of an audit. (Doc. 12 at IRS-Maze-036-37 (Q&A 51), JA___.) Plaintiffs did not need to bring suit to achieve that. But clearly they view the OVDP, and its attendant limits on taxes and penalties and protection against criminal liability, as preferable to an audit, because they have not opted out. And under the OVDP, plaintiffs are required to file eight years of amended returns. Plaintiffs ***55** may not pick and

choose between elements of the OVDP. Thus, their suit seeks to restrain the assessment and collection of tax relative to the OVDP by narrowing their filing obligation to only three years of amended returns. And it is beside the point that the same requirement would not apply outside the OVDP.

At all events, plaintiffs' suit to use the Streamlined Procedures seeks to restrain the assessment and collection of tax in other ways relative to either the OVDP or statute. It would result in the waiver of accuracy-related penalties, the substitution of a miscellaneous offshore penalty for numerous penalties treated as taxes, and the reduction of the miscellaneous offshore penalty from 27.5 percent to five percent of the highest value of the foreign assets without the agreement of the IRS that plaintiffs acted non-willfully.

Fourth, plaintiffs are mistaken that the ‘ ‘burden’ on the IRS to prove willfulness is the same under both the Transitional Rules and the Streamlined Procedures.” (Br. 47.) Under the Streamlined Procedures, taxpayers need only certify that their conduct was non-willful, although the IRS reserves the right to verify the certification for “accuracy and completeness.” (Doc. 12 at IRS-Maze-150-51, JA__.) Taxpayers in the ***56** OVDP may qualify for the same five-percent miscellaneous penalty available under the Streamlined Procedures, but there is more to it. The IRS “must agree that the available information is consistent with the taxpayer's certification of non-willful conduct.” (Doc. 12 at IRS-Maze-293 (Q&A 7), JA___.) Upon request for Transitional Treatment, an IRS examiner makes an initial recommendation, which may be elevated to a central review committee. (Doc. 12 at IRS-Maze-293 (Q&A 8), JA___.) The committee's decision is final, because there are no appeal rights within the OVDP. If a certification is rejected, and “the OVDP miscellaneous penalty [at the 27.5-percent rate] is unacceptable to the taxpayer, the taxpayer may opt out of the OVDP and choose to have the case resolved in an examination process.” (Doc. 12 at IRS-Maze-294 (Q&A 8), JA___.) In short, as plaintiffs recognized in their complaint (Doc. 1 ¶ 71, JA___), taxpayers in the OVDP bear the burden of proving that their conduct was non-willful, in contrast to the Streamlined Procedures, where the burden is reversed. Accordingly, plaintiffs' suit to use the Streamlined Procedures would shift the burden to the IRS regarding plaintiffs' eligibility for a five-percent ***57** miscellaneous penalty, resulting in a restraint on assessment and collection.

Finally, plaintiffs' contention that the District Court drew negative inferences from their complaint (Br. 48-50) is both incorrect and irrelevant to the court's decision that the AIA bars their suit. Both issues - plaintiffs' receipt of non-prosecution letters under the OVDP and their payments of taxes and penalties - were addressed not in the complaint, but in the parties' briefing, and were accurately portrayed by the court in that light. (*Compare* Doc. 20 at 11-12, 20-21, 22, JA___, ___ & ___, *with* Doc. 13 at 9-10, 20-21, JA ___ & ___.) Although these matters were noted by the court, neither one demonstrated that plaintiffs' suit sought to restrain the assessment or collection of tax, and the court did not rely on them in so holding. The District Court looked no further than the terms of the Streamlined Procedures in comparison with the OVDP, and that analysis amply supports its conclusion. *See supra* __.

C. The *South Carolina* exception to the Anti-Injunction Act is inapplicable

The Supreme Court in *South Carolina v. Regan,* 465 U.S. 367 (1984), created a narrow exception to the AIA when there is no ***58** “alternative avenue for an aggrieved party to litigate its claims on its own behalf.” *Id.* at 381; *accord Z St.,* 791 F.3d at 31. As mentioned, *supra* __, the purpose of the AIA is to protect the assessment and collection of taxes from preenforcement judicial interference and to confine tax disputes to suits for refund. *Bob Jones Univ.,* 416 U.S. at 737. The *South Carolina* exception applies when an aggrieved party has no ability to bring a refund action or other type of action capable of redressing the harm alleged, and not merely when an avenue of review leaves something to be desired. *See id.* at 747 (stating that an avenue of review need not be “the best that can be devised”).

In this case, the District Court correctly concluded that plaintiffs may challenge their inability to use the Streamlined Procedures by opting out the OVDP, paying the amounts determined by audit, and then bringing a refund action “for the difference between the liability determined and the amount that would be due under the Streamlined Procedures.” (Doc. 20 at 29, JA___.) That is what Congress intended when it enacted the AIA.

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Plaintiffs dispute the adequacy of a refund action on two grounds, neither of which holds water. First, they contend that the focus of a ***59** refund action "would be solely on the correctness of the tax liability - not on the validity of the Transition Rules" (Br. 51), ignoring the inherent connection between the two. Taxpayers routinely challenge the validity of a rule or regulation as the basis for a refund in district court (or redetermination of a deficiency in the Tax Court). Under similar circumstances in *Florida Bankers,* this Court held that the suit to enjoin a reporting requirement on banks enforced by a penalty treated as a tax was barred by the AIA because "[a] bank may decline to submit a required report, pay the penalty, and then sue for a refund," at which point "a court may consider the legality of the regulation." 799 F.3d at 1067.

To the extent plaintiffs argue that a court may only determine the correctness of their liability by statute, and not according to the terms of the Streamlined Procedure, they ignore instances to the contrary. Most notably, in *Kearney Partners Fund, LLC v. United States,* 946 F. Supp. 2d 1302 (M.D. Fla. 2013), *aff'd,* 803 F.3d 1280 (11th Cir. 2015), the taxpayer voluntarily disclosed his participation in an abusive tax shelter with the expectation that the IRS would waive accuracy-related penalties in accordance with its disclosure initiative described in ***60** Announcement 2002. When the IRS determined accuracy-related penalties anyway, the taxpayer brought suit. The District Court held in relevant part that "it may review whether the disclosure complies with Announcement 2002," waiving penalty liability. *Id.* at 1309. The court explained that "the IRS allegedly failed to observe self-imposed limits upon the exercise of its discretion which invited reliance upon such limitations, in which case courts have held that judicial review is appropriate." *Id.* at 1310 (citing *Estate of Shapiro v. Commissioner,* 111 F.3d 1010, 1018 (2d Cir. 1997); *LeCroy Research Systems Corp. v. Commissioner,* 751 F.2d 123, 127-28 (2d Cir. 1984)).

Of course, plaintiffs are making a subtly different argument - that they are disqualified from using the Streamlined Procedures because they are in the OVDP, and that this restriction is invalid. Plaintiffs, in other words, contend not that they meet the terms of the Streamlined Procedures, but that the terms of the Streamlined Procedures should be changed so that they do. To the extent that they are contending that they are similarly situated to taxpayers who are entitled to use the Streamlined Procedures and that it is unfair to deny them the same ***61** benefits of using that compliance option, it cannot be said that similar claims have never been heard in refund suits or deficiency actions.

For example, in *Moritz v. Commissioner,* 469 F.2d 466, 469-70 (10th Cir. 1972), the court allowed a bachelor the benefit of the dependent care deduction under I.R.C. § 214, finding that the statute unconstitutionally withheld the deduction only from never-married men. In *International Business Machines Corp. v. United States,* 343 F.2d 914, 921 (Ct. Cl. 1965), the court granted a refund, holding that the IRS had abused its discretion under I.R.C. § 7805 when it denied IBM a private letter ruling equivalent to one already issued to its competitor, Remington Rand, without granting any retroactive relief, while the ruling to Remington was revoked on a prospective basis only. [10] And in *Baker v. Commissioner,* 787 F.2d 637, 643 (D.C. Cir. 1986), an attorney's fees case under I.R.C. § 7430, the length of time the Commissioner took to concede the taxpayer's case was questioned where ***62** his co-workers had allegedly obtained swift concessions of the same I.R.C. § 911 exclusion. The court remanded the case for a hearing regarding the reasonableness of the delay, commenting that "[t]ax cases, we add, are encompassed within the general concern that officialdom avoid arbitrary distinctions between like cases." *Id.* As a result, plaintiffs' contention that complaints such as theirs could not be aired in a suit for refund falls flat.

Second, plaintiffs contend, erroneously and without support, that by opting out of the OVDP they "waive their right to participate" in the Streamlined Procedures and so "[a]ny APA challenge would be moot." (Br. 52.) More accurately, plaintiffs appear to want to litigate their right to use the Streamlined Procedures without opting out of the OVDP because they would lose the benefits of the OVDP. (Doc. 12 at IRS-Maze-203 (Q&A 51), JA___.) And the OVDP is better than nothing. But opting out of the OVDP has no bearing on plaintiffs' rights - or lack thereof - *vis-à-vis* the Streamlined Procedures. Moreover, a refund action does not cease to be an avenue for review if it puts a taxpayer in a "precarious financial position." *Bob Jones Univ.,* 416 U.S. at 747.

***63** The overarching goal of plaintiffs' suit to allow them to use the Streamlined Procedures rather than Transitional Treatment is to allow them to pay less taxes and penalties, reduce their obligation to file returns from which their tax liabilities could be determined and shift the burden of demonstrating non-willful conduct from themselves to the IRS. These objectives clearly give rise a suit "for the purpose of restraining the assessment or collection of any tax" within the broad strictures of the AIA. That being so, the District Court correctly dismissed plaintiffs' complaint.

***64 CONCLUSION**

For the foregoing reasons, the order of the District Court should be affirmed.

Appendix not available.

Footnotes

1 "Doc." references are to the document numbered by the Clerk of the District Court in *Maze v. Internal Revenue Service,* D.D.C. Case No. 15-cv-1806. "JA" references are to the deferred joint appendix.

2 Accordingly, we limit our discussion herein to the *Maze* complaint, with the understanding that it is equally applicable in *Green.*

3 In its motion to dismiss, the Government also raised an alternative jurisdictional ground for dismissal, *i.e.,* that plaintiffs' grievance is with an enforcement action committed to agency discretion and not subject to judicial review. (Doc. 20 at 12, JA___.) The District Court did not find it necessary to reach the issue (*id.*), nor did plaintiffs discuss the issue in their opening brief on appeal. In the event this Court were to reverse the ruling that this suit is barred by the AIA and the tax exception to the DJA, it would be appropriate to allow the District Court to consider the unreviewability issue in the first instance on remand.

4 There are, however, incidental differences in the penalty base used to calculate the miscellaneous offshore penalty under the OVDP as compared to the penalty base under the Streamlined Procedures. (*Compare* Doc. 12 at IRS-Maze-236 (Q&A 35), JA___ (focusing on tax noncompliant assets), *with id.* at IRS-Maze-159, JA___ (focusing on tax or reporting noncompliant assets).)

5 For simplicity, we focus exclusively on the AIA with the understanding that the discussion also apples to the DJA, given its equivalent reach. ***27** It is beyond cavil, considering the intended outcome, that plaintiffs' suit is a "suit for the purpose of restraining the assessment or collection of any tax," I.R.C. § 7421(a), and therefore is barred by the AIA.

6 Other decisions have likewise adopted a similarly broad construction of the AIA. *See, e.g., Lotto Fund v. Virginia State Lottery Dept.,* 20 F.3d 589, 591 (4th Cir. 1994) (barring a suit to enjoin the withholding of federal income tax on lottery winnings on the ground that "[n]o court is permitted to interfere with the federal government's ability to collect or assess taxes" under the AIA); *Smith v. Rich,* 667 F.2d 1228, 1230 (5th Cir. 1982) (barring a suit to enjoin a revenue agent from examining returns); *Kemlon Products and Development Co. v. United States,* 638 F.2d 1315, 1316, 1318, 1320 (5th Cir. 1981) (barring a suit to enjoin IRS agents from disclosing information in corporate tax returns as part of an audit), *modified,* 646 F.2d 223 (5th Cir. 1981); *United States v. Dema,* 544 F.2d 1373, 1376 (7th Cir. 1976) (barring a suit to enjoin internal revenue summonses); *Lewis v. Sandler,* 498 F.2d 395, 399 (4th Cir. 1974) (barring a suit to enjoin local officials from giving the IRS information about narcotics traffickers for use in making jeopardy assessments); *Black v. United States,* 534 F.2d 524, 526 (2d Cir. 1976) ("[I]f the IRS is enjoined from continuing its investigation, it will be hindered in its efforts to uncover, correct and remedy improper deductions which may have been claimed by Black on behalf of his clients," which "is precisely th[e] kind of interference which the Anti-Injunction Act is designed to prevent."); *Koin v. Coyle,* 402 F.2d 468, 469 (7th Cir. 1968) (barring a suit to enjoin the IRS from using certain evidence in determining tax liability); *Debt Buyers' Ass'n v. Snow,* 481 F. Supp. 2d 1, 9 (D.D.C. 2006) (barring a suit to enjoin an information reporting requirement imposed by a Treasury Regulation).

7 The Supreme Court in *Williams Packing* stated that language in the TIA, conditioning its application on there being an available remedy under state law, "throws light on the proper construction" of the AIA, which contained no such condition. 370 U.S. at 6. "It indicates that if Congress had desired to make the availability of the injunctive remedy against the collection of federal taxes not lawfully due depend upon the adequacy of the legal remedy, it would have said so explicitly." *Id.* That does not suggest, and the Court did not endorse, that interpreting language in the TIA also informs the meaning of the AIA.

8 In any event, even though the Court in *Direct Marketing* held that the TIA did not bar a challenge to the notice and reporting requirements imposed on the marketer, Justice Ginsburg emphasized, in a concurrence joined by Justice Breyer and by Justice Sotomayor on this point, that the plaintiff there in no way challenged anyone's tax liability, whereas a "different question" would be posed by "a suit to enjoin reporting obligations imposed on a taxpayer ... in lieu of a direct challenge to an 'assessment.' " 135 S. Ct. at 1136 (Ginsburg, J., concurring). Plaintiffs' suit here, of course, relates to the compliance options available for just such obligations.

9 Indeed, by conceding that they entered the OVDP, plaintiffs implicitly recognize the fallacy of their point that they are "just like" taxpayers allowed to use the Streamlined Procedures, who did not. (Br. 40.)

10 To be sure, *IBM* has been effectively limited to its facts. *See, e.g., Knetsch v. United States,* 348 F.2d 932, 940 n.14 (Ct. Cl. 1965); *see also Stitchting Pensioenfunds Voor de Gezondheid v. United States,* 129 F.3d 195, 200 (observing that "courts interpreting *IBM* have limited it to cases involving direct competitors"). But it remains an example of awarding a refund to rectify unequal treatment.

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