[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Case No. 22-5341

MONTE SILVER, ET AL.

Plaintiffs-Appellants,

-v-

INTERNAL REVENUE SERVICE, ET AL.

Defendants-Appellees

ON APPEAL FROM THE ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANTS' REPLY BRIEF

L. Marc Zell (Bar No. 28960)
ZELL & ASSOCIATES
INTERNATIONAL ADVOCATES, LLC
1345 Ave. of the Americas
2nd Floor
New York, NY 10105
(212)-971-1349
Email: mzell@fandz.com

Noam Schreiber (Bar No. 63387)
ZELL, ARON & CO.
34 Ben Yehuda St.
14th Floor
Jerusalem, Israel 9423001
011-972-2-633-6300
Email: noam.schreiber@fandz.com

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

Cases

Statutes

Regulations

Law Review Articles

Legislative History and Congressional Debates

Federal Rules of Civil Procedure

SUMMARY OF ARGUMENT

Anti-Injunction Act

The Anti-Injunction Act, 26 U.S.C. §7421(a), does not bar this lawsuit because (i) the underlying purpose is solely to enforce compliance with the RFA; and (ii) this action does not "restrain the assessment or collection of taxes." 26 U.S.C. §7421(a)

Article III Standing

As the district court correctly ruled, Plaintiffs easily satisfy Article III standing. *First*, per *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs who are the objects of the challenged government action have standing to bring suit. *Second*, Plaintiffs have demonstrated that: (1) they suffered an injury-in-fact in the form of compliance and reporting costs; (2) these compliance costs are traceable to government's failure to conform their rule-making procedures to the RFA; and (3) these injuries can be redressed by requiring defendants to abide by the RFA.

ARGUMENT

A. The Anti Injunction Act does not bar this lawsuit

1. The purpose of this RFA lawsuit is not to restrain the assessment or collection of any tax

Under *CIC* when the purpose of the action is to enforce procedural rights rather than an impending or eventual tax obligation — the AIA is not an obstacle. *CIC Servs., LLC v. Internal Revenue Serv.*, 141 S. Ct. 1582, 1590 (2021); *Id.*, at 1588-1589. As *CIC* instructs, this is so even in an APA action where the direct outcome of the lawsuit is to restrain the ultimate assessment of a tax.

Furthermore, sitting *en banc*, this Court has ruled that where the litigation "does not seek to restrain the assessment or collection of any tax," and will not affect future "tax liabilities," the AIA does not bar jurisdiction. *Cohen v. United States*, 650 F.3d 717, 725 (D.C. Cir. 2011).

This case falls within the parameters established by *CIC* and *Cohen*. The sole purpose of this action is to require the government to comply with the RFA. Plaintiffs, like an estimated 200,000 other small businesses and business owners, owe no GILTI tax. However, they still must bear GILTI-related annual compliance costs. The sole objective of

this action is to require the government to conduct a proper regulatory flexibility analysis under §604, which may result in the complete or partial alleviation of the annual compliance costs that small businesses must incur.

The government's sole argument is that the "manifest purpose" of the lawsuit is to restrain the assessment and collection of tax because, if successful, would invalidate the regulation and prevent collection. Gv't Br., at 22-23. That is false for several reasons.

i. The purpose of the lawsuit is to enforce the RFA

As explained above, the sole purpose of this action is to enforce the RFA and obtain the remedies specifically set forth in the RFA. The government admits that Plaintiffs seek "to remand the regulations to Treasury and defer enforcement of the regulations against plaintiffs and all other small entities until Treasury conducts a full RFA analysis." Gv't Br., at 20. By the government's own admission, Plaintiffs only seek the relief available under the RFA. Plaintiffs do not seek to invalidate any regulation, as such remedy is not available under the RFA.[1] Thus any

[1] The government's reference to Silver's newspaper article is irrelevant. *See* Gv't Br., at 20-21 (citing Silver's July 24, 2020 Jerusalem Post article). While it is true that Plaintiffs would like to have small

claim that the purpose of the action was anything but enforcement of the RFA is baseless.

ii. In an RFA action, the scope of the relief is decided at the remedy stage; it is not a jurisdictional issue

Legislative history teaches that the RFA "should be applied in a manner consistent with the purposes of the AIA, which may limit **remedies available in particular circumstances**." 142 Cong. Rec. S3242, S3245 (daily ed. Mar. 29, 1996), 1996 WL 142887 (Joint Managers' Statement of Legislative History and Congressional Intent) (emphasis added). The district court in *Silver I* agreed:

> The court need not decide at this stage whether the greater relief Plaintiffs seek—staying enforcement of the regulations "until such time as Defendants comply with their statutory duties," Am. Compl. at 19—would run afoul of the Anti-Injunction Act. The court need address that issue only if Plaintiffs prevail on the merits.

Silver v. Internal Revenue Serv., 2019 WL 7168625, at *3 (D.D.C. Dec. 24, 2019).

This follows inexorably from the statutory text of 5 U.S.C. §611(a)(4) which expressly contemplates the authority of a court to

---

businesses exempt from GILTI, such goal cannot be achieved in an RFA action. Such relief can only be achieved if the government, *after complying with the RFA*, agrees to exempt small businesses from GILTI.

remand without staying the challenged regulation. Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 325 (2003) (section 611(a)(4) embodies Congress' adoption of "its own version of remand without vacation."); *see also* Pl. Br., at 21, n. 8; *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993) (discussing the remand-without-vacatur doctrine under the APA).[2]

iii. This action is not a "tax action in disguise"

Splitting hairs, the government argues that *CIC* is not controlling

---

[2] The government suggests that remanding without deferring would require the complaint to be amended [Gv't Br., at 26]. Defendants also argue that the issue was raised "for the first time on appeal." [*Id.*, at 27]. Both statements are wrong. Again, to the extent certain type of relief is unavailable, that can and should be determined later and need not be pleaded in the complaint. *See* Federal Rules of Civil Procedure, Rule 8(a)(3); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1289–90 (11th Cir. 2015) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), for the proposition that "federal courts possess broad discretion to fashion an equitable remedy" and concluding that whether to remand, with or without vacatur, "falls within our broad equitable discretion"); *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649, 674 (D.C. Cir. 2019) (ordering remand without vacatur).

Moreover, this argument is *not* raised for the first time on appeal. Plaintiffs urged the district court to address any potential AIA issues at the remedy stage. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss for Lack of Jurisdiction, 1:20-cv-1544-CKK (September 9, 2020) ECF 10, at 24. The district court declined this invitation.

in this case because this RFA lawsuit is actually a "tax action in disguise." Gv't Br., at 30-31. This argument fails because it ignores the essence of Plaintiffs' complaint, namely, that the regulations caused them and will continue to cause them to incur compliance costs in preparing to fulfill their GILTI reporting obligations. This litigation cannot be a "tax action in disguise" for the self-evident reason that Plaintiffs owe no tax and will not likely owe any tax. *See also* Pl. Br., at 13-18 (discussing *CIC*'s application to this case).

The government seeks to circumvent this argument by claiming that the reporting requirement under the GILTI regulations leads automatically to an assessment of a tax. Gv't Br., at 30. This, too, misses the mark. As noted, Plaintiffs' core injury is the enhanced compliance costs engendered by having to comply with the inscrutable regulations. GILTI compliance requires Plaintiffs annually to invest hours of effort with the attendant costs to complete the GILTI form and fulfill related requirements.[3]

[3] For example, to complete the information required for a taxpayer to submit an annual tax return (the Form 1040), she must first gather all the data necessary to determine whether her CFC had "tested income." Then, she must determine whether the CFC had "net tested income." Thereafter, she must collect data to determine whether her CFC had

iv. The government's additional arguments are without merit

Rather than addressing the substance of Plaintiffs' "remand-without-deferral" argument, the government opts for textual casuistry. Because the complaint connects the two forms of relief with the conjunction "and," the government concludes that Plaintiffs are seeking both remand *and* deferral and "that both are necessary." Gv't Br., at 26, *citing Orlans v. Orlans*, 238 F.2d 31, 32 (D.C. Cir. 1956).[4]

Respectfully, this argument does not pass the "straight-face test."[5] *First*, the government completely misreads the complaint. The reference

---

"deemed tangible income return." Each of these steps requires extensive information collection and parsing the GILTI regulations – **prior to completing and filing the actual form** – even if at the end of the process, no tax is owed. *See* Gv't Br., at 7-9. The Court is respectfully invited to review the GILTI regulations at 26 C.F.R. §§1.951A-1-A7.

[4] *Orlans* is a case of statutory interpretation. It involved an action by a husband for divorce on ground of wife's adultery. The Court of Appeals interpreted a section of the District of Columbia Code addressing residency requirements for jurisdiction. The Court held that the conjunctive "and" in the relevant section indicated that the two-year residency requirement applied when (a) the cause of divorce occurred outside the District; *and* (2) prior to residence.

[5] Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What If Conan the Grammarian Were A Strict Textualist?*, 16 CONST. COMMENT. 7 (1999); for use of this phrase, *see United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 402 (D.C. Cir. 2017), Brown, J., *dissenting*; *Francisco v. Comm'r*, 370 F.3d 1228, 1231 (D.C. Cir. 2004).

to the conjunction "and" appears in paragraph 56 of the complaint [JA 13] and simply cites the language of the RFA, authorizing the two forms of relief. 5 U.S.C. §611(a)(4). In contrast, the prayer-for-relief section lists the two forms of relief in separate, distinguishable paragraphs. JA 14. *Second*, in any case, even if the use of the conjunction "and" actually referred to the relief sought, that does not warrant dismissal of the lawsuit *as a whole*. *See Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 846 n. 10 (D.C. Cir. 1982) (complaint not dismissible even if injunctive relief unavailable when plaintiff may have alternative relief); *Furniture by Thurston v. United States*, 103 Fed. Cl. 505, 515 (2012), *citing Gull Airborne* (unavailability of one type of relief due to mootness not ground for dismissal when court can fashion alternative forms of relief). By analogy, when a prayer for relief seeks attorney's fees, the complaint would not be dismissed merely because that form of relief happens to be unavailable. Not surprisingly, except for *Orlans v. Orlans*, the government did not cite any authority for its proposition.

v. The AIA should not apply for public policy reasons

In 1996, Congress amended the RFA in two main ways: (1) provide small businesses with a cause of action for agency violations; and (2)

explicitly placing IRS and Treasury actions within the scope of the RFA. Pl. Br., at 5-6.

The congressional intent behind the 1996 amendment is clear: the RFA was to be applied liberally in favor of small businesses, otherwise the government – especially the IRS and Treasury – would continue to evade their statutory responsibilities. Unless the decision below is reversed, the RFA will be a dead letter with respect to any small business challenge to tax regulations. *See also* Pl. Br., at 17, 20.

In light of all the above, this lawsuit is not barred by the AIA and the decision below should be reversed.

2. This action will not restrain the assessment or collection of taxes

The AIA does not proscribe activities that may improve the government's ability to assess and collect taxes. Instead, it is "keyed to the acts of assessment [and] collection themselves." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 12 (2015). This RFA case will not restrain the assessment or collection of taxes for three main reasons.

First, **Plaintiffs owe no taxes**. Rather, they have brought this lawsuit to require the government to comply with the RFA and, thus, reduce Plaintiffs' compliance costs. Thus, there is no assessment or

collection involved.

Second, Plaintiffs and all small businesses are liable for GILTI under the *statute*. Thus, even if Plaintiffs prevail, they, like all small businesses, would still be subject to GILTI.

Third, the Supreme Court has specifically held that the terms "restrain," "collection" and "assessment" must be read narrowly. Congress used "restrain" in its narrower, "equitable sense." *See Direct Mktg.*, 575 U.S. at 14. To give these terms a broad meaning would be to "defeat the precision of these words." *Id.*, at 13. Otherwise, any court action related to any phase of taxation might be said to implicate the AIA. *Id.* Such a broad construction would thus render "assessment" "mere surplusage," a result to be avoided. *Id.*, *citing Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (interpreting the terms of the TIA to avoid superfluity).

Accordingly, inasmuch as the present case does not involve the assessment or collection of taxes, the AIA poses no barrier to the exercise of subject matter jurisdiction.

B. Plaintiffs have Article III Standing

The district court concluded – over the opposition of the government – that the allegations in the complaint adequately support Article III standing. JA 89 ("the Court sees no Article III standing issues here."). Undaunted, the government now doubles down and reiterates its Article III standing objection. These arguments are without merit.

1. Plaintiffs are the object of the GILTI regulations

Under *Lujan*, when a litigant is the "object of" government action or inaction, there is little question as to his Article III standing. *Lujan*, 540 U.S. at 561.

Plaintiffs are the object of the GILTI statute and regulations. The very first sentence of the statute makes it clear that it regulates U.S. shareholders (Monte Silver) and controlled foreign corporations (Monte Silver, Ltd.). The regulations, which interpret the statute, use the term "U.S. shareholder" 441 times and the term "controlled foreign corporation" 1,520 times.

2. Under *Lujan*, Plaintiffs have satisfied all of the elements of Article III standing

i. Plaintiffs have adequately pled a concrete and particularized injury

The complaint alleges the following:

1. Plaintiffs have "no idea how to comply [both] with GILTI [and] the Final Regulations." JA 89;

2. The regulations [are] "extremely complicated and lengthy." JA 89;

3. The lack of "any guide to assist small entities in complying with the Final Regulations," required under the RFA, has "adversely affected [and] aggrieved" Plaintiffs. JA 89;

4. District court citing Silver's declaration that he and his "company […] have been forced to spend funds, time, and effort to comply with GILTI." JA 89.

As regulated entities, Plaintiffs' allegations are more than adequate to establish Article III standing at the motion to dismiss stage. *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015); *Grand River Enterprises Six Nations, Ltd. v. Boughton*, 988 F.3d 114, 121 (2d Cir. 2021), *cert. denied*, 211 L. Ed. 2d 473, 142 S. Ct. 755 (2022) (regulated entity may plead an "injury in fact" by plausibly alleging compliance costs associated with an increased regulatory burden);

Contender Farms, L.L.P. v. U.S. Dep't of Agric., 779 F.3d 258, 266 (5th Cir. 2015) (an "increased regulatory burden typically satisfies the injury in fact requirement").

The government concedes that Plaintiffs will need to continue to comply with GILTI and its regulations on an annual, forward-looking basis. The government claims, however, that because Plaintiffs have already complied once, they will not incur "similar learning costs in future years." This argument does not hold water, factually and legally. Not only is it an unsupported factual contention – inappropriate at the motion to dismiss stage – it is also irrelevant. Complying with the annual GILTI reporting requirements (*i.e.*, data collection and analysis needed to comply with the GILTI regulations on an annual basis) is an injury-in-fact, whether or not Plaintiffs have already "learned" how to do so in the previous year(s). *See*, *supra*, n. 3 (describing the preparatory process). Injury-in-fact is well established in the complaint and in the record.

ii. Plaintiffs' alleged injury is traceable to the failure of the government to comply with the RFA

In cases involving an alleged procedural violation, Article III causation consists of two links: (1) a defendant's acts omitted some

procedural requirement; and (2) it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest. *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996). These two elements are easily satisfied here.

The complaint clearly sets forth the government's procedural violation, *i.e.*, its failure to comply with the RFA and, in particular, its unsubstantiated 5 U.S.C. §605 certification. *See* JA 12, ¶¶45-50.

As for the second element, the complaint lays out the connection between the government's procedural violation and the complained-of injury, *i.e.*, compliance and reporting costs. *See* JA 13, ¶¶51-52 (describing the effects of the burdensome regulations on Plaintiffs). Accepting the truth of the allegations, as the Court must, there can be no serious contention that causation is lacking here. *See* JA 89 (district court's conclusion that all elements of Article III standing are satisfied); *State Nat. Bank*, 795 F.3d at 53.

Unyielding, the government argues that (1) Plaintiffs' allegation that defendants could have made the GILTI regulations less burdensome is "speculative"; and (2) the compliance costs are caused by the statute, not the regulations. Gov't Br., at 41-43.

These arguments were properly rejected by the district court. JA 88-89. The GILTI regulations imposed on small businesses like Plaintiffs various reporting and information-gathering obligations. Even the government admits that the regulations "must be consulted in determining" GILTI tax liability. Gv't Br., at 30. Thus, the government's compliance with the RFA ***could*** ameliorate the effects of the regulations on small businesses. After all, the very purpose of the RFA is to sensitize government agencies – in particular the IRS – to the needs of small businesses in the rule-making process.

In addition, in this litigation, Plaintiffs have no quarrel with the GILTI statute itself. Rather, their challenge is aimed solely at the augmented burdens imposed upon them by the GILTI regulations, including, especially, reporting and information-gathering requirements. These are not statutory obligations; they stem from the regulatory scheme. *See*, for example, 26 C.F.R. §§1.951A-1-A7.

iii. Plaintiffs' alleged injury can be redressed by a decision in their favor

The relaxed redressability requirement is easily met. That prong is met "when correcting the alleged procedural violation **could** change the substantive outcome in the [plaintiff's] favor; the [plaintiff] need not go

further and show that it would effect such a change." *Narragansett Indian Tribal Historic Pres. Office v. Fed. Energy Regul. Comm'n*, 949 F.3d 8, 13 (D.C. Cir. 2020). *See also Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002). Having defendants comply with the RFA could alleviate some or all the injuries suffered by Plaintiffs. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013) (applying relaxed redressability standard for procedural injury cases).

Had the government declined to certify under §605 and properly conducted a regulatory flexibility analysis under 5 U.S.C. §604, it would have had to consider the needs of small businesses. This consideration ***could*** have led (and could lead in the future) to a wide range of benefits for small businesses, such as guidance in plain English; taxpayer-friendly forms and instructions; relaxed reporting obligations; information-gathering obligations tailored to small businesses; expanded taxpayer assistance for small business at home and abroad; and even exemption from the regulation itself.

In enacting and amending the RFA, Congress sent a clear and unmistakable message to the IRS and Treasury that they are not above compliance with the rule-making procedures to alleviate the regulatory burdens on small businesses. Congress was also well attuned to the important policies underlying the AIA. The decision below, if allowed to stand, will effectively subvert congressional policy in favor of small businesses like Plaintiffs. It is hoped that the Court will strike an appropriate balance between the RFA and the AIA by limiting the application of the latter in this case.

CONCLUSION

For all the reasons above, the judgment below concerning Article III standing should be affirmed; its ruling on the AIA reversed; and the case remanded for further proceedings on the merits.

Date: June 8, 2023

Respectfully submitted,

/s/ L. Marc Zell

L. Marc Zell (Bar No. 28960)
ZELL & ASSOCIATES
INTERNATIONAL ADVOCATES, LLC
1345 Ave. of the Americas
New York, NY 10105
(212)-971-1349
Email: mzell@fandz.com
Counsel for Plaintiffs-Appellants

/s/ Noam Schreiber

Noam Schreiber (Bar No. 63387)
34 Ben Yehuda St.
Jerusalem, Israel 9423001
011-972-2-633-6300
Email: noam.schreiber@fandz.com
Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains **3,347** words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word for Microsoft 365 in Century Schoolbook 14.

/s/ L. Marc Zell

L. Marc Zell
ZELL & ASSOCIATES
INTERNATIONAL ADVOCATES LLC
1345 Ave. of the Americas,
2nd floor,
New York, NY 10105

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2023, a copy of the foregoing document was served electronically through the Court's ECF system on all counsel of record.

/s/ L. Marc Zell

L. Marc Zell
ZELL & ASSOCIATES
INTERNATIONAL ADVOCATES LLC
1345 Ave. of the Americas,
2nd floor,
New York, NY 10105

Counsel for Plaintiffs-Appellants