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## Tax Regulations

### **IRS Won't Always Follow Lower Court Interpretations of Tax Code**

**T**he IRS will abide by the dictates of the U.S. Supreme Court and Congress, but not necessarily those of lower courts when it wants to change its interpretation of a tax code provision.

“Sometimes we do want to change the interpretation of a statute,” Adrienne Griffin, a senior technician reviewer with the Internal Revenue Service’s Office of Chief Counsel, said June 3 at a Federal Bar Association Section on Taxation insurance tax seminar. The agency looks at what court has interpreted the statute differently and whether Congress changed the statute, she said.

Griffin spoke on a panel discussing the level of deference courts accord the IRS in its rulemaking following moderator Walker Johnson’s reference to the Supreme Court’s decision in *United States v. Home Concrete & Supply, LLC*.

In *Home Concrete*, the court found that the existing statute didn’t provide the IRS the authorization to include an overstated investment or basis in the actions covered by the six-year limitations period instead of the

three-year period. The Supreme Court said the IRS couldn’t apply an interpretation different from the high court’s “unless Congress told you otherwise,” said Johnson, a partner at Steptoe & Johnson LLP.

**‘Good Cause’ Abuse.** The IRS has been known to act as though the Administrative Procedure Act doesn’t apply to it or that it is entitled to special deference. Joseph Judkins, an associate at Baker & McKenzie LLP in Washington, referred to the “good cause” exception in the APA that allows an agency to issue regulations that are effective immediately, prior to notice and comment.

The IRS likes to cite good cause. Judkins said good cause applies to urgent or emergency situations, such as when the Federal Aviation Administration issues regulations when people’s lives are at stake. Judkins listed mine safety regulations as another example that would justify the good cause exception.

In contrast, Judkins said he thinks the proposed rules under Section 385 will be “procedurally defective. They represent a fundamental sea change to settled law.”

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