

## Fourth Circuit Bars Challenge To Healthcare Reform Act

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In holding that a challenge to the individual mandate of the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148) is barred by the Anti-Injunction Act (AIA), the U.S. Court of Appeals for the Fourth Circuit became the first court to find the act applicable to the healthcare mandate. The court held that the act applies to the penalty under the mandate because it will be collected by the IRS under its authority to assess and collect taxes.

The September 8 opinion comes after the Sixth and Eleventh circuits issued opinions finding that the penalty is not a tax. The Sixth Circuit upheld the mandate under the commerce clause, while the Eleventh Circuit struck down the mandate as unconstitutional.

Section 5000A, added by the PPACA, requires nonexempt individuals to have health insurance starting in 2014. If those individuals fail to buy insurance, a penalty is assessed on their income tax return. (For tax-related excerpts of P.L. 111-148, see *Doc 2011-4583* or *2011 TNT 43-55*.)

Opponents of the legislation filed lawsuits soon after its enactment attacking its constitutional basis. The government defended the mandate under the commerce clause and the taxing power. When defending the mandate under the taxing power, the government argued that the penalty functions as a tax and that placing its administration with the IRS showed that Congress intended it to be a tax. (For prior coverage, see *Tax Notes*, Dec. 20, 2010, p. 1290, *Doc 2010-26528*, or *2010 TNT 239-1*.)

### Fourth Circuit

The Fourth Circuit decided that the AIA barred the suit because the penalty would be collected by the IRS under its authority to assess and collect taxes. The AIA, codified in section 7421(a), prevents courts from hearing suits for the purpose of restraining the assessment or collection of taxes. (For *Liberty University Inc. v. Geithner*, No. 10-2347 (4th Cir. Sept. 8, 2011), see *Doc 2011-19031* or *2011 TNT 175-12*.)

Judge Diana Gribbon Motz, writing for the majority, cited sections 6201(a) and 6202 as including

the collection of penalties under the IRS's overall authority to collect taxes. Based on past Supreme Court cases, she reasoned that the term "tax" in the AIA should be interpreted to encompass the penalty assessed in section 5000A.

In a concurring opinion, Judge James A. Wynn Jr. found the section 5000A penalty constitutional as an excise tax, citing the use of taxable income as a basis for the penalty and its enforcement through income tax returns as evidence that the penalty functions like a tax. Wynn is the first judge to label the penalty a tax.

Steven J. Willis, a professor at the University of Florida Levin College of Law, criticized Wynn's conclusion that the penalty is an excise tax, saying, "Excises must apply to something: an action, a service, a use of property," as opposed to "not having insurance," which Willis interprets as a direct tax. He has argued that the penalty is unconstitutional. (For his article, see *Tax Notes*, July 12, 2010, p. 169, *Doc 2010-11669*, or *2010 TNT 133-6*.)

In a dissenting opinion, Judge Andre M. Davis criticized the majority for concluding "that the AIA must apply to *all* exactions." He agreed with earlier court opinions that found that the AIA did not apply to section 5000A because the penalty was not a tax, or that the lawsuit would not restrain its assessment or collection if it were a tax.

### Sixth and Eleventh Circuits

Although they disagreed on whether the commerce clause supported the mandate, both the Sixth and Eleventh circuits found that the penalty was not a tax because Congress did not intend it as such.

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Writing for the Sixth Circuit, Judge Jeffrey S. Sutton said, "Words matter, and it is fair to assume that Congress knows the difference between a tax and a penalty." (For *Thomas More Law Center v. Obama*, No. 10-2388 (6th Cir. June 29, 2011), see *Doc 2011-14236* or *2011 TNT 126-9*.)

According to the Eleventh Circuit, "The plain language of the individual mandate is clear . . . [It] is not a tax, but rather, as the statute itself repeatedly states, a 'penalty' imposed on an individual."

## NEWS AND ANALYSIS

(For *Florida v. U.S. Department of Health and Human Services*, Nos. 11-11021, 11-11067 (11th Cir. Aug. 12, 2011), see *Doc 2011-17561* or *2011 TNT 158-14*.)

The courts said that Congress's stated reliance on the commerce clause, and not the taxing power, to pass the legislation further indicated that the penalty was not a tax. Both courts cited restrictions placed on normal IRS enforcement powers to collect the penalty as evidence that it was not a tax. The opinions were in accordance with previous district court decisions.

Jasper L. Cummings, Jr., in his review of the Eleventh Circuit decision, said that the government had "nothing to work with on the taxing power argument, other than the location in Title 26." However, he also said that the Supreme Court could still uphold the mandate as a tax, especially given the historical deference the Court has for the taxing power. (For the article, see *Tax Notes*, Sept. 5, 2011, p. 1065, *Doc 2011-17976*, or *2011 TNT 172-7*.)

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Duke University School of Law Prof. Neil S. Siegel told Tax Analysts he thinks that courts that have held that the penalty is not a tax were reacting to the language of the statute without taking into account the material effect. He suggested that they reached their decisions because the provision "sounded like a penalty" even though it "looked like a tax." He cited the relatively small size of the penalty and the fact that it does not increase with repeated violations as making it more like a tax than a penalty. "The material consequences should matter," not just the language of the statute, said Siegel.

"Congress was arguably disingenuous" in not calling the penalty a tax, said Edward Kleinbard, a professor at the University of Southern California Gould School of Law and former chief of staff of the Joint Committee on Taxation. But he cautioned that the "punishment" for Congress should not include holding the law unconstitutional. (For Kleinbard's article supporting the mandate as a tax, see *Tax Notes*, Aug. 16, 2010, p. 755, *Doc 2010-15640*, or *2010 TNT 159-3*.)

Now that there is a split among the circuits, the Supreme Court is expected to address the mandate's constitutionality. A similar challenge to the healthcare law is on appeal in the D.C. Circuit. Oral arguments are scheduled for September 23. (For *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. Feb. 22, 2011), see *Doc 2011-3924* or *2011 TNT 38-18*.) ■