1-1-2011

Seven-Sky v. Holder - Amicus Brief of Mortimer Caplan and Sheldon Cohen

Mortimer Caplan

ORAL ARGUMENT SEPTEMBER 23, 2011

NO. 11-5047

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

SUSAN SEVEN-SKY, *et al.*,

***Plaintiffs-Appellants*,**

-vs.-

ERIC H. HOLDER, JR., *et al.*,

***Defendants-Appellees*.**

On Appeal from the United States District
Court for the District of Columbia

BRIEF OF AMICI CURIAE MORTIMER CAPLIN & SHELDON COHEN IN SUPPORT OF APPELLEES AND AFFIRMANCE

Alan B. Morrison
George Washington University
Law School
2000 H Street NW
Washington, DC 20052
(202) 994-7120
(202) 994-5157 (fax)
alanbmorrison@gmail.com

Counsel for Amici Curiae

July 1, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for amici curiae certifies as follows:

A. Parties and Amici: Except for amici curiae Mortimer Caplin and Sheldon Cohen, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Briefs of Plaintiffs-Appellants or Defendants-Appellees.

B. Rulings and Review: References to the rulings at issue appear in the Opening Brief for Plaintiffs-Appellants.

C. Related Cases: A list of related cases is provided in the Opening Brief for Plaintiffs-Appellants.

/s/ Alan B. Morrison
Alan B. Morrison

July 1, 2011

CERTIFICATE IN SUPPORT OF SEPARATE BRIEF

Under Circuit Rule 29(d), "[a]mici curiae on the same side must join in a single brief to the extent practicable." Counsel for amici curiae certifies that this separate brief is necessary to address an important jurisdictional issue that was not addressed by the district court below and, as far as counsel for amici is aware, will not be addressed in any depth by any party or amicus in this Court.

/s/ Alan B. Morrison
Alan B. Morrison

July 1, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

* Authorities upon which amici chiefly rely are marked with asterisks

GLOSSARY

Code: Internal Revenue Code

IRS: Internal Revenue Service

INTEREST OF AMICI CURIAE[1]

Amici curiae Mortimer Caplin and Sheldon Cohen are former Commissioners of the Internal Revenue Service ("IRS"), the agency that administers the law being challenged in this lawsuit. Their interests are more fully spelled out in the accompanying motion for leave to participate in oral argument.

INTRODUCTION & SUMMARY OF ARGUMENT

This case challenges the constitutionality of section 1501 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), known as the individual mandate. Section 1501 is codified in 26 U.S.C. § 5000A of the Internal Revenue Code (the "Code") and will not go into effect until 2014. With some exceptions, section 1501 requires that individuals who do not have health insurance meeting certain federal standards must pay—with their federal income taxes—an amount estimated to be no more than $3000 a year for 2014. It is undisputed that no individual plaintiff in this or any case currently owes any money pursuant to section 1501. Nor is it possible to predict with any reasonable degree of certainty whether any individual plaintiff in this or any other case challenging section

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Both parties have consented to the filing of this amicus brief.

1501 will fail to have the required health insurance in 2014, or whether that person will be obligated to make any payment pursuant to section 1501.

The federal defendants in cases challenging section 1501 originally argued that the plaintiffs lacked standing and that the cases were not ripe, in addition to defending the claims on the merits. Initially, the Government also argued that the Federal Tax Anti-Injunction Act, 26 U.S.C. § 7421—which bars federal courts from enjoining the assessment or collection of federal taxes—was also a barrier to these suits, but it subsequently decided not to press those defenses in this and other cases. Moreover, on May 31, 2011, in response to an order of the Court of Appeals for the Fourth Circuit in *Liberty University, Inc. v. Geithner*, No. 10-2347, the Government filed a supplemental brief that recognizes that section 7421 is a jurisdictional bar but contends it is not applicable to a challenge to section 1501. A copy of that brief is attached as Addendum A. In addition, on June 29, 2011, the Court of Appeals for the Sixth Circuit upheld the constitutionality of section 1501, and, at pages 11-13 of its opinion, rejected the applicability of section 7421 to challenges to section 1501. *Thomas More Law Center v. Obama*, No. 10-2388.

This brief argues that section 7421 is a jurisdictional bar to suit that effectively decides the standing and ripeness issues in cases involving the

Code by requiring that the specific procedures set forth in the Code for litigating disputes with the IRS, and only those procedures, be followed to the exclusion of all others (such as lawsuits like this one). Put another way, even if plaintiffs in cases challenging section 1501 met the Article III tests for standing and ripeness—which they do not—section 7421 would prevent them from going forward because it is a specific limitation on federal court jurisdiction.[2]

Several features of section 7421 deserve emphasis. First, its purpose is to assure that federal taxes are assessed and collected in an orderly fashion, a purpose that it shares with 28 U.S.C. § 1341, an analogous statute that protects states from federal court interference with the collection of their taxes. As demonstrated below, "any tax" in section 7421 has been broadly construed to include the whole range of amounts payable under the Code, whether labeled taxes, penalties, interest, or anything else. Second, there are two basic routes to challenge section 1501, both of which will be fully available and completely adequate once section 1501 is in effect. One option is to pay the tax and sue for a refund in the Court of Federal Claims or in the district court for the district where the taxpayer resides, with a right

[2] After defendants withdrew their motion to dismiss based on standing, ripeness, and section 7421, the district court deemed the section-7421 argument waived. Dist. Ct. Op. at 2, n.1. As the Government recognizes, section 7421 is jurisdictional and cannot be waived.

of appeal to the appropriate circuit court of appeals. In the alternative, the taxpayer can file a return without paying the tax, wait for the IRS to sue to collect, and then defend on the ground that the tax is unconstitutional. Because of section 7421, those routes are the exclusive means for resolving disputes regarding the constitutionality of section 1501.

Third, although section 7421 bars only injunctions, there is an express exception in the Declaratory Judgment Act, 28 U.S.C. § 2201, that similarly bars suits for declaratory relief in tax matters, and the courts have consistently held that these two provisions are coextensive. Fourth, another section of the Code, section 7428, allows actions for declaratory judgments regarding claims of non-profit organizations to tax-exempt status as an exception to the prohibition in the Declaratory Judgment Act. That provision was enacted in 1976, in response to two Supreme Court decisions requiring the use of the refund route even for claims that provisions of the Code violated the First Amendment and Equal Protection rights of organizations claiming tax-exempt status, and even where the actual taxes that might be owed, if any, were incidental to the constitutional principles at issue. Fifth, section 7421 includes twelve specific exceptions that allow federal courts to issue injunctions in federal tax disputes, none of which

applies here. Nor do plaintiffs or the Government rely on either of the implied exceptions enunciated by the Supreme Court and discussed *infra*.

Finally, subsection 1501(g) contains two exceptions to the usual procedures respecting disputes involving the Code, but neither of them negates section 7421's applicability. Moreover, there is no special judicial review provision permitting lawsuits over section 1501, comparable to section 7428 and other special review provisions that Congress enacted when it wished to assure an immediate decision involving an important statute that raised major constitutional issues, such as the Gramm-Rudman-Hollings Act, the Line Item Veto Act, and the Bipartisan Campaign Reform Act. Contrary to the views of the Government and the Sixth Circuit, the language used in subsection (g), incorporating existing administrative procedures with respect to section 1501, does not overcome either the specific inclusion of limited exceptions or the failure of Congress to provide for a further specific exception to section 7421 for cases such as this one. Taken together, these features make clear that section 7421 requires that this suit be dismissed without reaching the merits.

ARGUMENT

SECTION 7421 IS AN ABSOLUTE BAR TO THE COURT'S CONSIDERING THE MERITS OF THIS CASE.

The argument is divided into two parts. Part A discusses the general principles applicable to section 7421. Part B responds to the Government's brief in *Liberty University* and the portion of the Sixth Circuit opinion in *Thomas More* that relates to section 7421. In particular, Part B focuses on the aspects of section 1501(g) that bear directly on the applicability of section 7421 to this challenge.

A. The General Principles Underlying Section 7421

The complaint in this case seeks an order that would prevent the federal government from carrying out the individual mandate of section 1501. To obtain such relief, the plaintiffs must surmount section 7421 of the Code, which provides in pertinent part:

> **(a) Tax.**--Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

No one claims that any of the listed sections applies to this case, or that any previously recognized implied exception (discussed below) is available. Thus, if the plaintiffs are seeking to enjoin the assessment or collection of

"any tax," section 7421 is a bar to proceeding further, unless the Government is correct that section 1501(g) itself creates an implied exception to section 7421, a claim addressed in Part B.

The complaint in this case also seeks a declaratory judgment as to the invalidity of the individual mandate, but that relief, too, is barred, because of an exception to the Declaratory Judgment Act, 28 U.S.C. § 2201. That exception makes the declaratory judgment remedy unavailable in suits "with respect to federal taxes," with certain exceptions not applicable here.[3] In that regard, the courts have been clear that the bar of section 7421 and the tax exception in section 2201 are coterminous, such that if a court cannot issue an injunction because of section 7421, it is equally barred from rendering a declaratory judgment with respect to that controversy by the exception to section 2201. *See Bob Jones University v. Simon*, 416 U.S. 725, 732 n.7 (1984); *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 299 (4th Cir. 2000), *aff'd*, *Barnhardt v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002).

Plaintiffs in this and other cases have argued that the amounts due under section 1501 are designated as penalties and hence are not taxes under section 7421 or under the power of Congress to levy taxes. Amici will not

[3] The existence of one of the exceptions—the exception for suits challenging denials of certain organizations' tax-exempt status under section 7428 of the Code—is relevant to the applicability of section 7421 and is discussed *infra*.

engage that debate as it applies to the constitutional claim because the statutory scope of section 7421 is a question distinct from the scope of Congress's capacity under its constitutional taxation powers. Section 7421 prevents courts from reviewing all claims involving payments under the Code, not just those labeled taxes, unless there is an explicit exception in section 7421, which no plaintiff argues here, or the claim meets the implied exceptions in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), or *South Carolina v. Regan*, 465 U.S. 367, 378 (1984), on which no plaintiff has relied.

Perhaps the best illustration of the breadth of the applicability of section 7421 is that it has been uniformly applied to efforts to enjoin assessment of "penalties" under section 6672. Section 6672 deals with the frequent problem of employers withholding taxes (including income, social security, and Medicare taxes) from their employees and then not turning them over to the IRS as required by law. In many cases, the employer is a corporation, and the corporation is no longer in business or is unable to pay its debts when the IRS catches up with it for failure to pay over the amounts withheld. Section 6672 creates a special remedy for the IRS that entitles it to collect personally from the corporate officers who were responsible for not paying over the amounts withheld what is designated as a "penalty"

equal to 100% of the amounts withheld but not paid over. The penalties under section 6672 were never direct obligations of the responsible officers, unlike amounts due under section 1501, which are solely the obligation of the uninsured taxpayer. Nonetheless, the courts have always applied section 7421 to those penalties and have remitted the responsible officer to the specific means provided by the Code for contesting those liabilities. *See, e.g.*, *Shaw v. United States*, 331 F.2d 493 (9th Cir. 1964); *Botta v. Scanlon*, 314 F.2d 392 (2d Cir. 1963).

In addition, section 7421 has been applied in a wide variety of other similar circumstances, including efforts to block the collection of transferee liability for interest due on interest, *Transport Manufacturing & Equipment Co. v. Trainor*, 382 F.2d 793 (8th Cir. 1967); penalties for late filings of tax returns, *Professional Engineers, Inc., v. United States*, 527 F.2d 597 (4th Cir. 1975); $500 penalties for false filings on withholding, *Herring v. Moore*, 735 F.2d 797 (5th Cir. 1984); a $25 penalty for a tax preparer who did not include social security numbers on returns he prepared, *Crouch v. Commissioner of Internal Revenue*, 447 F. Supp. 385 (N.D. Cal 1978); penalties for promoting abusive tax shelters for others, *National Commodity & Barter Ass'n v United States*, 625 F. Supp. 920 (D. Col. 1986); and a penalty of as little as $5 for parents who refused to obtain a social security

number for their children because it would require them to participate in a "mandatory universal numbering system for all American citizens and residents" that they claimed violated their First and Fifth Amendment rights. *Spencer v. Brady*, 700 F. Supp. 601, 602 (D.D.C. 1988). It was even applied in *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003), to bar a First Amendment challenge to contribution and expenditure disclosure provisions for political organizations as a condition of obtaining tax exemption under section 527, for which a significant penalty was imposed for failure to comply.

The Sixth Circuit in *Thomas More* pointed to the fact that the amount payable under section 1501 is labeled a "penalty," not a tax, thus making section 7421, which refers to "any tax," inapplicable. No. 10-2388, slip op. at 11. To our knowledge, *Thomas More* and the district court cases involving section 1501 are the *only* decisions that have treated penalties under the Code as outside the scope of section 7421. In our view, the proper question is not whether, for all purposes (or even for some purposes), a tax and a penalty are identical. Rather, the question is whether under section 7421 Congress made any distinction between the two. As to that, the answer is clear that it did not, as is demonstrated by the cases cited above, in particular the responsible officer cases under section 6672.

The section 6672 penalty is, to be sure, a "punishment for an unlawful act or omission," *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996), and "an exaction imposed by statute as punishment for an unlawful act," *United States v. LaFranca*, 282 U.S. 568, 572 (1931). Yet there is no dispute that section 7421 bars actions seeking to enjoin the imposition of the penalties imposed under 6672. *See, e.g.*, *Shaw*, 331 F.2d 493; *Botta*, 314 F.2d 392. That penalties may be treated differently from taxes for some purposes does not mean that Congress drew that distinction for purposes of section 7421. As demonstrated above, the authorities are clear that Congress has not made that distinction under section 7421 for provisions labeled penalties in general or for "penalties" owed under section 1501 in particular.

As the Government correctly notes in its argument on the merits, the payments required by section 1501 are made to the IRS, are based on the taxpayer's income, are deposited into the Treasury, and are used to fund government programs. That they are labeled penalties has no bearing on the constitutional question or the applicability of section 7421. Indeed, in two cases decided the same day, both involving challenges to the Child Labor Law, the Court held that a penalty provision was a "tax" barring the suit under the predecessor of section 7421, *Bailey v. George*, 259 U.S. 16 (1922),

and then reached the merits in a properly maintained refund action, holding that the penalty was not a tax for constitutional purposes and hence was invalid. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

Far more significant than the label used is the choice that Congress made to include the mandate in the Code and make it enforceable by the IRS, using the laws and practices applicable to the collection of taxes, including the filing of annual income tax returns to report whether the taxpayer had health insurance. In that way, Congress assured that the money would be collected and, if necessary, contested in a timely and efficient way, subject only to the express exceptions contained in section 1501(g). Had Congress not done so, it would have had to establish a new mechanism to assure that the payments were made by those who chose not to purchase health insurance, in which case individuals who objected to the mandate would not have faced the bar of section 7421.

The broad sweep of section 7421 endorsed by the courts, including the Supreme Court, is supported by a very sensible reason: "the principal purpose of this language [is] the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference." *Bob Jones*, 416 U.S. at 736. To serve that need, section 7421 requires taxpayers to use the mechanisms explicitly

created by Congress to contest amounts claimed to be owed to the IRS, which both assures due process for taxpayers and enables the IRS to avoid being sued in inconvenient places and at times when it has not finished its review of the taxpayer's return.

Examining the options available to taxpayers to contest the collection of taxes (including the tax created by section 1501) illustrates both their fairness and why Congress would not want to have the ordinary processes of tax administration interrupted by having to respond to suits by taxpayers who want to challenge the IRS at times and places of their choosing. For ordinary income taxes, many taxpayers either cannot afford to pay the amounts that the IRS claims are due or would prefer to keep their money until there has been a final determination that they owe the money. They also do not want the IRS to start collection actions while the merits of their case are being decided. The Code allows taxpayers to do this under sections 6212, 6213 and 6512. Before the IRS can begin collection efforts, it must send the taxpayer a formal notice of assessment within three years from the time that the return is filed, spelling out what is owed and why. That notice is required to trigger the 90 days that the taxpayer has to file a petition with the Tax Court contesting the IRS's position. If that is done, the IRS, with certain limited exceptions mainly applicable where the taxpayer may be

dissipating his assets, is forbidden from starting collection efforts while the case is pending, including on an appeal as of right to the circuit court where the taxpayer resides.

In this case, however, the Tax Court route is unavailable because section 6213 applies only to taxes imposed by subtitles A or B, or by chapters 41, 42, 43, or 44, and section 1501 is in chapter 48 of subtitle D. Still, taxpayers challenging the constitutionality of section 1501 have the option of not paying the amount due and waiting for the IRS to file a collection action under 28 U.S.C. § 1340, when they can raise the constitutional claim in defense. That option is made more attractive because section 1501(g)(2)(B) forbids the IRS from using liens and levies to collect amounts owed under section 1501, which effectively means that a taxpayer can avoid paying amounts asserted under section 1501 until the case is decided, making the avenue very similar to the Tax Court route.

Alternatively, taxpayers may pay the tax and sue for a refund, either in the Court of Federal Claims or in the district court for the district where they reside. 28 U.S.C. § 1346(a)(1). Another feature of refund actions confirms the desire of Congress to assure that tax disputes are resolved in an orderly manner: taxpayers cannot simply pay the tax alleged to be due and then sue. Rather, sections 6532 and 7422 require that the taxpayer first file a claim for

a refund, telling the IRS why he is not liable for the tax, and then wait at least six months to give the IRS a chance to agree (or disagree) and to marshal its defense.

The carefully crafted methods Congress has chosen to resolve disputes with the IRS assure both fairness to the taxpayer and the ability of the IRS to complete its determination of liability and the gathering of necessary information before the litigation is commenced. The contrast to preemptive suits by the plaintiffs in this case could hardly be greater. It is because Congress has set these rules for contesting IRS determinations, which benefit all Americans by assuring fairness to taxpayers and non-taxpayers alike, that the Supreme Court has held that the bar in section 7421 is jurisdictional. *Enochs*, 370 U.S. at 5 (section 7421 "withdraws jurisdiction from federal courts"). Because the statute is jurisdictional, the Government cannot waive it, and the courts must note it on their own, even if not raised: "We are duty-bound to clarify our subject matter jurisdiction even if the parties do not develop it as an issue. Unlike personal jurisdiction, subject matter jurisdiction cannot be waived." *Sigmon Coal*, 226 F.3d at 299 (internal citations omitted) (section 7421 first raised in post-oral-argument letter to court, which required supplemental briefing before finding section 7421 inapplicable).

Another feature of section 7421 demonstrates the absoluteness with which its ban is applied. Through a series of amendments, Congress has created in section 7421(a) twelve specific exceptions to the ban on injunctions. Many of them are there to assure that other procedures designed to protect taxpayers from overreaching by the IRS are followed, with the injunction remedy restored if the IRS disobeys them. The existence of these exceptions underscores that Congress did not intend the courts to create new exceptions for whatever reason, but to follow the command of section 7421 and its partner, the tax exception to the Declaratory Judgment Act.

Despite section 7421's breadth, the Supreme Court has found two implied exceptions to it, neither of which any plaintiff (and surely not the Government) argues is applicable here. The first is where it is "apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim." *Enochs*, 370 U.S. at 7. The second applies where a person with standing literally has no possible remedy under the Code. *Regan*, 465 U.S. at 378. Neither of these exceptions applies simply because the putative taxpayer (and the Government) would prefer to have the merits decided now, by a route other than through a refund or collection action.

To avoid section 7421, plaintiffs in other cases have argued that this is not a tax case, but a constitutional law case, which, they suggest, means that

the carefully designed routes are not applicable. That kind of argument was made to the Supreme Court in *Alexander v. "Americans United," Inc.*, 416 U.S. 752 (1974), and *Bob Jones*, 416 U.S. 725, in which the plaintiffs raised only constitutional objections to their denial of tax-exempt status under section 501(c)(3) of the Code. Indeed, in *Americans United*, the claim was that the applicable statute violated the First and Fifth Amendments, a facial challenge similar to those made to section 1501 here. No income taxes were at stake in *Americans United* because the plaintiff was exempt from those taxes as a section 501(c)(4) organization. However, under the law at the time, it would not have owed small amounts of unemployment taxes if it had qualified under section 501(c)(3). Nonetheless, the Court held that only by paying those taxes and suing for a refund could the organization have its constitutional claims adjudicated.

Equally significant for these cases is Congress's response two years later in 1976. It left section 7421 unchanged, and instead created a declaratory judgment remedy in section 7428 of the Code to allow challenges to adverse tax-status determinations (but not revocations). Section 7428, like other tax dispute provisions, requires the taxpayer to exhaust administrative remedies with the IRS before suing and gives the taxpayer the same choice of fora as in more traditional tax disputes.

Moreover, Congress also created an express exception in the Declaratory Judgment Act for actions brought under section 7428. Thus, Congress has provided a special method to bring certain constitutional challenges to provisions of the Code, but that method plainly is not available to this particular challenge.

Aside from the fact that section 7421 is a jurisdictional bar, there is another reason why the Court should focus on it rather than on the issues of standing and ripeness. In addition to its function of preserving the orderly administration of the tax laws, section 7421 incorporates the same concerns as the ripeness and standing concepts, but does so in a much clearer way, by absolutely forbidding speculation about whether a taxpayer would be subject to a tax and deferring litigation until he has either paid it, and sued for a refund, or is facing an enforcement proceeding. As several of the courts dealing with these issues have recognized, the question is not whether someone, someday, will not obtain insurance and object to paying the amount due under section 1501. Rather, the question is whether any of the individuals named in this lawsuit will be among that group. Section 7421 provides a direct answer, which is that all taxpayers must wait until 2015, the first time that the IRS could either assert a deficiency, or an individual could pay the tax and sue for a refund.

As the Supreme Court made clear in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), the leading precedent on ripeness (which is how most of the courts have been analyzing this situation), one aspect of the ripeness question is whether a statute other than the one being challenged precludes the action. That there is an express alternative avenue for judicial review is not dispositive in determining whether there is review under the Administrative Procedures Act, so long as the alternative does not directly, or by implication, preclude other types of non-statutory review. In this case, the remedies of suits for refunds or defending against collection efforts might not on their own preclude other judicial review, but section 7421, with its specific exceptions and its clear direction that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person," could not be more definitive that the litigation alternatives spelled out in the Code are the only means by which Congress wished to have legal and factual issues involving the tax laws resolved. Because section 7421 provides a clean, simple, and direct answer to the ripeness and standing inquiries as they relate to challenges to the individual mandate, plaintiffs must proceed by the routes specified in the Code and not through suits like this.

Finally, there is an irony that applies to the cases in which States are plaintiffs. As noted above, Congress has enacted similar protections against disruptive suits that interfere with tax collection efforts by States, now contained in 28 U.S.C. § 1341. *See International Lotto Fund v. Virginia State Lottery Department*, 20 F.3d 589 (4th Cir. 1994) (applying statutes to prevent suit to challenge federal and Virginia withholding taxes on lottery winnings); *California v. Grace Brethren Church*, 457 U.S. 393 (1982) (section 1341 bars declaratory judgments as well as injunctions). Under section 1341, the "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." There are no express exceptions to section 1341, for the obvious reason that Congress does not write state tax laws, and it would be futile for a federal law to try to capture all of the possible exceptions that are analogous to those set forth in section 7421. Instead, Congress has enunciated a principle by which exceptions may be created: where there is no "plain, speedy and efficient remedy" under state law. That, we submit, is also the principle applicable to section 7421, and it is why the Supreme Court allowed the State of South Carolina to avoid section 7421 and directly challenge the constitutionality of a law that imposed what the State said was an

unconstitutional tax on the interest of bonds that the State issued to third parties. *Regan*, 465 U.S. at 378 ("Congress did not intend the Act to apply to actions brought by aggrieved parties [with proper standing] for whom it has not provided an alternative remedy."). Here, both the refund remedy and the remedy of a constitutional defense to an IRS collection action, plus the exceptions in 7421(a), are "plain, speedy, and efficient," as determined by the Congress that enacted them, and the federal courts are obligated to honor that determination and to remit plaintiffs to the express remedies provided by the Code.

B. The Government and the Sixth Circuit Misread Subsection 1501(g), Which Supports the Applicability of Section 7421.

In its brief to the Fourth Circuit, the Government contended that section 7421 is not a bar to challenges to section 1501 for two basic reasons. First, it cited section 6671, a provision that treats penalties imposed under chapter 68 of the Code as taxes for assessment and collection purposes (which includes section 7421), and argued that, because section 1501 is not part of chapter 68, it is not subject to section 7421. Second, it argued that Congress could not have intended the refund route to be the "sole path" or "sole recourse" to challenging the individual mandate, Addendum A at 2, 10, and thus there must be an implied exception to section 7421 for these lawsuits. The Sixth Circuit in *Thomas More* agreed that the language of

section 1501 and of section 6671 made section 7421 inapplicable, No. 10-2388, slip op. at 11-13, but it did not accept the Government's implied-exception argument. Neither the Sixth Circuit's view nor the Government's is correct.

As to the Government's first argument, section 6671 does not say that "only" the penalties found in chapter 68 are treated like taxes: it makes clear that all penalties in that chapter are treated like taxes for assessment and collection purposes. Moreover, section 7421 does not refer to or incorporate section 6671 or otherwise suggest that its applicability is dependent on whether a penalty is within chapter 68. Indeed, many of the courts holding section 7421 applicable to a wide variety of penalties and other impositions have not expressly relied on section 6671, and, to our knowledge, none has treated it as the exclusive touchstone for the applicability of section 7421.

In addition, chapter 68 covers a wide range of penalties, some very significant and others quite trivial. For the convenience of the Court, we have attached as Addendum B the section and title (and in some cases, where the title alone does not explain what the provision is, the text of the operative parts) of the penalties included in chapter 68. The Sixth Circuit concluded that section 1501 is distinguishable from all the penalties under chapter 68 because it "has nothing to do with tax enforcement." No. 10-

2388, slip op. at 12. However, contrary to the Sixth Circuit's view, a number of those penalties are equally unrelated to "tax enforcement." *See* 26 U.S.C. §§ 6685, 6711, 6718, & 6720A (all of which create tax penalties to help enforce some other regulatory law). Moreover, a brief examination of Addendum B shows the breadth of Congress's concern over the collection of those penalties, and yet the Government and the Sixth Circuit assume that Congress would not have wanted to assure the same orderly assessment, collection, and litigation of amounts due under section 1501 as under those provisions.

Indeed, if the Government and the Sixth Circuit are correct as to the inapplicability of section 7421, a taxpayer in 2014 or any year thereafter could also bypass the refund route and proceed directly to court to challenge a potential liability under section 1501. The Sixth Circuit also suggested that the available methods discussed above for resolving the constitutionality of section 1501 would never be used, and hence direct actions such as this must be available. No. 10-2388, slip op. at 13. But there is simply no evidence that Congress wanted to create such a wholesale evasion of section 7421, now or forever. Moreover, in contrast to the Government's position on the merits, the Government's narrow view of what constitutes a tax under section 7421 would mean that the constitutional power to tax would be

broader than the reach of section 7421, which is the opposite of what the Supreme Court held in the Child Labor Cases, discussed *supra* at 11-12.

The Government's other suggestion—that Congress impliedly created an exception to section 7421 when it enacted section 1501—is also unavailing. The most direct answer to the implied-exception approach is the language that Congress actually included in section 1501(g) and the language regarding section 7421 that it failed to include. Section 1501(g) provides as follows:

> (g) Administration and procedure.--
>
> (1) In general.--The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.
>
> (2) Special rules.--Notwithstanding any other provision of law—
>
> (A) Waiver of criminal penalties.--In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.
>
> (B) Limitations on liens and levies.--The Secretary shall not--
>
> (i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or
>
> (ii) levy on any such property with respect to such failure.

The proper reading of subsection (g)(1) is that, with the limited exceptions in (2), section 1501 penalties should be treated "in the same

manner" as penalties under chapter 68. Thus, contrary to what the Sixth Circuit stated in *Thomas More*, No. 10-2388, slip op. at 12, the fact that section 1501 is not "a penalty 'provided by' chapter 68" is irrelevant because subsection 1501(g)(1) directs that it be treated as part of chapter 68 for assessment and collection purposes. Nor is there any reason to support the Sixth Circuit's conclusion, *id.* at 13, that the word "manner"—which is found in both subsection (g)(1) and subsection 6671(a)—encompasses section 7421 as applied to all penalties except those under section 1501. Therefore, even if the Government is correct that the normal route by which penalties are treated as taxes is through section 6671, there is nothing in the 2,300-page statute, or its legislative history, that suggests anything other than that Congress has directed that the penalty imposed by section 1501 should be treated like other penalties under chapter 68—which means that it is subject to section 7421.

The Government's answer to this argument is that section 6671(a) has two sentences. The first sentence mirrors subsection 1501(g)(1), but the second contains the following additional statement: "Except as otherwise provided, any reference to 'taxes' imposed by this title [which includes section 7421] shall also be deemed to refer to the penalties and liabilities provided by this subchapter." Because that additional statement is not in

subsection 1501(g), the Government contends that section 7421 is inapplicable. To bolster its argument, the Government points to sections 5114(c)(3), 5684(b) and 5761(e) of the Code, which it agrees are subject to section 7421. All three sections contain virtually identical language to subsection 1501(g)(1), except that the cross-reference is to section 6665(a). Like subsection 1501(g)(1), all three refer only to assessment, collection and payment of taxes, which is what is contained in subsection 6665(a)(1). However, none of the three sections pointed to by the Government refers to the language in subsection 6665(a)(2)—"any reference in this title 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"—which is virtually identical to the second sentence in subsection 6671(a), quoted above. Thus, the Government's argument provides no way to distinguish section 1501 from sections 5114(c)(3), 5684(b) and 5761(e) for purposes of the application of section 7421. In our view, Congress intended that the three sections cited by the Government *and* section 1501 be subject to section 7421, because there is no sensible reason why Congress would have wanted any of those penalties to be treated like taxes for assessment, collection, and payment purposes, but to categorically exclude them from section 7421.

The second response to the Government's implied-exception argument is that Congress included in subsection (g)(2) three specific exceptions from the normal rules on administration and procedure for penalties under section 1501: it waived criminal prosecutions, it barred the use of notices of liens on a taxpayer's property for failure to pay, and it prohibited levies for such a failure. These exceptions support two related arguments as to the applicability of section 7421: (1) the inclusions of specific exceptions to the ordinary rules on assessment and collection show that Congress expected those ordinary rules to apply, other than where it created a specific exception; and (2) the failure to include an express exception for section 7421, while creating other exceptions, meant that Congress did not intend to render section 7421, and presumably provisions allowing the IRS to sue to collect deficiencies, inoperable as to claims involving section 1501.

Finally, contrary to the Government's claim that Congress could not possibly have intended to require taxpayers to wait until 2015 to challenge section 1501, the indisputable fact is that Congress did not include a special judicial review provision for claims regarding section 1501, although it has often included such provisions to assure prompt judicial review, generally before three-judge district courts in the District of Columbia, that would do

exactly what Congress did not do here. Three prominent examples of special judicial review provisions in wide-ranging new laws with potentially significant constitutional issues are the Gramm-Rudman-Hollings Act in *Bowsher v. Synar*, 478 U.S. 714 (1986); the Line Item Veto Act in *Raines v. Byrd*, 521 U.S. 811 (1997); and the Bipartisan Campaign Reform Act in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). These examples, combined with the special judicial review provisions for denials of tax-exempt status found in section 7428, plus the dozen express exceptions within section 7421(a), show that there can be no doubt that Congress knows how to create exceptions to section 7421 when it wants to do so. It did not do so here. In short, there is no basis for the Government's creation of an implied exception to section 7421 for challenges to section 1501 and every reason to believe that Congress did not want there to be one.

CONCLUSION

The complaint in this case should be dismissed for lack of subject matter jurisdiction because of the bars in section 7421 and the Declaratory Judgment Act.

Respectfully Submitted,

Alan B. Morrison
George Washington
University Law School
2000 H Street NW
Washington, DC 20052
(202) 994-7120
(202) 994-5157 (fax)
alanbmorrison@gmail.com

Counsel for Amici Curiae

July 1, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a type-face of 14 points, and as calculated by my word-processing software (Microsoft Word) contains 6,494 words.

/s/ Alan B. Morrison
Alan B. Morrison

July 1, 2011

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on July 1, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Alan B. Morrison
Alan B. Morrison

July 1, 2011

Addendum A

No. 10-2347

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, et al.,

Plaintiffs-Appellants,

v.

TIMOTHY GEITHNER, SECRETARY OF THE TREASURY, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

SUPPLEMENTAL BRIEF FOR APPELLEES

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

TIMOTHY J. HEAPHY
United States Attorney

MARK B. STERN
ALISA B. KLEIN
SAMANTHA L. CHAIFETZ
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Legislative Materials:

In response to this Court's order of May 23, 2011, appellees respectfully submit that the Anti-Injunction Act (AIA) is not applicable to these proceedings.

1. The AIA provides, with statutory exceptions not implicated here, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The purpose of the AIA is to preserve the government's ability to assess and collect taxes with "a minimum of preenforcement judicial interference, and to require that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) (internal quotation marks omitted). The AIA, when applicable, bars any suit seeking relief that "would necessarily preclude" the assessment or collection of taxes under the Internal Revenue Code, regardless of the plaintiff's professed motivation for the suit. *Id.* at 731-32.

a. Like other provisions that "govern[] a court's adjudicatory capacity," *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011), the AIA limits the federal courts' subject-matter jurisdiction. *See Hansen v. Dep't of Treasury*, 528 F.3d 597, 600-01 (9th Cir. 2007); *Gardner v. United States*, 211 F.3d 1305, 1310 (D.C. Cir. 2000). Accordingly, if the AIA applied here, it would deprive the court of jurisdiction to hear a pre-implementation challenge to the

minimum coverage provision of the Affordable Care Act (ACA), 26 U.S.C.A. § 5000A.

b. In the district courts, the government argued for dismissal of these actions under the AIA. On further reflection, and on consideration of the decisions rendered thus far in the ACA litigation, the United States has concluded that the AIA does not foreclose the exercise of jurisdiction in these cases. Unique attributes of the text and structure of the ACA indicate that Congress did not intend to dictate a single pathway to judicial review of Section 5000A – *i.e.*, failure to maintain minimum essential coverage starting more than two and a half years from now, in January 2014; payment of the tax penalty starting nearly four years from now, in April 2015; and, only then, commencement of an action seeking a tax refund.

As noted, the AIA applies to a "suit for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). Separate provisions of the Internal Revenue Code expressly provide that certain penalties will be deemed "tax[es]" for purposes of other parts of the Code, including the AIA. Thus, the second sentence of Section 6671(a) provides that, "[e]xcept as otherwise provided, any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided *by this subchapter*." 26 U.S.C. § 6671(a)

(emphasis added). Thus, the AIA bars a suit to restrain assessment or collection of a "penalty" established in Subchapter B of chapter 68 (in which 26 U.S.C. § 6671(a) appears) because such penalties are deemed taxes for purposes of all of Title 26. Likewise, paragraph (2) of Section 6665(a) provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to . . . penalties provided by this chapter [68]." 26 U.S.C. § 6665(a)(2).

The minimum coverage provision penalty, however, appears in Chapter 48 of Subtitle D ("Miscellaneous Excise Taxes"), not Chapter 68. *See* 26 U.S.C.A. § 5000A. It is therefore not among the "penalties" that come within the ambit of the AIA by reason of Sections 6665(a)(2) or 6671(a).

To be sure, Congress provided in the ACA that "[t]he penalty provided by this section . . . shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C.A. § 5000A(g)(1). And the first sentence of 26 U.S.C. § 6671(a) (in subchapter B) provides that "[t]he penalties and liabilities provided by this subchapter [B] . . . shall be assessed and collected in the same manner as taxes." (The Internal Revenue Code elsewhere specifies the manner in which taxes are assessed, 26 U.S.C. §§ 6201-6255, and collected, *id.* §§ 6301-6344.) But Congress differentiated in Section 6671(a) itself between assessment and collection of assessable penalties (the first sentence) and

other Internal Revenue Code-specific attributes applicable to assessable penalties (the second sentence). And Section 5000A(g)(1) mirrors only the former, and indeed does so without referring to Section 6671(a). The significance of that choice is illuminated by comparing the limited instruction in Section 5000A(g)(1) to other actual cross-references in the Code.

For example, several tax penalty provisions, *e.g.*, 26 U.S.C. §§ 5114(c)(3), 5684(b) & 5761(e), expressly cross-reference to Section 6665(a), which provides that "the additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes," 26 U.S.C. § 6665(a)(1), and, as noted, that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to . . . penalties provided by this chapter [68]," *id.* § 6665(a)(2). It is Section 6665(a)(2) that renders the AIA applicable to those penalties. In contrast to Section 5000A(g)(1), these cross-reference provisions also mention "taxes" and cite to (all of) Section 6665(a) – *i.e.*, they identically provide that the penalty "shall be assessed, collected, and paid in the same manner as taxes, as provided in section 6665(a)." 26 U.S.C. §§ 5114(c)(3), 5684(b), 5761(e).

Section 5000A(g)(1), by contrast, does not specifically cross-reference Section 6671 (or Section 6665(a)). Nor does Section 5000A(g)(1) state that the

penalty shall be assessed and collected in the same manner as "taxes." Instead, it provides that the penalty will be assessed and collected in the same manner as an "assessable penalty." Finally, Section 5000A(g)(1) does not provide that the penalty shall be "paid" in the same manner as an assessable penalty or (as noted above) refer to Section 6671(a), which provides that penalties and liabilities provided by subchapter B of Chapter 68 "shall be paid upon notice and demand" by the Secretary. Rather, Section 5000A(g)(1) includes its *own* directive that the penalty "shall be paid upon notice and demand by the Secretary."

Given that Congress in other penalty provisions had included explicit cross-references to Section 6665(a), the distinctions discussed above indicate that the absence of such a specific cross-reference to that section or to Section 6671(a), and thus derivatively to the AIA, was deliberate.[1]

The structure and legislative history of the ACA support this conclusion. First, in Section 5000(A)(g)(2)(B) (the provision immediately following the

[1] This conclusion is further reinforced by the contrast between Section 5000A(g)(1) and Section 9010 of the ACA, which establishes a penalty and provides that it "shall be subject to the provisions of subtitle F of the Internal Revenue Code . . . that apply to assessable penalties imposed under chapter 68 of such Code." *See* ACA § 9010(g)(3)(C), as amended by the Health Care and Education Reconciliation Act of 2010 § 1406, 26 U.S.C.A. Subt. D, note. In contrast to the limited direction in Section 5000A(g)(1), the broad cross-reference in Section 9010 incorporates all of Sections 6665(a) and 6671(a), both of which appear in Subtitle F.

"assessed and collected" provision discussed above), Congress prohibited the IRS from filing a notice of lien or levying on property in order to collect the penalty.[2] Those actions are among the principal tools the federal government uses to collect unpaid taxes, and, as a practical matter, resort to those tools is what a pre-enforcement challenge to a tax statute would typically "restrain" (26 U.S.C. § 7421(a)). Because those particular tools are unavailable in the context of the minimum coverage provision, it makes sense that Congress would regard it as unnecessary to apply the AIA to bar challenges to the minimum coverage provision prior to its effective date.

Second, and as the government has acknowledged, the minimum coverage requirement is "integral" to the ACA's guaranteed-issue and community-rating provisions – *i.e.*, Sections 2701, 2702, 2704 (with respect to adults), and 2705(a) of the Public Health Service Act, as added by Section 1201 of the ACA – which go into effect in 2014 along with that requirement and cannot be severed from it. *See* U.S. Response/Reply Brief at 47, *Virginia v. Sebelius*; *see also* U.S. Response/Reply Brief at 58, *Florida v. HHS*, Nos. 11-11021 & 11-11067 (11th Cir.) (filed May 18, 2011). Congress would not have wanted to wait until after

[2] The ACA also provides that "[i]n the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure." 26 U.S.C.A. § 5000A(g)(2)(A).

these interconnected provisions were implemented (and relied upon by millions of individuals, as well as the insurance industry) for challenges to the constitutionality of the minimum coverage provision to be resolved.

Third, Congress delayed the effective date of the minimum coverage provision, thus dramatically mitigating the risk of disruption to ongoing administration of the tax code that the AIA is intended to prevent. The AIA's purpose is to prevent anyone from interfering with the federal government's administration of the Tax Code, from forcing it by judicial fiat to treat a particular taxpayer or group of taxpayers differently than others, and from compelling it to stop or alter the ongoing business of tax enforcement. This broad challenge to the constitutionality of the minimum coverage provision, which was brought nearly four years before the minimum coverage provision is to be implemented, five years before any tax is to be paid and the IRS begins assessing and collecting those taxes, and well before the IRS has even set up the systems to administer the provision, poses no realistic threat of such disruption -- in contrast to the threat of disruption to the administration of the ACA that postponing review would raise.

Finally, the ACA's legislative history supports the conclusion that Congress did not intend the AIA to prohibit pre-enforcement challenges to the minimum coverage provision. In enacting the statute, Members of Congress reflected an

awareness that constitutional challenges were "likely" to be adjudicated, but never suggested that the only way for an individual to obtain review would be to refuse in 2014 to maintain the minimum essential coverage the ACA sought to ensure, pay the tax penalty in 2015, and commence a refund action. 155 Cong. Rec. S13,823 (Dec. 23, 2009) (Sen. Hatch); *see also* 156 Cong. Rec. E475-02 (Mar. 21, 2010) (Rep. Bonner) (noting "there are already attempts to challenge [the provision] in court").

2. As the United States has explained (U.S. Opening Brief at 58-61, *Virginia v. Sebelius*; U.S. Opening Brief at 54-59, *Liberty v. Geithner*), the minimum coverage provision is a valid exercise of Congress's constitutional power over taxation. But that conclusion does not mean that the AIA bars this lawsuit; the two inquiries are distinct.

In "passing on the constitutionality of a tax law," a court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (citation omitted). The minimum coverage provision easily satisfies that test. Among other things, it will be administered by the IRS; any penalty is due on April 15 with individuals' tax returns; and, in many cases, the penalty will be a percentage of income. In "practical operation," *id.*, this is a tax for

constitutional purposes. That inquiry, unlike the technical question of whether Congress intended the AIA to apply, does not depend on the particular Chapter in which the provision appears in the Internal Revenue Code or the precise language of the statutory cross-references Congress employed.

The distinction between these inquiries is illustrated by two Supreme Court cases from 1922. In *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20 (1922), the Court upheld a claim for a tax refund, and invalidated a federal child labor tax law as a punitive sanction. Nevertheless, on the same day, the Court ordered dismissal of a pre-enforcement suit to enjoin collection of the same tax. *Bailey v. George*, 259 U.S. 16 (1922). The Court held that "[t]he averment that a taxing statute is unconstitutional does not take this case out of" the predecessor to the AIA. *Id.* at 20. The Court has since reiterated that the AIA applies even where the taxpayer challenges Congress's power to enact a purported tax. *See Bob Jones Univ.*, 416 U.S. at 740-41; *Alexander v. Americans United, Inc.*, 416 U.S. 752, 759-60 (1974).

The converse is also true. For the reasons provided above, this Court may determine that, as a matter of statutory interpretation, the AIA does not apply here and that Section 5000A is an exercise of Congress's taxing power.

3. An individual plaintiff may also challenge Section 5000A in a refund suit. A taxpayer who seeks a refund of taxes that he claims were unlawfully assessed or collected may sue either in a district court or the Court of Federal Claims. 28 U.S.C. § 1346(a)(1). However, he must first comply with the tax refund scheme in the Internal Revenue Code – *i.e.*, pay the challenged tax and file an administrative claim for a refund with the IRS before bringing suit. 26 U.S.C. § 7422(a). Having complied with these prerequisites, the taxpayer may challenge the constitutionality of the tax in his refund suit, *see, e.g., United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 9-10 (2008), but could not do so in this context until 2015 at the earliest, after he failed to maintain minimum coverage during the 2014 tax year. In the unique circumstances of this case, we do not believe that Congress intended a refund suit to be the sole recourse for a constitutional challenge to the minimum coverage provision.

Respectfully submitted,

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

TIMOTHY J. HEAPHY
United States Attorney

MARK B. STERN
ALISA B. KLEIN /s/
SAMANTHA L. CHAIFETZ
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

MAY 2011

Addendum B

OPERATIVE PROVISIONS OF SUBCHAPTER B OF CHAPTER 68

Chapter 68. Additions to the Tax, Additional Amounts, and Assessable Penalties

Subchapter B

§ 6671. Rules for application of assessable penalties

(a) Penalty assessed as tax.--The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

(a) General rule.--Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

§ 6673. Sanctions and costs awarded by courts

§ 6674. Fraudulent statement or failure to furnish statement to employee

In addition to the criminal penalty provided by section 7204, any person required under the provisions of section 6051 or 6053(b) to furnish a statement to an employee who willfully furnishes a false or fraudulent statement, or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051 or 6053(b), or regulations prescribed thereunder, shall for each such failure be subject to a penalty under this subchapter of

$50, which shall be assessed and collected in the same manner as the tax on employers imposed by section 3111.

§ 6675. Excessive claims with respect to the use of certain fuels

(a) Civil penalty.--In addition to any criminal penalty provided by law, if a claim is made under section 6416(a)(4) (relating to certain sales of gasoline), section 6420 (relating to gasoline used on farms), 6421 (relating to gasoline used for certain nonhighway purposes or by local transit systems), or 6427 (relating to fuels not used for taxable purposes) for an excessive amount, unless it is shown that the claim for such excessive amount is due to reasonable cause, the person making such claim shall be liable to a penalty in an amount equal to whichever of the following is the greater:
(1) Two times the excessive amount; or
(2) $10.

§ 6676. Erroneous claim for refund or credit

§ 6677. Failure to file information with respect to certain foreign trusts

§ 6679. Failure to file returns, etc., with respect to foreign corporations or foreign partnerships

§ 6682. False information with respect to withholding

§ 6684. Assessable penalties with respect to liability for tax under chapter 42

If any person becomes liable for tax under any section of chapter 42 (relating to private foundations and certain other tax-exempt organizations) by reason of any act or failure to act which is not due to reasonable cause and either--
(1) such person has theretofore been liable for tax under such chapter, or
(2) such act or failure to act is both willful and flagrant,
then such person shall be liable for a penalty equal to the amount of such tax.

§ 6685. Assessable penalty with respect to public inspection requirements for certain tax-exempt organizations

§ 6686. Failure to file returns or supply information by DISC or former FSC

§ 6688. Assessable penalties with respect to information required to be furnished under section 7654

§ 6689. Failure to file notice of redetermination of foreign tax

§ 6690. Fraudulent statement or failure to furnish statement to plan participant§ 6692.

§ 6692. Failure to file actuarial report

§ 6693. Failure to provide reports on certain tax-favored accounts or annuities; penalties relating to designated nondeductible contributions

§ 6694. Understatement of taxpayer's liability by tax return preparer

§ 6695. Other assessable penalties with respect to the preparation of tax returns for other persons

§ 6695A. Substantial and gross valuation misstatements attributable to incorrect appraisals

§ 6698. Failure to file partnership return

§ 6699. Failure to file S corporation return

§ 6700. Promoting abusive tax shelters, etc.

§ 6701. Penalties for aiding and abetting understatement of tax liability

§ 6702. Frivolous tax submissions

§ 6704. Failure to keep records necessary to meet reporting requirements under section 6047(d)

§ 6705. Failure by broker to provide notice to payors

§ 6706. Original issue discount information requirements

§ 6707. Failure to furnish information regarding reportable transactions

§ 6707A. Penalty for failure to include reportable transaction information with return

§ 6708. Failure to maintain lists of advisees with respect to reportable transactions

§ 6709. Penalties with respect to mortgage credit certificates

§ 6710. Failure to disclose that contributions are nondeductible

§ 6711. Failure by tax-exempt organization to disclose that certain information or service available from Federal Government

§ 6712. Failure to disclose treaty-based return positions

§ 6713. Disclosure or use of information by preparers of returns

§ 6714. Failure to meet disclosure requirements applicable to quid pro quo contributions

§ 6715. Dyed fuel sold for use or used in taxable use, etc.

(a) Imposition of penalty.--If--

(1) any dyed fuel is sold or held for sale by any person for any use which such person knows or has reason to know is not a nontaxable use of such fuel,

(2) any dyed fuel is held for use or used by any person for a use other than a nontaxable use and such person knew, or had reason to know, that such fuel was so dyed,

(3) any person willfully alters, chemically or otherwise, or attempts to so alter, the strength or composition of any dye or marking done pursuant to section 4082 in any dyed fuel, or

(4) any person who has knowledge that a dyed fuel which has been altered as described in paragraph (3) sells or holds for sale such fuel for any use which the person knows or has reason to know is not a nontaxable use of such fuel,

then such person shall pay a penalty in addition to the tax (if any).

(b) Amount of penalty.--

(1) In general.--Except as provided in paragraph (2), the amount of the penalty under subsection (a) on each act shall be the greater of--

(A) $1,000, or
(B) $10 for each gallon of the dyed fuel involved.

(2) Multiple violations.--In determining the penalty under subsection (a) on any person, paragraph (1) shall be applied by increasing the amount in paragraph (1)(A) by the product of such amount and the number of prior penalties (if any) imposed by this section on such person (or a related person or any predecessor of such person or related person).

(c) Definitions.--For purposes of this section--

(1) Dyed fuel.--The term “dyed fuel” means any dyed diesel fuel or kerosene, whether or not the fuel was dyed pursuant to section 4082.

(2) Nontaxable use.--The term “nontaxable use” has the meaning given such term by section 4082(b).

(d) Joint and several liability of certain officers and employees.--If a penalty is imposed under this section on any business entity, each officer, employee, or agent of such entity who willfully participated in any act giving rise to such penalty shall be jointly and severally liable with such entity for such penalty.

(e) No administrative appeal for third and subsequent violations.--In the case of any person who is found to be subject to the penalty under this section after a chemical analysis of such fuel and who has been penalized under this section at least twice after the date of the

enactment of this subsection, no administrative appeal or review shall be allowed with respect to such finding except in the case of a claim regarding--

(1) fraud or mistake in the chemical analysis, or
(2) mathematical calculation of the amount of the penalty.

§ 6715A. Tampering with or failing to maintain security requirements for mechanical dye injection systems

(a) Imposition of penalty.--
(1) Tampering.--If any person tampers with a mechanical dye injection system used to indelibly dye fuel for purposes of section 4082, such person shall pay a penalty in addition to the tax (if any).
(2) Failure to maintain security requirements.--If any operator of a mechanical dye injection system used to indelibly dye fuel for purposes of section 4082 fails to maintain the security standards for such system as established by the Secretary, then such operator shall pay a penalty in addition to the tax (if any).

(b) Amount of penalty.--The amount of the penalty under subsection (a) shall be--

(1) for each violation described in paragraph (1), the greater of--
(A) $25,000, or
(B) $10 for each gallon of fuel involved, and

(2) for each--

(A) failure to maintain security standards described in paragraph (2), $1,000, and

(B) failure to correct a violation described in paragraph (2), $1,000 per day for each day after which such violation was discovered or such person should have reasonably known of such violation.

§ 6717. Refusal of entry

(a) In general.--In addition to any other penalty provided by law, any person who refuses to admit entry or refuses to permit any other

action by the Secretary authorized by section 4083(d)(1) shall pay a penalty of $1,000 for such refusal.

§ 6718. Failure to display tax registration on vessels

§ 6719. Failure to register or reregister

(a) Failure to register or reregister.--Every person who is required to register or reregister under section 4101 and fails to do so shall pay a penalty in addition to the tax (if any).

§ 6720. Fraudulent acknowledgments with respect to donations of motor vehicles, boats, and airplanes

§ 6720A. Penalty with respect to certain adulterated fuels

(a) In general.--Any person who knowingly transfers for resale, sells for resale, or holds out for resale any liquid for use in a diesel-powered highway vehicle or a diesel-powered train which does not meet applicable EPA regulations (as defined in section 45H(c)(3)), shall pay a penalty of $10,000 for each such transfer, sale, or holding out for resale, in addition to the tax on such liquid (if any).

(b) Penalty in the case of retailers.--Any person who knowingly holds out for sale (other than for resale) any liquid described in subsection (a), shall pay a penalty of $10,000 for each such holding out for sale, in addition to the tax on such liquid (if any).

§ 6720B. Fraudulent identification of exempt use property

§ 6720C. Penalty for failure to notify health plan of cessation of eligibility for COBRA premium assistance

§ 6721. Failure to file correct information returns

§ 6722. Failure to furnish correct payee statements

§ 6723. Failure to comply with other information reporting requirements

§ 6725. Failure to report information under section 4101