5-31-2011

Liberty University v. Geithner - Appelants' supplemental brief

Liberty University

APPEAL NO. 10-2347

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, a Virginia Nonprofit Corporation; MICHELE G. WADDELL; JOANNE V. MERRILL,

PLAINTIFFS-APPELLANTS

v.

TIMOTHY GEITNER, Secretary of the Treasury of the United States, in his official capacity; KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, in her official capacity; HILDA L. SOLIS, Secretary of the United States Department of Labor in her official capacity; ERIC H. HOLDER, JR., Attorney General of the United States, in his official capacity,

DEFENDANTS-APPELLEES.

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

SUPPLEMENTAL BRIEF OF APPELLANTS LIBERTY UNIVERSITY, MICHELE G. WADDELL AND JOANNE V. MERRILL

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INTRODUCTION

This Supplemental Brief responds to this Court's questions regarding the Anti-Injunction Act, 26 U.S.C. § 7421 ("AIA"). Every district court which has considered the AIA found that it does not apply because the Mandate exactions are penalties, not taxes.[1] This court cannot avoid this central question, nor can it find that the AIA applies without first deciding whether the Mandates themselves arise under the Commerce Clause or the Taxing and Spending Clause. Even if the challenged exactions were taxes, the AIA would still not apply to this case.

ARGUMENT

I. THE AIA DOES NOT DEPRIVE THIS COURT OF JURISDICTION.

The AIA deprives a court of jurisdiction *only if* the suit seeks to restrain the assessment or collection of a tax. Even then, the AIA does not apply if (1) it is clear that under no circumstances could the Government ultimately prevail, and (2)

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[1] *Liberty Univ., Inc. v. Geithner*, 753 F.Supp.2d 611, 627-629 (W.D. Va. 2010); *Virginia v. Sebelius*, 702 F.Supp.2d 598, 613-614 (E.D. Va. 2010); *Florida ex. rel. Bondi v. Dep't. of Health and Human Servs*, 716 F. Supp. 2d 1120, 1143-1144 (N.D. Fla. 2010); *Thomas More Law Center v. Obama*, 720 F.Supp.2d 882, 891 (E.D. Mich. 2010). *Goudy-Bachman v. Dep't of Health and Human Servs.*, 2011 WL 223010 at *12 (M.D. Penn. 2011); *U.S. Citizens Ass'n v. Sebelius*, 754 F.Supp.2d 903, 909 (N.D. Ohio 2010). By the time the question reached the District of Columbia court, the Government abandoned the claim. *Mead v. Holder*, 2011 WL 611139 at *1 n.1 (D.D.C. 2011) ("On January 21, 2011, Defendants filed a Notice stating that they do not intend to pursue their Rule 12(b)(1) arguments. *See* Notice Regarding Mot. to Dismiss [Dkt. No. 34]. The Court therefore will deem the Defendants' arguments concerning the Anti-Injunction Act waived and will not consider them.").

equity jurisdiction otherwise exists. 26 U.S.C. §7421; *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). *See also Bob Jones University v. Simon*, 416 U.S. 725, 736-748 (1974).

This case does not seek to restrain the assessment or collection of a tax. The fines associated with the Mandates are penalties under the purported authority of the Commerce Clause, not taxes under the Taxing and Spending Clause. Even if the Mandate exactions were taxes, the AIA would still not apply. Plaintiffs do not challenge an assessment or collection of taxes or any other IRS action. Plaintiffs allege that the Mandates themselves, not just the concomitant penalties, exceed Congress' authority under the Commerce Clause and otherwise violate Plaintiffs' constitutional rights. (Joint Appendix ("JA") 0012-0051).

In *Bob Jones University* and *Williams Packing*, the Plaintiffs challenged tax determinations made pursuant to Congress' undisputed authority under the Taxing and Spending Clause. The parties did not contend that underlying statutes were unconstitutional, but rather that the IRS was wrong in denying tax-exempt status or assessing the tax in question. Here, Plaintiffs challenge the authority of Congress to impose the Mandates under the Commerce Clause. Before reaching the application of the AIA, this Court must first determine if the Mandates arise under the Commerce Clause, and the Act itself asserts, or under the Taxing and Spending Clause, which argument the Government concocted after the Act was challenged.

Even if the Mandates were taxes, which Plaintiffs dispute, the AIA would still not apply because of the *Williams Packing* exception. Under no circumstances can the Government prevail in a claim that the Mandate exactions are taxes under the Taxing and Spending Clause and therefore subject to the AIA. Furthermore, Plaintiffs are entitled to equitable relief because they will suffer irreparable injury for which there is no adequate remedy at law. *Williams Packing*, 370 U.S. at 7. The Government cannot prevail on a claim that the Mandates are taxes, since the Mandates themselves are compelled purchases of a product, or penalties for failure to purchase a product, not taxes. The exactions are not designed to raise revenue but to deter non-compliance with the Mandates, which places them squarely in the category of penalties. *See Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779-80 (1994) ("Whereas [penalties] are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising, rather than punitive, purposes."); *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937) (to qualify as a tax, an exaction must be "productive of some revenue."). The penalties might not raise any revenue if all citizens comply with or are exempt from the insurance Mandates. 26 U.S.C. §§ 5000A and 4980H. Neither of the penalties is listed as a revenue generating provision in Title IX of the Act. 124 Stat 119 at 848-855.

The Act itself distinguishes between taxes and penalties. The legislative history shows that Congress intended that the payments would be penalties, not taxes. (Appellants' Opening Brief, at 40-43). President Obama has stated that the Mandate are not taxes.[2] The exactions do not meet the criteria for income taxes. *See Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (defining "income" for tax purposes). They are not excise taxes because they are not assessed as the result of a commercial transaction, activity, privilege or use of property. *See Murphy v. IRS*, 493 F.3d 170, 180-181 (D.C. Cir. 2007) (defining excise taxes). The exactions are not direct or capitation taxes because they are not apportioned. *See id.* "[A] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government." *United States v. Reorganized CF & I Fabricators of Utah, Inc*., 518 U.S. 213, 224 (1996). A penalty, on the other hand, connotes a sanction or a punishment for an unlawful act or omission. *Id.* "A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act." *United States v. LaFranca*, 282 U.S. 568, 572

[2] http://www.cnn.com/2009/POLITICS/09/20/obama.health.care/index.html (last visited January 11, 2011). Further evidence that the Act is not a revenue raising provision under the Taxing and Spending Clause is the fact that it originated in the Senate, not the House. *See* U.S. Const. art. I, §7, cl. 1 ("All bills for raising revenue shall originate in the House of Representatives …").

(1931). "The two words [tax vs. penalty] are not interchangeable ... and if an exaction [is] "clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *Id.* That is precisely what Defendants are attempting to do here. Every district court addressing the issue has determined such eleventh-hour maneuvers are ineffective in changing the nature of the exactions.[3] It is clear that the Government cannot prevail on a claim that the exactions are taxes under the Taxing and Spending Clause to which the AIA could apply. The Government has apparently conceded this fact as it has abandoned its AIA defense in all the pending appeals, including this one. In addition, in *Mead*, the district court denied the Government's motion to dismiss the challenge to the Mandate exactions under the Taxing and Spending Clause, and the Government has not appealed that denial to the District of Columbia Circuit. *Mead v. Holder,* 2011 WL 611139 at *23, *appealed sub nom Seven-Sky v. Holder*, District of Columbia Circuit Court case 11-5047.

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[3] *Liberty Univ., Inc. v. Geithner*, 753 F.Supp.2d at 630 (Finding that the AIA did not apply because the exactions are penalties and failing to reach the Taxing and Spending argument because the Mandates were found valid under the Commerce Clause); *Virginia v. Sebelius*, 728 F. Supp. 2d, 768, 787 (E.D. Va. 2010); *Florida ex. rel. Bondi v. Dep't. of Health and Human Servs*, 2011 WL 285683 (N.D. Fla. 2011); *Thomas More Law Center v. Obama*, 720 F.Supp.2d at 895; *Goudy-Bachman v. Dep't of Health and Human Servs.*, 2011 WL 223010 at *11 (M.D. Penn. 2011); *U.S. Citizens Ass'n v. Sebelius*, 754 F.Supp.2d at 909; *Mead v. Holder,* 2011 WL 611139 at *23 (denying Defendants' motion to dismiss under General Welfare, *i.e.*, Taxing and Spending Clause).

Plaintiffs are entitled to equitable relief because there is no alternative remedy available to redress the irreparable injuries caused by the Mandates. Plaintiffs are seeking redress for violations of fundamental constitutional rights, which the Supreme Court has found constitute irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). As Judge Moon said during oral argument on the Motion to Dismiss, a refund suit would not accord Plaintiffs relief, as it would not provide a forum for challenging the constitutionality of the Mandates. (JA 0132-0133). As Judge Moon noted, if the plaintiffs are provided health insurance or are exempted under the Act, then they will never pay the penalty and never have the opportunity to challenge the constitutionality of the Mandate. (JA 0132-0133). "They would have to participate and keep on going until maybe some fortuitous thing down the road might cause them to pay the penalty." (JA 0133). A refund suit in this case is an inadequate remedy. *See Estate of Michael v. Lullo*, 173 F.3d 503, 510 (4th Cir. 1999). The AIA is intended to bar a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax. *South Carolina v. Regan*, 465 U.S. 367, 373 (1984). No such remedy is available here since a suit to contest the assessment or collection of the penalties will not address the constitutionality of the Mandates.

Plaintiffs' remedies are further limited by the fact that they do not have the procedural due process usually available when the IRS assesses criminal penalties or levies property. Congress exempted the penalties from those enforcement actions. 26 U.S.C. § 5000A(g). The notice of deficiency provided in Section 6212, pre-levy hearing in Section 6320, collection due process administrative hearing under Section 6330 and other notices and hearings under the IRC are not available to challenge the Act's penalties. The individual Plaintiffs and Liberty University are forced to reorder their affairs because the Mandates require them to act now even before any penalty or alleged tax under the Mandates are due. Liberty University must adjust its business and insurance practices to comply with the requirements of the Act even before a penalty is due in 2014. Already Liberty University has faced financial burdens imposed by the Act. The District Court found that Liberty University has standing because it currently faces a concrete injury that is neither hypothetical nor remote. Over 1,000 employers have already been forced to seek a temporary waiver because of the crushing burden imposed by the Act. Liberty cannot wait until 2014, pay a penalty (or an alleged tax), and then challenge the Act. Significant provisions of the Act have already gone into effect and more will continue to go into effect, thus increasing the injury until the full weight of the Act hits in 2014. Liberty University has a current, not a future, injury and thus has no other adequate remedy. Even if the Mandates were taxes under the

Taxing and Spending Clause, the *Williams Packing* exception would allow the Plaintiffs to challenge the Act now rather than wait until payment of a penalty. The Government cannot prevail in its argument that the Mandates are taxes under the Taxing and Spending Clause, and Plaintiffs face irreparable injury with no adequate alternative remedy.

II. *GEORGE* AND *DREXEL FURNITURE* DO NOT PERMIT THE AIA TO BE APPLIED WITHOUT FIRST DETERMINING THAT THE MANDATES ARE TAXES OR PENALTIES.

Neither of the cases cited in the second question presented permit this Court to apply the AIA and avoid the central issue of whether the Mandates are constitutional. *See Bailey v. George*, 259 U.S. 16 (1922), *Bailey v. Drexel Furniture Co.* 259 U.S. 20 (1922). In *George*, the plaintiff filed suit to halt the assessment of taxes under the Child Labor Tax Law. The case was dismissed under the AIA because it was a suit to restrain the collection of revenue. *Id.* The plaintiff did not dispute that the exaction was a tax under the Taxing and Spending Clause.

In *Drexel Furniture,* the plaintiff was denied a refund after paying the tax and then challenging its validity. 259 U.S. at 34. On appeal the Supreme Court found that the Child Labor Tax was not a valid "tax" because it was not enacted to raise revenue but to coerce employers into complying with congressional regulations. *Id.* at 37-40 ("the so-called tax is a penalty to coerce people of a state to act as Congress wishes …"). Neither *George* nor *Drexel Furniture* imply that

this Court can treat the challenged Mandates or the exactions as taxes and apply the AIA without reaching the central question of whether the Mandates arise under the Commerce Clause or the Taxing and Spending Clause. The law challenged in *George* and *Drexel Furniture*, was enacted under the Taxing and Spending Clause, facially denominated as a tax, part of "An act to provide revenue," and imposed an annual "excise tax." *Drexel Furniture*, 259 U.S. at 34. There was no question about which enumerated power supported the law.

Here, Congress explicitly based the Mandates (and their penalties) on the Commerce Clause, not the Taxing and Spending Clause. Congress rejected prior bills that called the Mandate exactions taxes and enacted them instead as penalties. The Act uses the term "tax" in describing other exactions, but the word "penalty" in describing the Mandate exactions. The Mandate exactions are not listed among the seventeen other revenue generating provisions. 124 Stat 119 at 848-855. Congress excluded the Mandate exactions from the usual civil and criminal penalties associated with non-payment of taxes. 26 U.S.C. § 5000A(g).

Congress enacted the AIA to prevent those who are liable for taxes from interfering with or thwarting the collection of authorized revenues. *Miller v. Standard Nut Margarine Co. of Florida*, 284 U.S. 498, 509 (1932). Congress was concerned that exactions enacted to raise revenues, *i.e.*, taxes under Art. I §8, not be held up in litigation and thereby jeopardize governmental operations. *See id.*

When revenue collection is not an issue, then the Court can determine whether an exaction is a "tax" under Art. I §8 or a penalty disguised as a tax. The central question in this litigation is whether the Mandates arise under the Commerce Clause as the Act itself proclaims, and whether Congress exceeded it authority in passing the Mandates. The question of whether the Mandate exactions are penalties under the Commerce Clause or taxes under the Taxing and Spending Clause must be determined before deciding whether the AIA applies, and if so, whether the *Williams Packing* exception applies to prevent application of the AIA

III. PLAINTIFFS DO NOT HAVE EFFECTIVE ALTERNATIVES TO CHALLENGE THE MANDATES.

If the AIA applies, as question three asks Plaintiffs to assume, Plaintiffs would not have an adequate alternative remedy to redress its claims despite the fora provided under the IRC and FRCP sections cited by the Court. As discussed under Argument I (*infra* 6-8), The Mandates burden Plaintiffs now even though the exactions will not arise until 2014, so the constitutionality of the Mandates must be determined now. The future penalties under the Mandates are less onerous than the constitutional violations posed by the Mandates now. Without the ability to challenge the Mandates now, Plaintiffs have no remedy.

Dated: May 31, 2011.

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CERTIFICATE OF COMPLIANCE

This brief has been prepared using 14 point, proportionately spaced Times New Roman typeface in Microsoft Office Word 2007.

May 31, 2011.

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