Appeals Court Lacks Jurisdiction For ACA Exaction Challenges

by Caitlin Mullaney

The courts lack jurisdiction over suits aimed at preventing the IRS from collecting exactions from employers that fail to comply with the employer mandate in the Affordable Care Act because the exaction is a tax, an appeals court has affirmed.

In an August 8 decision in *Optimal Wireless LLC v. IRS*, the D.C. Circuit affirmed a district court's March 2022 opinion that the section 4980H exaction against employers for failing to meet the ACA coverage requirement for employees is a tax and is thus outside the jurisdiction of the courts under the Anti-Injunction Act.

In 2019 the IRS sent Optimal letters stating that the company owed more than $1.1 million because of its failure to maintain coverage for its employees in 2016 and 2017. Under the ACA, employers with at least 50 full-time employees must give them the opportunity to enroll in an employer-sponsored plan with minimum essential coverage. Employers must also provide an affordable healthcare option and a minimum-value plan. Those that don't comply can incur exactions under section 4980H.

The IRS based its determination on its certification that Optimal employees claimed section 36B premium tax credits because Optimal failed to comply with the employer mandate. Optimal argued that the certification should have been done by the Department of Health and Human Services and that the IRS and HHS failed to satisfy the procedural requirements for imposing the exactions.

In the opinion, Chief Judge Sri Srinivasan explained that Optimal's complaint clearly seeks to prevent the IRS from assessing the section 4980H exactions. That triggers application of the AIA, which prohibits courts from maintaining any suit that has the intention of "restraining the assessment or collection of any tax," he wrote.

"The pivotal question for purposes of the Anti-Injunction Act is whether that exaction is a 'tax' within the meaning of the Act. . . . We hold that an exaction under Section 4980H is a 'tax' within the meaning of the Anti-Injunction Act," Srinivasan wrote.

Srinivasan referenced Congress's repeated references to the section 4980H exaction as a tax, and he noted a contrast with the Supreme Court's determination in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), in which the Court found that the AIA didn't apply to the exaction for noncompliance with the ACA's individual mandate because Congress never referred to it as a tax, only as a penalty.

Optimal argued that Congress did refer to the employer mandate exaction as both an assessable payment and a penalty in addition to a tax, but Srinivasan rejected that argument.

"Congress's use of those additional labels . . . does not dissuade us from concluding that its repeated references to the exaction as a 'tax' require treating it as one for purposes of the Anti-Injunction Act," Srinivasan wrote.

Srinivasan explained that both terms aren't inconsistent with use of the term "tax" and that an exaction can be described as both a tax and a penalty. He also pointed to provisions that reference the exaction as a tax.

Srinivasan noted that Optimal's argument that its suit falls within enumerated exceptions to the AIA wasn't considered because it wasn't raised in the district court.

The petitioner in *Optimal Wireless LLC v. IRS*, No. 22-5121, was represented by Jason B. Freeman of Freeman Law, Kodie P. Bennion of Hedrick Kring Bailey PLLC, and Glen Frost of Frost Law. ■