The Anti-Injunction Act Issue

By Bryan Camp and Jordan Barry

United States Department of Health and Human Services et al.
v.
State of Florida et al.

Docket No. 11-398
Argument Date: March 26, 2012
From: The Eleventh Circuit

Case at a Glance The Anti-Injunction Act, 26 USC §7421, says that "no suit for the purpose of restraining the assessment or collection of any tax may be maintained in any court by any person." If the Anti-Injunction Act bars this lawsuit, the Supreme Court will not be able to decide whether the Patient Protection and Affordable Care Act (ACA) is constitutional and the lower court opinions will be vacated. The parties to this case all want the Supreme Court to decide the ACA's constitutionality. They all argue that the Anti-Injunction Act (AIA) does not bar this lawsuit, but for different reasons. Three amici disagree and argue that AIA bars this lawsuit, but several amici join the parties in arguing that it does not.

Introduction

To decide a case, a federal court must have the power to adjudicate matters of that type. This concept is known as "subject matter jurisdiction." Generally, federal courts only have subject matter jurisdiction when a federal statute gives it to them. And what Congress gives, it can also take away. The question in this case is whether 26 USC §7421, which prohibits "any person" from suing the federal government "for the purpose of restraining the assessment or collection of any tax," strips federal courts of their power to decide this case at this time. This law is commonly called "the Anti-Injunction Act" because it prevents federal courts from hearing cases where taxpayers are seeking court orders, such as injunctions, to prevent the government from assessing or collecting federal taxes. So before the Supreme Court can address whether the ACA is a constitutional exercise of congressional power, it must first decide that the Anti-Injunction Act (AIA) either (1) does not take away subject matter jurisdiction from the federal courts or (2) does not apply to this case. If the AIA is jurisdictional and does apply,courts likely will not be able to decide whether the ACA is constitutional until at least 2015.

Issues

1. Is the Anti-Injunction Act jurisdictional? That is, when the act applies, does it take away subject matter jurisdiction from federal courts or is it merely a defense that the federal government can raise if it chooses?

2. If the Anti-Injunction Act is jurisdictional, does it apply to this lawsuit?

Facts

In 2009 Congress enacted the ACA. Several provisions were codified in title 26, the Internal Revenue Code (the code), including one commonly called the individual mandate. This provision, codified in §5000A, requires individuals to have health insurance beginning in 2014. Individuals who fail to do so must report that failure on their tax returns and must pay an amount labeled a "penalty" along with their federal income and other taxes. In §5000A(g) Congress specified how the IRS must assess and collect this penalty.

Several states and some individuals sued the federal Department of Health and Human Services (the government) challenging the constitutionality of several provisions of the ACA, including §5000A. Initially, the government argued that AIA barred the plaintiffs' suit. The

federal district court disagreed and went on to find the individual mandate unconstitutional. On appeal to the Eleventh Circuit Court of Appeals, the federal government dropped the AIA procedural argument. The Eleventh Circuit ruled the individual mandate unconstitutional. It did not discuss the AIA in its opinion.

Although the Eleventh Circuit did not address § 7421, three other Courts of Appeals have. The Sixth Circuit and the District of Columbia Circuit decided that the AIA does not prevent courts from reaching the merits of the constitutional issues and that the ACA is constitutional. *Thomas More Law Center v. Obama*, 651 F. 3d 529 (6th Cir. 2011); *Seven-Sky v. Holder*, 681 F.3d 1 (D.C. Cir. 2011). However, the Fourth Circuit concluded that the AIA does bar challenges to the ACA at this time and did not reach the constitutional issues. *Liberty University v. Geithner*, 2011 U.S. App. LEXIS 18618; 2011 WL 3962915. 2011-2 U.S. Tax Cas. (CCH) & 50,613.

Because all of the parties contend that the AIA does not bar this suit, the Supreme Court appointed a special Amicus, Robert Long (Amicus Long), to argue that the AIA does bar the suit.

Case Analysis

This section will put the AIA into context and then explain the various positions the parties take as to each of the two questions presented. It does not discuss the related but separate question of standing.

Background: The General Rule of § 7421

The administration of taxes in the United States has historically been divided into two functions: (1) the determination of tax, which culminates in an act of assessment, and (2) the collection of taxes assessed. Section 7421 speaks in those terms, prohibiting suits seeking to restrain either the assessment or collection of taxes. Since the creation of the Internal Revenue Service (the IRS) in 1862, taxpayers have been required to pay assessed taxes before they could contest their liability for them. Enacted in 1867, the Anti-Injunction Act is part of the cement holding this "pay first, litigate later" regime together. As the Supreme Court explained in 1876:

> [T]here are provisions for recovering [a] tax after it has been paid. ... *But there is no place in [the U.S. tax] system for an application to a court of justice until after the money is paid.*
>
> That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

State R.R. Tax Cases, 92 U.S. 575, 613 (1876) (emphasis added)

Over time, Congress amended the AIA to create several exceptions to the general "pay first, litigate later" regime. Two are important to this case, the Deficiency Procedure and the Collection Due Process Procedure.

1. Deficiency Procedure

In 1924, Congress created a special procedure to allow taxpayers to restrain some assessments of certain types of taxes, notably income and gift taxes. It provided that, in some circumstances, the IRS must give taxpayers a "Notice of Deficiency" before making an assessment. Taxpayers then have a chance to challenge the Deficiency in the Tax Court. At the time it created this special procedure, Congress amended the AIA so that it did not apply to suits challenging Deficiencies.

There are many, many taxes that are not subject to this procedure. For example, employment taxes, which are imposed on employers for the privilege of employing workers, are not subject to the Deficiency Procedure. The IRS need not issue a Notice of Deficiency and can simply assess the tax and start collection activities.

Similarly, "Assessable Penalties," a group of penalties imposed on taxpayers for various bad behaviors, do not trigger the Deficiency Procedure. Taxpayers wishing to contest Assessable Penalties must follow the general "pay first, litigate later" rule of the AIA. For example, § 6673 allows courts to impose a fine of up to $25,000 against taxpayers who advance frivolous arguments in court. The IRS then simply assesses that fine and starts collection. Section 6676 allows the IRS to assess a penalty against taxpayers who claim excessive refunds. Again, the IRS just assesses the penalty and starts collection. Many Assessable Penalties have little to do with tax liability and are more in the mold of nontax regulatory requirements. For example, tax preparers who fail to put their social security numbers on returns they prepare, employers who fail to furnish proper documentation to their employees, and parents who refuse to obtain social security numbers for their children are all subject to Assessable Penalties.

Although Assessable Penalties are called "penalties," §6671(a) makes clear that they are generally treated as taxes throughout the Code. This means that the AIA fully applies to Assessable Penalties. Thus, taxpayers must generally pay Assessable Penalties before contesting them—unless the Collection Due Process (CDP) Procedure applies.

2. Collection Due Process Procedure

In 1998, Congress created the CDP Procedure, a special procedure that allows taxpayers to restrain certain types of collection actions. Similar to the Deficiency Procedure, the CDP procedure requires the IRS to tell taxpayers that it proposes to levy on their property or that it has just filed a notice of federal tax lien. Taxpayers may then seek relief from the IRS Office of Appeals and, if unhappy with that result, may seek judicial review in the Tax Court. As it did with the Deficiency Procedure, Congress explicitly amended the AIA so that it would not apply to the CDP Procedure.

The CDP Procedure generally only allows taxpayers to contest the manner in which the IRS proposes to collect an already-assessed tax. However, taxpayers who were not given a prior opportunity to contest the merits of their tax liability can also do that in a CDP proceeding. Thus, when the IRS is collecting an assessed Deficiency, taxpayers may not use the CDP process to get a second prepayment opportunity to contest the merits of the assessment because they already had that opportunity through the Deficiency Procedure. But, when the IRS is collecting an Assessable Penalty, taxpayers who are entitled to a CDP

proceeding are generally able to contest the merits of that assessment before having to pay it.

Issue I: Is the Anti-Injunction Act jurisdictional? That is, when it applies, does it take away subject matter jurisdiction from federal courts or is it merely a defense that the federal government can raise if it chooses?

Several parties and Amici attack the idea that the AIA takes away federal courts' jurisdiction over suits seeking to restrain the assessment or collection of taxes. Instead, they say, it merely gives the federal government a defense to such suits. If the government waives the defense (as it has done here), courts have the power to decide such cases. Mounting this attack are (1) the Private Respondents; (2) the State Respondents; and (3) Amici Curiae Liberty University, Inc., Michele Waddell and Joanne Merrill. Defending the jurisdictional nature of the AIA are (1) the government; (2) Amicus Long; (3) Amici Curiae Mortimer Caplin and Sheldon Cohen, who are distinguished former Commissioners of the IRS (Amici Former IRS Commissioners) and (4) Amicus Curiae Center for the Fair Administration of Taxes (Amicus CFAT). The chief arguments on both sides are summarized below, generally without attribution to the particular parties advancing them.

Those attacking the jurisdictional nature of the AIA note that the statute neither refers to courts' power expressly nor uses the word "jurisdiction." They cite various cases from the late 1800s through the 1940s in which the Court did not treat the AIA as jurisdictional. They also point out that the Supreme Court recognized exceptions to the AIA in *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1 (1962) and *South Carolina v. Regan*, 465 U.S. 367 (1984). They argue that these exceptions are inconsistent with the AIA being jurisdictional. They also raise policy arguments against treating statutes as jurisdictional when there is any ambiguity.

Those defending the jurisdictional nature of the AIA assert that, in *Enochs*, the Court deliberately put an end to what it described as a history of vacillation about the nature of the AIA. In *Enochs*, the Supreme Court flatly stated that "The object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." Since *Enochs*, the Supreme Court has consistently viewed the AIA as jurisdictional. Moreover, the defenders argue that while the AIA does not expressly say that courts do not have jurisdiction, the Court has interpreted other statutes with similar language as jurisdictional. They concede that the Supreme Court created exceptions to the AIA in *Enochs* and *Regan*, but argue that these exceptions are entirely consistent with the AIA being jurisdictional. They also raise policy arguments of their own. First, the defenders contend that treating the AIA as a waivable defense would invite taxpayers to ignore the statute and sue, hoping that they could convince the government to waive its defense or that the government might simply forget to assert it. Second, it would permit the executive branch to play favorites, or at least create that impression, by waiving the defense in some instances but not in others.

Issue 2: If the Anti-Injunction Act is jurisdictional, does it apply to this lawsuit?

Alliances shift on this issue. Between them, the State Respondents and Private Respondents raise four chief arguments explaining why the AIA does not apply to their suit, even if it is jurisdictional: First, they argue that the §5000A "penalty" is not a "tax" within the meaning of the AIA. Second, plaintiffs argue that they are only challenging the individual mandate itself, not the §5000A penalty. Since they are challenging the requirement to have insurance, not the penalty meant to enforce that requirement, they contend that they are not seeking to restrain the assessment or collection of a "tax" and, accordingly, the AIA does not apply. Third, the State Respondents assert that the AIA bars suits by "any person" and that a state is not a "person" within this definition. Fourth, the State Respondents argue that their lawsuit qualifies for the exception to the AIA that the Supreme Court recognized in *Regan*. Amicus Cato Institute and Amicus CFAT join the first and third arguments. The government is more selective. It supports the first argument but affirmatively argues against the others. The Court-appointed Amicus Long and Amici Former IRS Commissioners defend the applicability of the AIA from all the attacks. Amici Tax Law Professors dispute the first argument but do not address the others.

1. The Anti-Injunction Act does not apply to the § 5000A penalty.

Those arguing that the AIA does not apply to the § 5000A penalty advance arguments based on statutory text and Congressional intent. Before looking at these issues, it is helpful to highlight a few aspects of § 5000A that provide support for each side's arguments.

Congress debated whether to call the § 5000A penalty a "tax" or a "penalty" and deliberately chose to call it a "penalty." However, it placed the individual mandate and the penalty enforcing it within the Code. Congress charged the IRS with administering and enforcing the individual mandate and the penalty enforcing it: Congress instructed the IRS to assess and collect the §5000A penalty "in the same manner as an assessable penalty." Recall that assessable penalties generally fall within the reach of the AIA. Congress also chose to make insurance status a part of what taxpayers must self-report to the IRS each year on their income tax returns and to have taxpayers submit the penalty with their income tax returns.

In addition, Congress distinguished the § 5000A penalty from other liabilities that the IRS is charged with collecting. Congress put three unique restrictions on the IRS's ability to collect the penalty: It prohibited the IRS from seeking criminal sanctions against violators; it prohibited the IRS from using levies to enforce the § 5000A penalty; and it prohibited the IRS from filing notices of federal tax lien with respect to taxpayers' liability for the § 5000A penalty.

As discussed below, the litigants have starkly differing opinions about the implications of these various actions and language choices.

- *The Textual Argument*

This argument is about the word "tax" in the AIA. It starts simple but quickly gets

complex. Remember, the AIA is part of the code. Those attacking the AIA start by noting that Congress deliberated on what to call the provision and decided it was a penalty and not a tax. Thus, the § 5000A penalty is not a "tax" within the meaning of the AIA.

Those who defend the applicability of the AIA counter that § 5000A(g) provides that the § 5000A penalty is to be "assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." The first sentence of § 6671(a) says that the assessable penalties of subchapter B of chapter 68 "shall be assessed and collected in the same manner as taxes." Section 7421 applies to taxes, so the IRS can assess and collect taxes without judicial interference. Accordingly, they contend, in order for the § 5000A penalty to be assessed and collected in the manner that § 5000A(g) provides, the § 5000A penalty must constitute a tax for purposes of the AIA. The defenders assert that courts have routinely applied the AIA to Assessable Penalties and that they should apply it to § 5000A.

The attackers agree that the AIA applies to Assessable Penalties, but they argue that this is because of the second sentence of § 6671(a) instead of the first. The second sentence of § 6671(a) says that whenever the word "tax" is used in the Code, it includes the Assessable Penalties codified in subchapter B of chapter 68. The attackers argue that the second sentence of § 6671(a) does not apply to § 5000A because § 5000A is not codified within subchapter B of chapter 68, and § 5000A lacks any language that resembles the second sentence of 6671(a). Accordingly, while the word "tax" in the AIA includes certain Assessable Penalties, it does not include the § 5000A penalty.

The defenders disagree that the second sentence of § 6671(a) is the reason that the AIA applies to Assessable Penalties. In addition, they argue that § 6671 is not the only reason that the word "tax" in the AIA includes Assessable Penalties. Amici Former IRS Commissioners argue that when the word tax is used in the Code, it includes penalties and interest as a general matter. They point to §§6201 and 6202 as examples, among others. Amicus Cato Institute disagrees. It argues that in almost all of the examples given, Congress explicitly provided that the penalties were to be treated as taxes and that the bar of the AIA was to apply.

Amici Tax Law Professors support the Former IRS Commissioners by pointing to the limitations that Congress imposed on the IRS's ability to use certain collection powers to collect the § 5000A penalty. The statutes creating those collection powers only allow the IRS to use them to collect "taxes." The fact that Congress limited the IRS's ability to use those tools with respect to the § 5000A penalty implies that those powers would otherwise have been available to the IRS, and that would only be true if the § 5000A penalty is a tax within the ordinary meaning of that term as it is used in the code.

• *Congressional Intent*

Congress forbade the IRS from using its administrative levy power or filing a notice of federal tax lien with respect to the § 5000A penalty. The attackers of the application of the AIA argue that pre-payment judicial review of the § 5000A penalty would not interfere with the IRS's activities in the same way as it would with respect to other liabilities the IRS is charged with collecting. Thus, these unique assessment and collection provisions render the normal logic behind the AIA inapplicable. Accordingly, conclude the attackers, Congress could not have intended for the AIA to apply to the §5000A penalty.

The defenders respond with three reasons why the logic of the AIA still applies to § 5000A. First, the IRS can still collect the penalty. It can set off tax refunds, including those created by refundable credits, or file civil suits. Second, the IRS must still assess the penalty, and the AIA applies to suits that seek to restrict either assessment or collection actions. Moreover, Congress instructed the IRS to assess the penalty in the same manner as Assessable Penalties. If Congress had wanted the AIA not to apply, the defenders assert, it could easily have amended the AIA or instructed the IRS to assess the penalty in the same manner as a Deficiency. Third, Amici Tax Law Professors point out that the collection actions that Congress prohibited are precisely those that trigger the CDP Procedure. If Congress had allowed the IRS to use those collection tools, taxpayers would be able to avoid the AIA using the CDP exception described above. Thus, the restrictions on collection powers is as much a command that the "pay first, litigate later" rule applies as it is a restriction on the IRS.

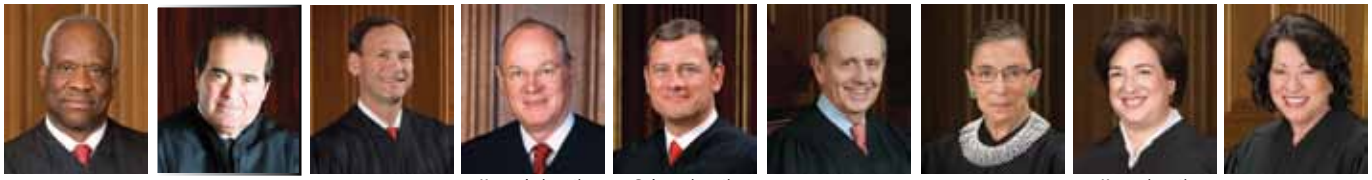
2. Plaintiffs are not seeking to restrain the assessment or collection of the

EXPERT POLL

Does the AIA bar jurisdiction?

YES —

NO



Thomas (**100%**) Scalia (**100%**) Alito (**87%**) Kennedy (**87%**) Roberts (**87%**) Breyer (**71%**) Ginsburg (**71%**) Kagan (**71%**) Sotomayor (**56%**)

Photos courtesy of the Collection of the Supreme Court of the United States

*Percentages indicate the proportion of experts polled who believe a justice will vote in a given way

penalty but only the requirement to buy health insurance.

Private Respondents contend that even if the §5000A penalty is a tax, they are not seeking to enjoin its assessment or collection. Rather, they are seeking to enjoin the individual mandate—the requirement that they purchase health insurance. Private Respondents say that they will, in fact, acquire the required health insurance if they have to, so they won't even incur the § 5000A penalty. That is, they are trying to avoid the legal obligation imposed by § 5000A, not the penalty for noncompliance.

The defenders of the applicability of the AIA counter that even if the Private Respondents plan to comply with the individual mandate and not incur the § 5000A penalty, other individuals would not comply and would incur the § 5000A penalty. As Amicus Long points out, in similar situations the Supreme Court has held that "a suit seeking to enjoin the assessment or collection of anyone's taxes triggers the literal terms of § 7421(a)."

The defenders also argue that, since the individual mandate has no enforcement mechanism except the penalty, the two provisions cannot be separated. The attackers counter that the individual mandate and penalty provision can be separated because certain low-income taxpayers are required to have insurance but are exempt from the penalty if they do not.

Finally, the defenders say that the motives of the litigants are not important to the AIA; it applies to any lawsuit that would have the effect of restraining the assessment or collection of a tax. The attackers reject this interpretation of the AIA and submit that it applies only to suits whose purpose is restraining the assessment or collection of tax. Both sides invoke the same Supreme Court precedents to support their divergent views.

3. The AIA only bars suits by "any person" and a state is not a "person."

The State Respondents suggest that the word "person" in the AIA does not include a "state." They support their argument by noting that the word "person" does not usually include states and that § 7701, the Code provision defining the word "person" for tax purposes, includes many organizations and entities but does not mention states.

The government switches sides here and joins Amicus Long in defending the application of the AIA to states. Both point out that the term "includes" in § 7701 means the definition is not exclusive and could therefore encompass states as well. They further point out that the Supreme Court has found states to be "persons" for many other tax provisions and that the Court has previously recognized that § 7421's "any person" language was not added to limit the reach of § 7421 but to broaden its reach to prevent suits by third parties that would interfere with the collection of others' taxes.

4. Regan excepts the States' lawsuit from the AIA.

State Respondents argue that their challenge to §5000A is not barred as it falls within the exception to the AIA recognized in *South Carolina v. Regan*, 465 U.S. 367 (1984). That exception applies when a plaintiff would not have any other way to obtain judicial review of the federal government's actions. In Regan, South Carolina claimed that a federal statute that made interest on certain South Carolina state bonds taxable instead of tax-free violated the Tenth Amendment. The only way for South Carolina to obtain judicial review was by seeking an injunction, so the Court held the AIA would not apply. The State Respondents argue that this exception should apply here because there is no other procedure for them to protect their interests.

The government and Amicus Long disagree. In *Regan*, the statute at issue applied to bonds issued by the state, but here the individual mandate does not apply to states, just to individuals. In *Regan,* South Carolina was defending its own interest in being able to issue bonds in the form it chose; here, the states are not directly affected by the individual mandate. Rather than seeking to protect their own constitutional rights under the Tenth Amendment, the states are seeking to protect the interests of their citizens.

Significance

A ruling that the AIA is jurisdictional and that it bars consideration of this suit would invalidate all the court rulings on the constitutionality of the ACA thus far. Federal courts would not be able to rule on that question until 2015 unless Congress passes a special statute.

The significance of a ruling that the AIA is jurisdictional but does not apply to this suit would depend on why the Court concluded that it does not apply. Both the government and Amici CFAT urge the Court to go this route and craft a very narrow ruling based on the unique nature of the assessment and collection provisions.

A ruling that the AIA is not jurisdictional and has been waived would be a surprise and would create significant uncertainty about who can waive the statute's defense and how deliberate waiver must be.

There is yet another possibility. Some courts have postponed the the AIA analysis until after they decide whether § 5000A is a constitutional exercise of Congressional taxing power. They reason that if the § 5000A penalty is not a tax for purposes of the constitutional taxing power, it cannot be a "tax" within the meaning of the AIA. It seems doubtful the Supreme Court would go this route, however, and none of the briefs have argued for it. As the government's brief points out, the constitutional meaning of "tax" may differ from the statutory meaning. For example, in the early 1920s Congress tried to use its taxing powers to regulate child labor. The Supreme Court held that the AIA barred prepayment lawsuits challenging the law but held that the law was not a constitutional exercise of the taxing power when the matter came properly before the Court.

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