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It's Not a Tax (Statutorily), but It Is a Tax (Constitutionally)

By Steve R. Johnson*

On June 28, 2012, the Supreme Court handed down its decision on the validity of the individual mandate, a key portion of so-called ObamaCare. *National Federation of Independent Business v. Sebelius (NFIB)*, 132 S. Ct. 2566. The sharply divided Court held that, constitutionally, Congress does not have authority to compel persons to purchase medical insurance but does have authority to impose a non-coercive tax on persons who choose not to purchase such insurance.

Three aspects of *NFIB* are of principal significance to tax professionals: (1) its treatment of the Anti-Injunction Act (AIA), (2) its discussion of the Taxing Power, and (3) its preservation of the myriad tax increases contained in the upheld legislation. The third of these will present practical challenges for lawyers and accountants whose clients have been putting off preparing for these taxes in the hope that they would go away because of Supreme Court action or the results of the November elections. Several of them are discussed elsewhere in this issue of *NewsQuarterly*. The first and second are more conceptually meaty and are discussed below following background information.

Background

In 2010, Congress radically revised the structure and delivery of medical care in the United States through the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act. Among numerous other changes, this legislation added section 5000A to the Code. Beginning in 2014, this section requires non-exempt persons to have medical insurance or else make a “shared responsibility payment” along with their income tax returns each year.

Many suits have been brought challenging the constitutionality of various aspects of the legislation. *NFIB* resulted in four opinions. Chief Justice Roberts wrote the lead opinion. Justice Ginsburg, joined in part or whole by Justices Breyer, Sotomayor, and Kagan, concurred in part, concurred in the judgment, and dissented in part. Justices Scalia, Kennedy, Thomas, and Alito participated in a joint unsigned dissent. Justice Thomas also penned a separate dissent to emphasize his position that the “substantially affects interstate commerce” prong should be excised from Commerce Clause analysis.

The opinions addressed five issues. First, all nine Justices agreed that the AIA did not prevent the Court from deciding the merits of the case. Second, five Justices (the Chief Justice and the four joint dissenters) agreed that, under the Commerce Clause and the Necessary and Proper Clause, Congress cannot compel persons to acquire medical insurance. Third, five Justices (the Chief Justice and the four in the Ginsburg opinion) agreed that the shared responsibility payment is constitutional under the Taxing Power. Fourth, seven Justices (the Chief Justice, the four joint dissenters, and Justices Breyer and Kagan) agreed that, under the Spending Power, Congress could not threaten the states with loss of their existing Medicaid funding if they decline to comply with the legislation’s expansion of Medicaid. Fifth, since they would have wholly invalidated the individual mandate and the Medicaid expansion, the four joint dissenters went on to consider the severability issue. Concluding that these provisions cannot be severed without fundamentally disturbing the balance Congress sought to achieve, the joint dissenters would have invalidated the entirety of the Patient Protection and Reconciliation Acts.

AIA

With enumerated statutory exceptions and very limited judicial exceptions, section 7421(a) provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.” Only one lower court had held that the AIA bans on-the-merits review of the individual mandate. *Liberty Univ. v. Geithner*, 671 F.3d 391 (4th Cir. 2011).

Based on the oral argument, many predicted that *Liberty University* would be unanimously reversed, and this prediction proved correct. The Chief Justice reasoned that Congress labelled the shared responsibility payment as a penalty, not a tax. The label is not controlling for constitutional purposes, but it is for statutory purposes. 132 S. Ct. at 2583 (the AIA and the 2010 Acts “are creatures of Congress’s own creation. How they relate to each other is up to Congress.”).

The Chief Justice also rejected a “more circuitous” argument for applying the AIA. Section 5000A(g)(1) states that the payment “shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.” In turn, under section 6671(a), assessable penalties “shall be assessed and collected in the same manner as taxes.” However, the Chief Justice viewed section 5000A(g)(1) only as direction to the Service as to methodology and procedures it should apply in collecting the payment, not as a direction to the courts that they are to apply the AIA. 132 S. Ct. at 2583–84.

The joint dissent went further. “That the penalty is to be ‘assessed and collected in the same manner as taxes’ refutes the proposition that it is a tax for all statutory purposes, including with respect to the [AIA].” *Id.* at 2656 n.6 (emphasis in original). The joint dissent

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also argued that, in other places in the Code, Congress provided both that an item shall be “assessed and collected” in the same manner as a tax and that suits to restrain assessment and collection are prohibited. “The latter directive would be superfluous if the former invoked the [AIA].” *Id.* (citing sections 7421(b)(1), 6901(a) & 6305(a), (b)).

Finally, the Chief Justice rejected a contention based on section 6201(a), which authorizes the Service to assess “all taxes (including interest, additional amounts, additions to the tax, and assessable penalties).” From this, it was argued that the shared responsibility payment must be a tax because it is an assessable penalty. The Chief Justice found this argument forceful “only if § 6201(a) is read in isolation” since “[t]he Code contains many provisions treating taxes and assessable penalties as distinct terms.” 132 S. Ct. at 2584 (citing sections 860(h)(1), 6324A(a), 6601(e)(1)–(2), 6671(a) & 7122(b)). Again, this language was read as instruction to the Service that it has assessment authority, not as instruction to the courts to apply the AIA. The joint dissent added: “the fact that [assessable penalties] are included as ‘taxes’ for purposes of assessment does not establish that they are included as ‘taxes’ for purposes of other sections ..., such as the [AIA], that do not contain similar ‘including’ language.” *Id.* at 2656 n.6.

Thus, the AIA does not apply to pre-enforcement challenges to the shared responsibility payment. Theoretically, new challenges against it could go forward if not barred by res judicata. However, the AIA still should apply with respect to the numerous “real taxes” imposed by the 2010 legislation.

Taxing Power

Article I, section 8, clause 1 of the Constitution sets out both the Taxing Power and the Spending Power. It authorizes Congress “[t]o lay and collect Taxes ... to pay the Debts and provide for the common Defence and general Welfare

of the United States.” The Chief Justice conceded that “[t]he most straightforward reading” is that the individual mandate is a requirement enforced by a penalty, not that it is a tax. 132 S. Ct. at 2593.

Nonetheless, he (joined by the four Justices of the Ginsburg group) upheld the shared responsibility payment as a valid exercise of the Taxing Power. The Chief Justice reasoned as follows. First, “[t]he text of a statute can sometimes have more than one possible meaning.” *Id.* at 2593. Second, “if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.” *Id.* Third, although this is not “the most natural interpretation of the mandate,” reading the provision as a tax is one “fairly possible” rendition of it. *Id.* at 2594.

To support the “fairly possible” position, the Chief Justice observed that the measure possesses “the essential feature of any tax: it produces at least some revenue for the Government.” *Id.* He also noted particular features of section 5000A: that the payment is made to the Treasury, by “taxpayer[s]” when they file their income tax returns, if they are required to file; that the amount of the payment is determined by features familiar under the income tax; that the provision is lodged in the Code; and that it is assessed and collected by the Service “in the same manner as taxes.” *Id.*

The joint dissent maintained that the “fairly possible” principle does not authorize a court to “rewrite the statute to be what it is not” and that there was no way to escape that the individual mandate involves a penalty, not a tax. *Id.* at 2651. The joint dissent advanced a number of structural features in support of this proposition, including as “the nail in the coffin” that the mandate and payment are in Title I of the Patient Protection Act, its operative core, not in Title IX, containing its “Revenue Provisions.” *Id.* at 2655. The joint dissent also noted that 18 times in section 5000A and other parts of the legislation the measure is called a “penalty.” *Id.* at

2653. The dissenters also objected that the question of whether the tax (if it be such) was a direct tax requiring apportionment had been inadequately briefed and analyzed. *Id.* at 2655.

Among the key questions resulting from *NFIB* is how aggressively Congress will choose to push its Taxing Power authority to regulate. *NFIB* prohibits Congress from requiring persons to act under the Commerce Clause, but it permits Congress to tax persons for not acting. What, if any, limits are there on the ability of Congress to regulate indirectly via the Taxing Power?

On the one hand, the Chief Justice observed that “[e]very tax is in some measure regulatory,” *id.* at 2596 (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)), and he noted that “taxes that seek to influence conduct are nothing new.” 132 S. Ct. at 2596.

On the other hand, the Chief Justice sought to reassure that “Congress’s ability to use its taxing power to influence conduct is not without limits.” *Id.* at 2599. At some point, a measure laden with regulatory and punitive features crosses out of the “tax” category. The Chief Justice declined to define that point. It is an open question whether such definition is possible via judicially manageable standards or whether future cases will have “eye of the beholder” unpredictability.

The closest thing to suggestion of a limiting principle is the Chief Justice’s observation that the amount of the shared responsibility payment “for most Americans ... will be far less than the price of insurance,” thus that many may rationally choose to pay the “tax” rather than accede to Congress’s desire that they buy medical insurance. *Id.* at 2595; *see also id.* (distinguishing a prior case in part on the ground that the exaction styled as a tax but recharacterized by the Court as a penalty “imposed an exceedingly heavy burden”). Plainly, however, future cases will have to wrestle with the extent to which Congress can achieve indirectly under the Taxing Power what it cannot achieve directly under the Commerce Clause. ■