TAX REFUND CLAIMS: ACA REINSURANCE MANDATE PAYMENTS ARE NOT TAXES THAT CAN BE RECOVERED THROUGH A REFUND ACTION

Posted on **July 24, 2017** by **Jim Malone**

What is a tax? The Supreme Court has indicated that taxes are "pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it." *New York v. Feiring,* 313 U.S. 283, 285 (1941). But the label that Congress applies counts too; that means something that looks like a tax may not be treated like a tax because Congress chose to call it something else. This point is illustrated by a recent district court case decided under the Affordable Care Act, which held that a mandatory reinsurance contribution imposed upon a self-funded, self-administered group health plan was not a tax recoverable through a refund action. *See Elec. Welfare Trust Fund v. United States*, No. DKC 16-2186, 2017 U.S. Dist. LEXIS 113687 (D. Md. July 21, 2017).

The plaintiff, Electrical Welfare Trust Fund, Inc., sought to recoup a payment it had made under the Transitional Reinsurance Program established under the ACA. Under the program, for 2014, all self-funded group health plans were required to make a reinsurance contribution for 2014, but for 2015 and 2016, this only applied to self-funded plans that used a third party administrator. *Elec. Welfare Trust Fund,* 2017 U.S. Dist. LEXIS 113687 at *3-*4. In comments issued in connection with the promulgation of regulations, the Secretary of Health and Human Services indicated that the appropriate application of the statute to self-funded, self-administered funds was subject to interpretation; self-funded, self-administered funds were required to contribute for 2014 only. The requirement was not applied in 2015 and 2016 based on the Secretary's determination that the exclusion of self-administered funds was a "better reading" of the statute. *Id.* The relevant statute imposed reinsurance contributions on "health insurance issuers, and third party administrators on behalf of group health plans." 42 U.S.C. § 18061(b)(1)(A).

The Fund filed suit, and the government moved to dismiss for lack of subject matter jurisdiction, arguing that there had been no relevant waiver of sovereign immunity. The Fund countered that the tax refund statute, 28 U.S.C. § 1346(a)(1), provided the relevant waiver, arguing that it sought to recoup a tax that had been improperly assessed and collected. 2017 U.S. Dist. LEXIS 113687 at *6. The Fund also argued that it could

pursue its claim under the tax refund statute because the statute also authorized an action to recover "any sum." *Id.*

The district court rejected the Fund's argument for several reasons. While acknowledging the general definition of a tax as an involuntary exaction imposed by a government for public purposes, the court observed that the labels Congress applies are significant, pointing to the Supreme Court's decision in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012), which held that the individual mandate under the ACA was not a tax under the Anti-Injunction Act largely because Congress chose to label it a penalty. 2017 U.S. Dist. LEXIS 113687 at *8-*9 (citing *Sebelius*, 567 U.S. at 544-46).

The court noted several other factors that supported its conclusion that the reinsurance contribution was not a tax that could be recouped in a refund action. In addition to the label that Congress chose to apply, the court pointed to the following factors:

- Congress directed that the payments be made to third-party reinsurance entities instead of the IRS;
- Congress put the Secretary of Health and Human Services in charge of the reinsurance program, not the Secretary of the Treasury or the Commissioner of the IRS; and
- Congress placed the provisions governing the reinsurance program in Title 42 of the U.S. Code, not Title 26.

Id. at *12. In the court's view, "the conclusion is inescapable that Congress did not intend for the reinsurance mandate to be considered an internal revenue tax." *Id.* at *12-*13.

Next, the district court addressed the Plaintiff's alternate argument that it could recoup "any sum" in a tax refund action. The problem here was the plain language of the statute, which authorizes suit to recover a tax, a penalty, or "or any sum alleged to have been excessive or in any manner wrongfully collected *under the internal-revenue laws*." 28 U.S.C. § 1346(a)(1) (emphasis added). Surveying the limited case law construing the term "any sum," the court concluded that the term reached payments that were incidental to the payment of a tax, such as interest. 2017 U.S. Dist. LEXIS 113687 at *13-*15.

That left the Fund's claim under the Administrative Procedure Act, which does not provide for damages. Accordingly, that claim was dismissed as well.

This is a solid decision: The Fund's argument that it could sue under the tax refund was frankly a stretch. Still, the case does raise a potential concern: Could Congress impose a payment that functioned like a tax but insulate it from recovery by calling it something else?

The answer is two-fold:

- As the district court reasoned, it is not simply the label that is relevant; the Supreme Court in *Sebelius* looked at the surrounding statutory context as well. *See Sebelius*, 567 U.S. at 544-46.
- The imposition of the payment requirement could be challenged through an action for injunctive relief, which would yield a determination that the payment was either a tax that could only be challenged through a refund claim or something else, which might be subject to injunctive relief if there was no mechanism for judicial review.

In fact, the Fund could have brought an action for injunctive relief when the payment was imposed upon it, as *Sebelius* provided a template for it to maneuver around the Anti-Injunction Act.

By: Jim Malone

Jim Malone is a tax attorney in Philadelphia. A Principal at Post & Schell, he focuses his practice on federal, state and local tax controversies. Learn more about Post & Schell's Tax Controversy Practice >>

This entry was posted in **Blog** and tagged **Affordable Care Act**, **reinsurance mandate**, **tax refund** by **Jim Malone**. Bookmark the **permalink [http://taxcontroversyposts.postschell.com/tax-refund-claims-aca-reinsurance-mandate-payments-not-taxes-can-recovered-refund-action/]** .