Affordable Care Act Arguments: The Anti-Injunction Act

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The initial oral argument in the Supreme Court of the United States' (the Court) consideration of the Patient Protection and Affordable Care Act of 2010 (the Act) deals with the federal Anti-Injunction Act (the AIA) and was held March 26, 2012. Generally speaking, the AIA requires that a *person* must first pay a federal tax and then sue for a refund rather than seeking an injunction against the federal government (the government) thereby preventing the collection of the tax in the first place.

The lower court history of the application of the AIA provides insight into the strategies of litigating major federal legislative efforts. The government first argued in the earliest case that the AIA barred a challenge to the Act. When the district court disagreed and the decision striking down the terms of the Act on the merits was appealed, the government failed to appeal or contest the AIA issue.

In other federal court challenges to the Act, different appellate courts focused on the AIA and held that it foreclosed the challengers from bringing suit and held the case barred as untimely. The Court chose to consider the issue and scheduled the first of the arguments before the Court on this issue alone. To that end, the Court appointed Robert A. Long, an experienced appellate attorney, to argue the applicability of the AIA to this litigation.

The legal arguments for all parties require a certain verbal and written agility and careful parsing of meaning and word choice. As Justice Alito asked the Solicitor General of the United States, Donald B. Verrilli, Jr., "General Verrilli, today you are arguing that the penalty is not a tax. Tomorrow you are going to be back and you will be arguing that the penalty is a tax. Has the Court ever held that something that is a tax for purposes of the taxing power under the Constitution is not a tax under the Anti-Injunction Act?" And as Mr. Verrilli responded to Justice Ginsburg that the Court need not decide the jurisdictional issue, Justice Kennedy asked, "Don't you want to know the answer?" In short, each of the parties in this argument faced challenges with which to deal.

Jurisdictional?

The government's position is that the AIA addresses whether or not a federal court may take a case (*i.e.,* whether the court has jurisdiction as a preliminary matter) but that the AIA is not implicated in this case because the penalty established by the Act is not a tax for AIA purposes. The states and the private parties argue that the AIA is not a jurisdictional bar, but that even if it is, it is waived in this case.

Is the penalty under the Act a tax?

The government argues that the penalty payable for failure to buy health insurance is not a tax for AIA purposes (although for other purposes of the government's position, the penalty *is* a tax). *See above*. The states and the private parties argue that their challenge is to the requirement to buy the insurance and *not* to the payment of the penalty (or tax, or whatever it is labeled). As Mr. Long stated, "The Anti-Injunction Act uses the term 'tax;' it doesn't define it. Somewhat to my surprise, 'tax' is not defined anywhere in the Internal Revenue Code. In about the time that Congress passed the Anti-Injunction Act, tax had a very broad definition. It's broad enough to include this exaction, which is codified in the Internal Revenue Code. It's part of the taxpayer's annual income tax return. The amount of the liability and whether you owe the liability is based in part on your income. It's assessed and collected by the IRS."

Who is "any person?"

The government argues that the states (and clearly the private parties) are *persons* subject to the AIA. The states beg to differ and instead argue that they are not *persons* for this purpose and would be unable to seek relief if not permitted to proceed in this case.

Standing?

A footnote, perhaps, to this entire matter is who can bring a claim in federal court. At least one court questioned whether the states had standing (and so held they did not) to pursue the claims against the Act. At oral argument, Gregory G. Katsas, for the National Federation of Independent Business, strongly argued that both individual parties and the various states had standing to challenge the Act.

Conclusion (for now)
Ironically, the various parties (including the specially appointed lawyer arguing as a friend of the Court) argued on the merits of the application of the AIA to these cases. However, the government, the states and the private parties all agree on the outcome; the Court should consider the Act challenges and do so now and not later. It remains to be seen whether the Court agrees.

Lawyers from Ice Miller's Health Care Group are closely monitoring all developments on this and related matters and will be preparing future updates as issues arise.

For answers to your health reform and other health care questions, please contact Greg Pemberton at (317) 236-2313 or gregory.pemberton@icemiller.com or any member of the Ice Miller Health Care Reform Group.