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Healthcare Penalty Need Not Be Apportioned Among the States

by Calvin H. Johnson

Summary by taxanalysts

Calvin H. Johnson uses historical precedent to dispute Steven J. Willis' and Nikku Chung's argument that section 5000A is unconstitutional.

To the Editor:

Steven J. Willis and Nakku Chung, ("Constitutional Decapitation and Healthcare," *Tax Notes*, July 12, 2010, p. 169, *Doc 2010-11669*, *2010 TNT 133-6*), argue that the penalty imposed under new section 5000A for failure to maintain minimum essential healthcare coverage is unconstitutional because it is not apportioned among the states by population. I write because section 5000A is constitutional. Only direct taxes must be apportioned. Under the 1787 meaning of the Constitution, section 5000A is not a direct tax because apportionment of this tax among the states is not reasonable and is not to be expected. "Direct taxes" are taxes in the nature of requisition upon the states. Apportionability was a key defining element of all direct taxes under the original intent.

In 1796, the Supreme Court held in *Hylton v. United States* that no tax was a direct tax if it was not reasonable to apportion the tax. The Justices of the Court that decided *Hylton* were Founders who still walked on Earth. Each of the Justices in *Hylton* had participated actively in the consideration of the apportionment debates and they are our wisest direct witnesses. The tax they allowed was a carriage tax, which the Treasury had listed as a direct tax, but apportionment of the carriage tax would have been an absurd requirement. In states, where carriages were rare, the tax rate would have been prohibitive, for no good policy reason. And so the tax was not direct.

Apportionment of the tax on failure to buy health insurance would be similarly absurd. In states where many people fail to buy health insurance coverage, an apportioned tax can be low, but if few people fail in a state, the rates on this tax will be draconian. At the extreme, a state's entire quota might fall on the one poor soul who does not get insurance. Under the doctrine of *Hylton*, the Constitution is a good document, and it does not impose absurdity. Section 5000A is not a part of an apportionable arrangement and, therefore, it is not direct.

Independently, I collected over 70 examples of "direct tax" in the period of the adoption of the Constitution and concluded that *Hylton* was exactly right.[1] Apportionability was a key requirement of the definition of direct tax, the telling trait. The thinking arose within the system of requisitions upon the states, which was the only way that Congress could collect any revenue in 1787. Direct taxes were requisitions falling directly on the states and also the state taxes that would be used to satisfy requisitions. "Excises" and "duties," for example, were considered to be direct taxes in ordinary language on both sides of the constitutional debates, but they ceased to be apportionable when the Constitution required that they be uniform in rate among the states. It is impossible simultaneously to satisfy both uniform tax rate and apportionment among the states. When excises and duties ceased to be apportionable, the ordinary language stopped calling them direct tax.

The historical needs that led to the Constitution make it implausible that it would impose an impossible condition on any federal tax. The immediate cause of the Constitution was to give the Congress power to collect its own taxes to pay off the debts of the Revolutionary War. The Founders were desperate. In the inevitable coming war they would need to borrow again. The Articles of Confederation had allowed federal revenue only by requisitions upon the states and the states had failed to pay their requisitions. The first purpose of the Constitution was to take sovereignty away from the states for failure to pay their dues and give the federal government plenary tax power.

The Constitution is first a tax document, a protax document.[2] No meaningful limitation on revenue raising could have happened within that overall constitutional mission. Both sides in the ratification debates called the congressional power over taxes "unrestricted." Congress has the power to tax "for the general welfare and common defense." Section 5000A fits within and will improve the general welfare.

There is no fundamental value pushing for the apportionment clause. It is not a states' rights issue and not an individual right. Given the draconian rates apportionment imposes on a few unlucky folks, how could it be? If Congress decides to use an apportionment system, as in a requisition directly upon the states, it must follow the formula. It is, however, only reasonable apportionable taxes that must be apportioned and section 5000A is not one of those.

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FOOTNOTES

[1] Calvin H. Johnson, "The Four Good Dissenters in Pollock," 32 *Journal of Supreme Court History* 162 (2007), *available at* http://www.utexas.edu/law/faculty/calvinjohnson/4_Good_Dissenters_in_Pollock.pdf.

[2] Johnson, *Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution* (Cambridge 2005).

END OF FOOTNOTES

Tax Analysts Information

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