IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FAULK COMPANY, INC.,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, in his official capacity as Secretary of HHS, and CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of CMS,	§	**CIVIL ACTION NO. 4:24-CV-00609-P**
	§	
Defendants.	§	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

While certain facts are necessary for the establishment of jurisdiction, venue and standing, and while the harm caused to Faulk Company, Inc. ("Faulk Company") is factual and very real, the facts are not in dispute. Rather, as the Court has stated, the matters before it are legal in nature. Accordingly, Plaintiff Faulk Company, Inc. hereby moves the Court to enter summary judgment as follows:

1. Against Defendants HHS, CMS, Secretary Becerra (or his successor) and Administrator Brooks-Lasure (or her successor) (collectively, the "HHS Parties") on Count III:

   a. Setting aside HHS regulation 45 C.F.R. § 155.310(i) as being contrary to law and in excess of statutory authority under 5 U.S.C. § 706(2)(A) and (C).

   b. Declaring that HHS regulation 45 C.F.R. § 155.310(i) is void retroactive to its inception;

c. Finding that Faulk Company is the substantially prevailing party, that the HHS Parties were not substantially justified in their position, that Faulk Company satisfies the means test of 28 U.S.C. § 2412(d)(2)(B), and that due to the difficulty of the issues in this case (principally the unique intersection of health and welfare benefits law with tax law) Faulk Company's attorneys' fees should be awarded at the rates billed;

d. Awarding Faulk Company its attorneys' fees, expenses, and costs from the preparation of the Complaint through the final disposition of this case; and

e. Such other relief as the Court may deem just and proper.

2. Against the United States of America on Count I:

a. Awarding Faulk Company $205,621.71 as a refund for excise taxes illegally assessed and collected by IRS, plus interest at the applicable underpayment rate;

b. Finding that Faulk Company is the substantially prevailing party, that IRS was not substantially justified in its position, that Faulk Company satisfies the means test of 28 U.S.C. § 2412(d)(2)(B), and that due to the difficulty of the issues in this case (principally the unique intersection of health and welfare benefits law with tax law) Faulk Company's attorneys' fees should be awarded at the rates billed;

c. Awarding Faulk Company its attorneys' fees, expenses, and costs from the preparation of the Complaint through the final disposition of this case; and

d. Such other relief as the Court may deem just and proper.

STATEMENT OF FACTS

Faulk Company has attached to this motion certain government documents and agency/congressional records that have been referenced in this and prior briefing both for the convenience of the Court and in an abundance of caution due to the age of some of these records, which may be archived before the final resolution of this case. To the extent the Court relies upon these sources as adjudicative facts, Faulk Company invites the Court to take judicial notice of them sua sponte under Federal Rule of Evidence 201(c)(1).

Plaintiff Faulk Company performs janitorial services in and around Fort Worth, Texas. With less than 500 employees and a net worth of less than $7 million, the business operates on small profit in comparison to its revenue. Oswalt Decl. ¶ 3. Faulk Company has not received anything other than a Letter 226-J purporting to be a "Section 1411 Certification," which does so in a manner contrary to statute, as explained in detail below. *Id.* at ¶¶ 3, 6. Faulk Company has never been granted the opportunity to appeal any exchange subsidy determination, or to present information to any exchange for review of the determination either by the exchange or the person making the determination, or to provide evidence of any employer-sponsored plan Faulk Company may have or of employer contributions to such plan, or to have access to the data used to make any employee's subsidy eligibility determination, or to know the names of employees who received subsidies and whether or not those employees' incomes are above or below the threshold by which the affordability of an employer's health insurance coverage is measured. *Id.* at ¶ 5.

Faulk Company offered traditional group health insurance to its employees prior to 2019, but not one employee enrolled in it, so Faulk Company stopped promoting it. *Id.* at ¶ 8. If Faulk had notice or certification in reasonable proximity to an employee's determination of eligibility for subsidized exchange coverage that it may be liable for 4980H excise taxes, Faulk would have

continued to promote its insurance plan, despite Plaintiff's belief based on past pattern and practice that no employee would have enrolled in it. *Id.* at ¶ 9.

IRS's three (3) year delay in providing to Faulk Company its purported Section 1411 Certification through letter 226-J further denied Faulk Company access to real-time information regarding its excise tax liability, thus forcing it to act reactively rather than proactively.

Faulk Company first received a letter 226-J from IRS on December 1, 2021, paid the ESRP at issue December 28, 2021 (albeit under protest) in the amount of $205,621.71, and filed a claim for refund on Form 843 January 28, 2022. *Id.* at ¶ 10. More than six months after silence from IRS regarding the Form 843 or anything that could be considered a claim of disallowance from the IRS, Faulk Company filed this lawsuit.

ARGUMENTS AND AUTHORITIES

Plaintiff Faulk Company, Inc. does not, at this time, move the Court for summary judgment as to Count IV. Count IV is an Administrative Procedures Act challenge under 5 U.S.C. § 706(2)(A) alleging that HHS acted arbitrarily and capriciously or otherwise abused its discretion. Such challenges are based on the administrative record, which the defending agency is to certify and file with the reviewing court. HHS has not yet filed with this Court its certified administrative record for its issuance of HHS regulation 45 C.F.R. § 155.310(i), but neither do we need to wait. It is not necessary for this Court to reach the issue of whether HHS acted arbitrarily or capriciously or abused its discretion because the statutory language of Section 1411 of the Affordable Care Act (42 U.S.C. § 18081) and Internal Revenue Code Section 4980H are sufficient, as Faulk Company has demonstrated in Plaintiff's Response to Defendant's Motion to Dismiss and Brief in Support, ECF No. 24.

In reply to Faulk Company's response, HHS and the United States have continued to press for an interpretation of those statutes that would do material, injurious harm to the English

language, and it is simply untenable. The arguments presuppose the conclusion, and they ignore—or at least downplay—grammar, syntax and the very meaning of words Congress used.

HHS and the United States make a lot of hay over the 4980H excise tax being a monthly calculation and the fact that employees can claim subsidies on their tax returns after-the-fact versus the Section 1411 due process taking place only at an employee's initial application to an exchange, but those arguments miss the point. The Section 1411 certification element in Code Section 4980H(a)(2) and (b)(1)(B) is only a trigger; it is not the method of calculating an ESRP excise tax. The method of calculation is later in the clause that begins, "then there is hereby imposed…." The details needed to calculate an ESRP excise tax become relevant only after the clause establishing the trigger is satisfied. (Notice that the triggering language requires just a single employee, whereas the calculation methodology clause is per-employee.) Similarly, it is irrelevant that employees technically do not need to apply for subsidies on the exchange and can instead claim them on their tax returns. Again, the number of people receiving subsidies is part of the calculation of the tax, not its trigger. The trigger gives way to the effect; the effect does not define the trigger. It is quite conceivable that Congress understood that there might be a rare situation where an employer would not owe an ESRP excise tax if not even one employee applied to the exchange and only claimed subsidies on their individual tax returns. Imperfect solutions are a hallmark of representative government.

Perhaps more fatal to HHS' and the United States' interpretation is that it flies in the face of how Section 1411 and Code Section 4980H interact. Of the two elements in the excise tax statute, Code Section 4980H, the one pertaining to employees receiving subsidies merely states that one or more employees "has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in [exchange coverage] with respect to which [a subsidy] *is allowed or paid*." 26 U.S.C. § 4980H(a)(2), (b)(1)(B)

(emphasis supplied). The employee's eligibility for the subsidy is not an element, only allowance or payment of a subsidy, irrespective of whether that subsidy was paid or allowed based on inaccurate, false or misleading information from the employee. Because Code Section 4980H has no element of employee eligibility, it does not permit an employer to defend an ESRP excise tax assessment on the basis that any employee was ineligible for a subsidy, even though the payment or allowance of a subsidy is a key element.

The silence in 4980H concerning employee eligibility for subsidies speaks volumes. In crafting Code Section 4980H, Congress was clearly relying upon the employer notice and appeal process detailed in Section 1411(f)(2) to produce the certification referred to Code Section 4980H. Is it any wonder, then, why Congress felt it needed to pass a second law reiterating the importance of the Section 1411 process mere months after HHS issued its due-process-sidestepping regulation 45 C.F.R. § 155.310(i)?

> Notwithstanding any other provision of law, the Secretary of Health and Human Services (referred to in this section as the ''Secretary'') shall ensure that American Health Benefit Exchanges verify that individuals applying for premium tax credits under section 36B of the Internal Revenue Code of 1986 and reductions in cost-sharing under section 1402 of the Patient Protection and Affordable Care Act (42 U.S.C. 18071) are eligible for such credits and cost sharing reductions *consistent with the requirements of section 1411* of such Act (42 U.S.C. 18081).

Continuing Appropriations Act, 2014, 2014, Pub. L. 113-46 (Oct. 17, 2013), at § 1001(a) (emphasis supplied).[1]

[1] Plaintiff has located the certification to Congress required by Section 1001(a) of the Continuing Appropriations Act, 2014 that HHS was to provide before it could provide subsidies on the exchanges. Consistent with HHS' general failure to involve employers in the process, when it certified to Congress that the exchanges "verify that applicants for advance payments of the premium tax credit and cost-sharing reductions are eligible for such payments and reductions, consistent with the requirements of section 1411," HHS failed to include any process whatsoever for employer notices or appeals. *See* Letter from Kathleen Sebelius, Secretary of HHS, to The Honorable Joseph R. Biden, Jr., President of the Senate (Jan. 1, 2014), *available at* https://www.cms.gov/cciio/resources/letters/downloads/verifications-report-12-31-2013.pdf.

Section 1411 and Code Section 4980H are sequential; the due process required by Section 1411 is a statutory prerequisite to the assessment of any ESRP excise tax. IRS has no authority to issue any certification under Section 1411, and HHS cannot delegate it. The due-process-sidestepping HHS regulation 45 C.F.R. § 155.310(i) is completely contrary to the language of the statute, and it must be set aside. Moreover, IRS cannot issue any Section 1411 certification, so Faulk Company is entitled to a refund.

REQUEST FOR ORAL ARGUMENT

Plaintiff Faulk Company, Inc. respectfully requests that the Court permit the parties an opportunity to present oral argument on the matters before it.

Respectfully submitted,

/s/ David L. LeFèvre

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CERTIFICATE OF SERVICE

On March 7, 2025, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Taylor J. Winn
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