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

FAULK COMPANY, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 4:24-cv-00609
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The United States files this response in opposition to Plaintiff Faulk Company, Inc.'s motion for summary judgment. ECF No. 30. Faulk's claims are based on the flawed premise that certain notice and appeal rights in § 1411 of the Affordable Care Act ("ACA") (codified at 42 U.S.C. § 18081) are a prerequisite to the IRS's authority under 26 U.S.C. ("I.R.C.") § 4980H to assess the employer shared responsibility payment ("ESRP"). As detailed below and in previous briefing (ECF Nos. 16, 26), the United States is entitled to judgment in its favor as a matter of law.

PROCEDURAL BACKGROUND

Consistent with the parties' agreement, the Court entered an order providing that it would construe the United States' pending motion to dismiss as a motion for summary judgment as to the following legal issues:

A. Count I: Whether 42 U.S.C. § 18081 and 26 U.S.C. § 4980H permit the IRS to certify and assess the employer shared responsibility payment against Faulk for tax year 2019 and thus whether Faulk is entitled to a refund under 26 U.S.C. § 7422.

B. Counts III and IV: Whether 45 C.F.R. § 155.310(i) conflicts with 42 U.S.C. § 18081 and 26 U.S.C. § 4980H.

C. Counts III and IV: Whether Faulk has standing to challenge 45 C.F.R. § 155.310(i).

D. Counts III and IV: Whether the Declaratory Judgment Act precludes issuance of a declaration invalidating 45 C.F.R. § 155.310(i).

ECF No. 29. The parties believe that resolution of these issues will be dispositive in determining Faulk's claims. *Id.* The Court allowed the parties to file optional supplemental briefing and a response to any supplemental briefing. *Id.* Faulk filed an optional supplemental brief, styled as a motion for summary judgment. ECF No. 30. To the extent that Faulk moves for summary judgment as to any factual issues or legal issues apart from the four legal issues detailed in the Court's Order on February 12, 2025 (ECF No. 29), Faulk's motion is at odds with the parties' joint proposal (ECF No. 28) as well as the Court's Order and should be denied.

FACTS RELEVANT TO THE FOUR LEGAL ISSUES[1]

In 2019, Faulk was subject to the ACA as an applicable large employer ("ALE").[2] ECF No. 1 ¶ 17. Faulk offered minimum essential coverage to its employees before 2019 but stopped because it alleges no employees enrolled. *Id.*

[1] There is no genuine dispute of material fact relevant to the four legal issues identified in the Court's Order, ECF No. 29. As recognized by the Court, "the Parties' disputes appear to be purely legal in nature." ECF No. 27. Faulk, however, supports its motion for summary judgment with a declaration from its president, Dawson Oswalt, attempting to introduce new, irrelevant facts. ECF No. 31 at 3-7. In addition, the declaration refers to four exhibits that are not attached to the declaration. *Id.* ¶ 16. Only two of the four exhibits, however, are found elsewhere in the record. *See* ECF No. 17 (IRS Letter 226-J dated December 1, 2021, which is referred to in the declaration as Exhibit A); *see also* ECF No. 25 (IRS Letter 227-M dated March 28, 2022, which is referred to in the declaration as Exhibit D). Faulk also attaches publicly available information that is not relevant to the central issue of whether the IRS has the authority to certify the information required by I.R.C. § 4980H. Thus, the United States objects to it, and the Court should give no weight to that information in rendering a decision here.

[2] An ALE is an employer that had an average of at least fifty full-time employees in the preceding year. I.R.C. § 4980H(c)(2)(A).

On or about December 1, 2021, the IRS issued a letter (Letter 226-J) to Faulk proposing an ESRP be assessed against Faulk in the amount of $205,621.71 for tax year 2019 under I.R.C. § 4980H. *Id.* ¶¶ 18, 38; *see also* ECF No. 17. The letter advised Faulk of the IRS's preliminary calculation of a potential ESRP assessment based, in part, on tax forms filed by Faulk with the IRS[3] and tax returns filed by some of Faulk's full-time employees claiming a premium tax credit that the IRS allowed. ECF No. 17. The IRS advised Faulk that "[t]his letter certifies, under Section 1411 of the Affordable Care Act, that for at least one month in the year, one or more of [Faulk Company's] full-time employees was enrolled in a qualified health plan for which a . . . [premium tax credit] was allowed." ECF No. 1 ¶ 38; *see also* ECF No. 17 at 2. The letter invited Faulk to respond by either agreeing to the computed liability or by submitting information disputing the liability. ECF No. 17 at 3.

On December 30, 2021, Faulk responded to Letter 226-J, advising that it disagreed with the proposed assessment and that it was paying the proposed assessment under protest. ECF No. 1 ¶¶ 32, 40. Faulk claimed that it did not receive notice from HHS or the Exchange[4] under the

[3] Those forms include Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, and Form 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns. ECF No. 17 at 2.

[4] Under the ACA, States were directed to establish "Exchanges" for individuals, including employees who are not offered affordable insurance that meets certain minimum standards by their employers, to purchase and enroll in insurance plans. *See, e.g.*, 42 U.S.C. § 18031(b). If a State did not establish an Exchange, HHS was directed to establish and operate an Exchange in that state. *See id.* § 18041(c). Certain low- and middle-income individuals who purchase insurance on an exchange may then qualify for refundable tax credits, in an amount linked to the premiums paid. I.R.C. § 36B. Enrollees may also be entitled to a "cost-sharing reduction." 42 U.S.C. § 18071 (*e.g.*, reduced deductibles). The allowance or payment of these premium tax credits and cost-sharing reductions to employees form, in part, the basis of an employer's liability under I.R.C. § 4980H.

ACA of its potential liability under I.R.C. § 4980H, and that HHS was required—but failed—to provide the requisite certification under I.R.C. § 4980H. *Id.* ¶¶ 16, 18, 37, 39.

On December 31, 2021, Faulk paid the proposed 2019 assessment. *Id.* ¶ 41. On January 28, 2022, Faulk filed a refund claim with the IRS for the 2019 ESRP. *Id.* ¶ 42. Faulk does not make any allegations about the accuracy of the computation of the IRS's assessment; instead, Faulk's refund claim is based on the allegation that HHS did not issue a certification to Faulk under the ACA or provide Faulk with any appeal rights before the IRS issued Letter 226-J proposing an ESRP assessment against Faulk for tax year 2019. *Id.* ¶ 39.

ARGUMENT

A. Faulk's interpretation of I.R.C. § 4980H is unworkable.

Faulk claims that only HHS has the authority to certify to employers the information required by I.R.C. § 4980H. According to Faulk, the eligibility notice described in ACA § 1411(e)(4)(B)(iii) ("the Exchange Notice") and employer appeal right described in ACA § 1411(f)(2)(A) constitute the certification required by I.R.C. § 4980H. ECF No. 24 at 26. That interpretation is unworkable.

The Exchange Notice is an initial eligibility determination. Eligibility is not the same as allowance. The IRS may assess an ESRP against an ALE who fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan for any month but only if the ALE received certification that at least one full-time employee enrolled for such month in a qualified health plan for which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to that employee. I.R.C. § 4980H(a). Thus, even if Faulk received the Exchange Notice providing that HHS determined an employee was *eligible* for a premium tax credit and was given the right to

appeal to the Exchange the determination that Faulk failed to offer its employees minimum essential coverage, such notice and appeal right would not inform Faulk whether at least one employee was allowed a premium tax credit for each month at issue. The IRS determines whether to allow a premium tax credit after the employee enrolls in a qualified health plan and the employee files an income tax return after the year coverage occurred.

Indeed, ACA § 1411 does not require the Exchange to issue a notice to employers each month, and it does not require that the Exchange Notice inform the employer if the premium tax credit or cost-sharing reduction was in fact allowed or paid for the month at issue. Faulk argues that the applicability of ESRP for a particular month is only relevant to the calculation of the amount of ESRP, implying that an employer need not receive certification of the information in I.R.C. § 4980H for each month at issue. ECF No. 30 at 5. Faulk is wrong. Section 4980H of the I.R.C. requires that an employer receive certification of certain information for each month at issue before the IRS can assess an ESRP for that month. This is fatal to Faulk's interpretation of I.R.C. § 4980H because the Exchange Notice (and appeal right) required by ACA § 1411 does not provide the employer the information required by I.R.C. § 4980H.

Faulk next argues that the United States' interpretation of I.R.C. § 4980H must fail because that statute does not give employers an opportunity to dispute an employee's eligibility for a subsidy. ECF No. 30 at 6 ("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."). It appears Faulk is suggesting that an employer can dispute whether an employee is eligible for a subsidy under the employer appeal process in ACA § 1411(f)(2)(A), but the employer could not make that argument to the IRS under I.R.C. § 4980H. For that reason,

Faulk conflates and confuses the two statutes to contend that the Exchange Notice (and corresponding appeal right) must be part of I.R.C. § 4980H. Again, Faulk is wrong.

Faulk misinterprets the scope of the employer appeal right in ACA § 1411(f)(2)(A). That section provides for a very narrow appeal right for employers to dispute "the determination that the employer does not provide minimum essential coverage through an employer-sponsored plan or that the employer does provide that coverage, but it is not affordable coverage with respect to an employee." ACA § 1411(f)(2)(A). Those issues are also central to ESRP assessments under I.R.C. §§ 4980H(a)-(b) and an employer can dispute them before the IRS. In an appeal pursuant to ACA § 1411(f)(2)(A), an employer does not have the right to an employee's taxpayer return information protected by I.R.C. § 6103 apart from "the name of an employee and whether or not the employee's income is above or below the threshold by which the affordability of an employer's health insurance coverage is measured." ACA § 1411(f)(2)(B). In other words, an employer is only given access to an employee's confidential return information to decide whether the employer offered minimum essential coverage to that employee and, if so, whether the coverage was affordable for the employee. The employer appeal process under ACA § 1411(f)(2)(A) is limited to those issues. Faulk's suggestion that there is a broader right to appeal an employee's eligibility under ACA § 1411(f)(2)(A) is at odds with the plain language of the statute.

Faulk also complains that it was denied the opportunity to file an appeal with the Exchange that would have allowed Faulk "to provide evidence of any employer-sponsored plan Faulk Company may have or of employer contributions to such plan." ECF No. 30 at 3. But

Faulk admits that it did not offer minimum essential coverage to its employees in 2019. ECF No. 1 ¶ 17. Thus, there was nothing for Faulk to appeal to the Exchange.[5]

Faulk cannot avoid the fact that the ACA is silent as to which agency has the authority to certify to employers the information required by I.R.C. § 4980H or the fact that the IRS is in the best position to make the certification. Indeed, ALEs—like Faulk—are required to report to the IRS information about the health care coverage, if any, they offered to full-time employees. I.R.C. §§ 6055, 6056. Specifically, ALEs must use IRS Form 1094-C to report to the IRS summary information for the ALE, including the number of full-time employees for each month during the calendar year, and IRS Form 1095-C for each employee who was a full-time employee of the ALE for any month of the calendar year. *Id.*; *see also* ECF No. 17. Employees who claim the premium tax credit are required to file a federal income tax return for the applicable year. The IRS bases the I.R.C. § 4980H certification on the information reported in these forms, and this information is not available to HHS. ECF Nos. 17 at 2, 25 at 13. The IRS Letter 226-J certifies to the employer the information required by I.R.C. § 4980H. *Id.* Faulk does not dispute that the IRS Letter 226-J it received for 2019 contained the information required by I.R.C. § 4980H.

Because the Exchange Notice does not provide the information required by I.R.C. § 4980H, it appears that what Faulk wants is for this Court to find that the Exchange Notice and appeal right in ACA § 1411 are an implied prerequisite to the IRS's ability to make

[5] If Faulk had offered its employees minimum essential coverage for 2019, Faulk would have reported that information to the IRS. In any event, Faulk is barred from raising a new basis for refund that Faulk failed to allege in its complaint and failed to make in its administrative refund claim filed with the IRS. *See Baxter v. United States*, 48 F.4th 358, 366 (5th Cir. 2022) (variance doctrine bars taxpayer from raising ground for recovery in refund suit that was not previously set forth in the administrative refund claim).

an ESRP assessment under I.R.C. § 4980H (separate from the requirement that an employer receive a certification of the information detailed in I.R.C. § 4980H). But Congress did not impose such a condition in I.R.C. § 4980H. Instead, Congress requires that the information specified in I.R.C. § 4980H be certified to an employer before the IRS may assess an ESRP for the month at issue. Congress did not specify which agency has to certify the information required by I.R.C. § 4980H. The IRS is the agency in the best position to certify the information and, here, the IRS properly certified the information to Faulk for tax year 2019.

B. Faulk's claim for attorneys' fees is premature.

Faulk argues that it is entitled to summary judgment as to its attorneys' fees claim. ECF No. 30 at 2. This issue—which is not identified in the Court's order regarding summary judgment (ECF No. 29)—is premature and may not be decided at this stage of the litigation. A "prevailing party" in a proceeding against the United States in connection with a tax refund claim may be awarded a judgment for the reasonable litigation costs incurred in connection with the proceeding if certain requirements are met, including a determination that the United States' position was not "substantially justified." I.R.C. § 7430. A "prevailing party" is defined as a party "(i) which—(I) substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and (ii) which meets the requirements of the 1st sentence of" 28 U.S.C. § 2412(d)(1)(B)[.]" *Id.* § 7430(c)(4)(A). The first sentence of 28 U.S.C. § 2412(d)(1)(B) reads:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witnesses representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

Id. (emphasis added); *see also Canada v. United States*, 950 F.3d 299, 314 (5th Cir. 2020) ("There can be no dispute that [a taxpayer] could not recover fees as a prevailing party before a final determination that he had actually prevailed on the [tax] dispute[.]"). Moreover, "[a] party shall not be treated as the prevailing party . . . if the United States establishes that the position of the United States in the proceeding was substantially justified." I.R.C. § 7430(c)(4)(B). Faulk does not meet the definition of "prevailing party." Indeed, the Court has not yet decided the merits of this case. But even if the Court finds that Faulk is entitled to a refund, Faulk has not yet taken the steps prerequisite to a fee award, and, in any event, the United States will be able to show that its position is substantially justified. *See id.* § 7430(c)(4)(B).

CONCLUSION

The United States is entitled to summary judgment in its favor as a matter of law as to count I because Faulk failed to offer its employees minimum essential coverage as required under the law, the IRS is authorized to certify the information to employers required by I.R.C. § 4980H, and the IRS made the requisite certification to Faulk for tax year 2019 when it issued IRS Letter 226-J. Because the IRS can make the I.R.C. § 4980H certification Faulk's remaining claims in counts III and IV attacking 45 C.F.R. § 155.310(i) fail as a matter of law.

But even if the Court were to adopt Faulk's interpretation of I.R.C. § 4980H and grant Faulk's motion for summary judgment, Faulk's request for attorney fees should be denied because the request is premature and fails to comply with I.R.C. § 7430. If Faulk submits a timely motion for attorney's fees in compliance with I.R.C. § 7430, the United States will respond as appropriate and show that the United States' position was substantially justified.

RESPONSE TO PLAINTIFF'S REQUEST FOR ORAL ARGUMENT

The United States maintains that oral argument on the pending cross-motions for summary judgment is unnecessary. *See* Local Rule 7.1(g) ("Unless otherwise directed by the presiding judge, oral argument on a motion will not be held.").

Dated: March 21, 2025

Respectfully submitted,

/s/ Mary Elizabeth Smith

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CERTIFICATE OF SERVICE

I certify that on March 21, 2025, I filed the foregoing document with the Clerk of Court using the CM/ECF electronic filing system, which will send notification to all counsel of record.

/s/ Mary Elizabeth Smith
MARY ELIZABETH SMITH