UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, *et al.*	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 1:13-cv-01612-WTL-TAB
	)	
INTERNAL REVENUE SERVICE, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

The defendants respectfully submit this response to the notice of supplemental authority filed by the plaintiffs in this action (ECF No. 94). The plaintiffs contend that a recent opinion of the Northern District of Texas denying a motion to dismiss in *Texas v. United States* (attached to plaintiffs' filing as ECF No. 94-1) supports their claim that 26 U.S.C. § 4980H, as applied to state or local government employers, violates the doctrine of intergovernmental tax immunity. The defendants respectfully submit that the *Texas* opinion is in error.

Notably, the district court in *Texas* erred by relying on cases discussing the federal government's immunity from state taxation. *See* ECF No. 94-1 at 36-40. Those authorities do not control the different question of a state's (or locality's) immunity from federal taxation: "the federal tax immunity has always been greater than the states' immunity …. [A]lthough the Federal Government has always enjoyed blanket immunity from any state tax considered to be 'on' the Government under the prevailing methodology, the States have never enjoyed immunity from all federal taxes considered to be 'on' a State." *South Carolina v. Baker*, 485 U.S. 505, 518 n. 11 (1988); *see also id.* at 523 n.14.

The *Texas* court invoked the supposed principle that the federal government may impose a tax directly on a state only if the "subject of taxation [is] of a nature which has been traditionally within that power from the beginning." ECF No. 94-1 at 35 (quoting *New York v. United States*, 326 U.S. 572, 588 (1946) (Stone, J., concurring)). More modern precedents have confirmed, however, that this supposed distinction is unworkable. As the Seventh Circuit has recognized, "*Garcia* [*v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)] overruled [prior authority] after concluding that the set of traditional or essential governmental functions is too indistinct to be a constitutional norm." *Travis v. Reno*, 163 F.3d 1000, 1003 (7th Cir. 1998).

The question of the states' immunity from federal taxation thus turns instead on a "rule of nondiscrimination." *Travis v. Reno*, 163 F.3d at 1002. Section 4980H imposes a tax on nondiscriminatory terms to both private and public employers, and thus may be constitutionally applied to state employers in the same manner as other well-established employment taxes. *See* Defs.' Mem. in Supp. of Mot. for S.J. at 39-40 (ECF No. 62).

Dated: August 24, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2016, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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