

Split Among Circuits over Premium Tax Credit

Cross References

- IRC §36B
- *Halbig*, U.S. Court of Appeals, District of Columbia Circuit, July 22, 2014
- *King*, U.S. Court of Appeals, Fourth Circuit, July 22, 2014

Two different Circuit Courts of Appeal reached opposite decisions on whether or not the Premium Tax Credit under IRC section 36B is allowed for individuals in a state where the state has chosen not to set up its own health insurance exchange.

Effective for taxable years ending after December 31, 2013, a refundable premium assistance credit is allowed for eligible individuals and families that help subsidize the purchase of health insurance through a state exchange. Eligible individuals enrolled in the plan report their income to the exchange. Based on the income reported, the individual receives a premium assistance credit. The individual then pays the insurance plan the difference between the credit amount and the total premium charged. Eligible individuals generally include individuals with household incomes between 100% and 400% of the federal poverty level. The premium assistance credit is only allowed when the individual purchases the health insurance through a state exchange.

At issue before the two courts is IRC section 36B(b)(2) which states the premium tax credit is available only if the health plan is purchased through “an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act” of 2010. IRC section 36B(b)(2) is silent on the issue of what happens if a state does not set up its own health insurance exchange. Under other provisions of the Patient Protection and Affordable Care Act of 2010, when a state does not set up its own health insurance exchange, the federal government under the Department of Health and Human Services (HHS), is to set up a Federal Exchange as a substitute for the State Exchange. That provision, however, is not mentioned in IRC section 36B(b)(2). The IRS has issued regulations defining an Exchange as “an Exchange serving the individual market for qualified individuals..., regardless of whether the Exchange is established and operated by a State...or by HHS.” [Reg. §1.36B-1(k)]

When the IRS issued these regulations, they acknowledged that commentators disagreed on whether the language in IRC section 36B(b)(2) limits the availability of the premium tax credit only to taxpayers who enroll in qualified health plans on State Exchanges. The IRS claimed that the law and relevant legislative history supports the view that the Exchanged as mentioned in IRC section 36B(b)(2) also includes those exchanges set up by HHS for individuals in states that do not have their own exchanges.

In *Halbig*, (Circuit Court of Appeals for the District of Columbia), the court concluded that a Federal Exchange is not an “Exchange established by the State,” and IRC section 36B does not authorize the IRS to provide tax credits for insurance purchased on Federal Exchanges.

In *King*, (Circuit Court of Appeals for the Fourth Circuit), the court said both parties offer reasonable arguments and counterarguments that make discerning Congress’s intent difficult. The court said the statute is ambiguous and subject to at least two different interpretations. When a statute is ambiguous, the question that needs answering is whether the federal agency in charge of issuing regulations issues regulations based on a permissible construction of the statute. The court said the IRS’ interpretation of the statute was “not arbitrary, capricious, or manifestly contrary to the statute.” The IRS’ interpretation was “a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute.” The court said the statute permits the IRS to decide whether the tax credits should be available on Federal Exchanges.

Author’s Comment

When two Circuit Courts disagree on tax issues, the Supreme Court usually steps in to resolve the issue. At this time, it is unknown if or when the Supreme Court will make a decision on the issue.