



## Federal Tax ADVISORY ■

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### Ignore Constitutional Issues?

*Horne v. Department of Agriculture*, 2013 U.S. LEXIS 4357 (2013)

#### **Overview**

Administrative agencies, including the IRS, commonly decline to consider challenges based on the Constitution or otherwise asserting that the law is “illegal,” to the laws they administer. Statements of this view appear in the early opinions of the federal Board of Tax Appeals, which was originally viewed as an agency, as extension of the IRS (it is now in the legislative branch, a curious placement). See Cummings, *The Supreme Court, Federal Taxation and the Constitution* 591 (ABA Books 2013).

Fortunately, the Tax Court ultimately concluded that it could decide constitutional issues, but generally the IRS will not. And yet sometimes the administration decides not to enforce an act of Congress because the administration concludes it is unconstitutional, as occurred in the case of the Defense of Marriage Act (DOMA), recently addressed by the Supreme Court. The case before the Court was a federal estate tax case and the administration refused to enforce DOMA to prevent the marital deduction from applying to a same sex couple. When the administration makes such a dramatic choice, it is required to inform Congress, under a law enacted in 2002. This was done in the case of DOMA, although Congress was hardly unaware.

The tax connection of the procedural issue of constitutional defenses to government action also arose in an indirect way in another ruling of the Supreme Court earlier in June concerning a federal agriculture program first enacted in 1937. *Horne v. Department of Agriculture*, 2013 U.S. LEXIS 4357 (2013), ruled that California raisin farmers did not have to pay to the Agriculture Department (USDA) an amount that an administrative law judge had ordered them to pay, and then sue for refund in the Tax Court. Rather, they could appeal the order and have their Fifth Amendment-taking claim considered, at least in the court appeal from the administrative action.

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The *Horne* opinion says:

In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding.

This statement casts doubt on the remedial system used by several states that may provide for a pre-payment administrative review of taxpayer protests, but do not allow constitutional objections to be heard in that process. Instead, the taxpayer must pay the tax and sue for refund in order to have a venue to raise constitutional objections (called post-deprivation remedy). Many states, including North Carolina prior to changes in 2008, use this system. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1992), ruled that a state does not have to provide a pre-deprivation remedy for taxes, so long as it provides meaningful backward-looking relief to remedy a constitutional violation.

## Facts

The Hornes are growers of raisins who have waged a long-running battle with the USDA. The Hornes were parties to three separate legal actions contesting the applicability of a raisin marketing order that held part of their crop off the market. Because they did not withhold the crops, they were supposed to pay their value to the USDA. The action on appeal was the one in which the lower court said the constitutional defense could not be considered. Rather, the Hornes would have to pay and sue for refund in the Claims Court.

This is the procedure that the unanimous opinion of the Supreme Court said made “little sense.” But of course it makes about the same sense as the procedures of maybe half of the states for state tax protests. And the issue can arise in the federal area outside of tax cases where other payments are at issue.

## Conclusion

State taxpayers and persons who are unhappy with a requirement to pay an amount to the federal government, who do not want to have to pay first and sue later based on constitutional defenses, should consider arguing that the procedure “makes little sense.” They can cite the Supreme Court.

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