SUPREME COURT OF THE UNITED STATES

No. 93–144

DEPARTMENT OF REVENUE OF MONTANA, PETITIONER
v. KURTH RANCH ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 6, 1994]

CHIEF JUSTICE REHNQUIST, dissenting.

Without giving any indication that it is doing so, the Court's opinion drastically alters existing law. We have never previously subjected a tax statute to double jeopardy analysis, but under today's decision a state tax statute is struck down because its application violates double jeopardy. The Court starts off on the right foot. It correctly recognizes that our opinion in *United States* v. *Halper*, 490 U. S. 435 (1989), says nothing about the possible double jeopardy concerns of a tax, as opposed to a civil fine like the one confronted in *Halper*. *Ante*, at 10. I agree with the Court's rejection of the *Halper* mode of analysis, which, with its effort to determine whether a penalty statute is remedial or punitive, simply does not fit in the case of a tax statute. *Ante*, at 16. But the Court then goes astray and the end result of its decision is a hodgepodge of criteria—many of which have been squarely rejected by our previous decisions—to be used in deciding whether a tax statute qualifies as "punishment."

The Court cites the case of *Helvering* v. *Mitchell*, 303 U. S. 391 (1938), as one in which a tax statute was subjected to double jeopardy analysis. But I agree with the Court's statement that the "penalty at issue in *Mitchell* is arguably better characterized as a sanction for fraud than a tax." *Ante*, at 11, n. 16.[1] All

[1]I disagree with the Court's statement that the *Mitchell* Court alternately characterized the penalty there in

of our other cases in this area of the law involved claims of double jeopardy where a statute imposing what was denominated a "civil penalty" was invoked following a separate criminal proceeding based on an indictment for fraud. In *Mitchell*, *supra*, *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537 (1943), and *Rex Trailer Co.* v. *United States*, 350 U. S. 148 (1956), the double jeopardy claim was rejected; in *United States* v. *Halper, supra,* a double jeopardy claim was upheld for the first time.

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question as a tax. *Ante*, at 11, n. 16. The only language which was used by the *Mitchell* Court to which we are referred for this proposition is 303 U. S., at 398, where the Court uses the word "tax" three times, but only in the context of summarizing the parties' arguments. As for the first two times, the word "tax" is mentioned only in discussing the Government's argument that the indictment of Mitchell for willful evasion of the tax in question did not raise the same issue as did the civil proceeding for the fraud penalty for purposes of res judicata. The Court simply said:

"Since there was not even an adjudication that Mitchell did not wilfully attempt to evade or defeat the tax, it is not necessary to decide whether such an adjudication would be decisive also of this issue of fraud." *Ibid*. The word "tax" is mentioned a third time in setting out the respondent's argument that "this proceeding is barred under the doctrine of double jeopardy because the 50 per centum addition . . . is not a tax, but a criminal penalty intended as punishment for allegedly fraudulent acts." *Ibid*. It is telling to note that the Court immediately thereafter denotes the 50% addition as a "sanction," and not a tax. *Id.*, at 398–399.

The Court, unlike the Court of Appeals below, wisely does not subject the Montana tax to the *Halper* analysis and it is thus unnecessary to determine whether *Halper* was correctly decided. See, *post,* at ___ (SCALIA, J., dissenting). This clearly is not the "rare case" contemplated by *Halper*, nor does this tax involve a "fixed-penalty provision." *Halper, supra,* at 449. In *Halper*, we held that the double jeopardy test was whether or not the penalty statute there enabled the Government to recover more than an approximation of its costs in bringing the fraudulent actor to book, because compensation for the Government's loss is the avowed purpose of a civil penalty statute. But here we are confronted with a tax statute, and the purpose of a tax statute is not to recover the costs incurred by the Government for bringing someone to book for some violation of law, but is instead to either raise revenue, deter conduct, or both. See, *e. g.*, *Welch* v. *Henry*, 305 U. S. 134, 146 (1938); *Sonzinsky* v. *United States*, 300 U. S. 506, 513 (1937). Thus, despite JUSTICE O'CONNOR's attempt to view this case through the *Halper* lens, *post,* at 3, the reasoning quite properly employed in *Halper* to decide whether the exaction was remedial or punitive simply does not work in the case of a tax statute. Tax statutes need not be based on any benefit accorded to the taxpayer or on any damage or cost incurred by the Government as a result of the taxpayer's activities. *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 622 (1981). Thus, in analyzing the instant tax statute, the inquiry into the State's "damages caused by the [Kurth's] wrongful conduct," *post,* at 3, is unduly restrictive.

The proper question to be asked is whether the Montana Drug tax constitutes a second punishment under the Double Jeopardy Clause for conduct already punished criminally. The Court asks the right question, *ante,* at 12, but reaches the wrong conclusion.

Taxes are customarily enacted to raise revenue to support the costs of government. Cf., *ante,* at 12 ("[T]axes are typically different [than fines, penalties, and forfeitures] because they are usually motivated by revenue-raising . . . purposes"). It is also firmly established that taxes may be enacted to deter or even suppress the taxed activity. Constitutional attacks on such laws have been regularly turned aside in our previous decisions. In *A. Magnano Co.* v. *Hamilton*, 292 U. S. 40 (1934), for example, the Court upheld against a due process challenge a steep excise tax imposed by the State of Washington on processors of oleomargarine during the depths of the depression. In *Sonzinsky* v. *United States*, *supra*, at 513, the Court upheld an annual federal firearms tax as a valid exercise of the taxing power of Congress. The Court there said "it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed." In *United States* v. *Sanchez*, 340 U. S. 42 (1950), the Court upheld the former federal tax on marijuana at the rate of $100 per ounce against a challenge that the tax was a penalty, rather than a true tax. In so doing, the Court noted that "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activity taxed." *Id.*, at 44. And, as the Court concedes, *ante,* at 11, it is well settled that the unlawfulness of an activity does not prevent its taxation. *Marchetti* v. *United States*, 390 U. S. 39, 44 (1968); *United States* v. *Constantine*, 296 U. S. 287, 293 (1935).

The Court's opinion today gives a passing nod to these cases, but proceeds to hold that a high tax rate and a deterrent purpose "lend support to the characterization of the drug tax as punishment." *Ante*, at 13. The Court then discusses "[o]ther

unusual features" of the Montana tax which, it concludes, brands this tax as a criminal penalty.

The Court first points to its conclusion that the so-called tax is conditioned on the commission of a crime, *ibid.,* a conclusion which the State disputes, and for good reason. The relevant provision of the rule, Mont. Admin. Rule 42.34.102(1) (1988), which provides that the tax return "shall be filed within 72 hours of . . . arrest," merely acknowledges the practical realities involved in taxing an illegal activity.[2] Then, quite contrary to the teachings of *Marchetti*, *Constantine*, and *James* v. *United States*, 366 U. S. 213 (1961), the Court states that the justifications for mixed motive taxes—imposed both to deter and to raise revenue—vanish "when the taxed activity is completely forbidden." *Ante*, at 15.

A second "unusual feature" identified by the Court is that the tax is levied on drugs that the taxpayer neither owns or possesses at the time of taxation. But here, the Court exalts form over substance. Surely the Court is not suggesting that the State must permit the Kurths to keep the contraband in order to tax its possession. Cf. *Constantine*, *supra*, at 293 ("It would be strange if one carrying on a business the subject of an excise should be able to excuse himself

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[2]Other potential schemes for taxing illegal drug possession will face similar pitfalls. Because the activity sought to be taxed is illegal, individuals cannot be expected to voluntarily identify themselves as subject to the tax. The Minnesota scheme cited by respondents provides for the anonymous purchase of tax stamps prior to, and independent of, any criminal prosecution. Minn. Stat. §§ 297D.01 *et seq.* (1992). Not surprisingly, when asked at oral argument "Does Minnesota collect any money off that scheme . . . Not too many stamps being sold?", counsel for respondents admitted, amidst laughter, that he did not know the answer. Tr. of Oral Arg. 41.

from payment by the plea that in carrying on the business he was violating the law"). And although Montana's "Dangerous Drug Tax" is described as a tax on storage and possession, it is clear from the structure and purpose of the Act that it was passed for the legitimate purpose of raising revenue from the profitable underground drug business. 1987 Mont. Laws, ch. 563 (1987) (preamble).[3]

I do not dispute the Court's conclusion that an assessment which is labeled a "tax" could, under

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[3]The preamble to the 1987 Montana Drug Tax provides:

"WHEREAS, dangerous drugs are commodities having considerable value, and the existence in Montana of a large and profitable dangerous drug industry and expensive trade in dangerous drugs is irrefutable; and

"WHEREAS, the state does not endorse the manufacturing of or trading in dangerous drugs and does not consider the use of such drugs to be acceptable, but it recognizes the economic impact upon the state of the manufacturing and selling of dangerous drugs; and

"WHEREAS, it is appropriate that some of the revenue generated by this tax be devoted to continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana.

"THEREFORE, the Legislature of the State of Montana does not wish to give credence to the notion that the manufacturing, selling, and use of dangerous drugs is legal or otherwise proper, but finds it appropriate in view of the economic impact of such drugs to tax those who profit from drug-related offenses and to dispose of the tax proceeds through providing additional anticrime initiatives without burdening law abiding taxpayers."

Funds collected from the tax are earmarked for youth evaluations, chemical abuse assessment and aftercare, and juvenile detention facilities. Mont. Code Ann. §15–25–122 (1993).

some conceivable circumstances, constitute "punishment" for purposes of the Double Jeopardy Clause. *Ante*, at 10, and n. 15, 12. The Court made a similar finding in *United States* v. *Constantine*, *supra*, although in the context of a different sort of challenge. At issue in that case was the validity of a special $1,000 excise tax levied against all persons dealing in the liquor business contrary to local law. *Id.*, at 289, n. 1. In striking down the tax as an unlawful penalty rather than a tax, the Court noted that the assessment was conditioned on the imposition of a crime, and that it was "highly exorbitant." *Id.*, at 295.

But the *Constantine* factors are not persuasive in the present context. As discussed above, I do not find the conditioning of the tax on criminal conduct and arrest to be fatal to this tax's validity; this characteristic simply reflects the reality of taxing an illegal enterprise. Furthermore, the rate of taxation clearly supports petitioners here. In *Constantine*, the special $1,000 excise tax on the sale of alcohol was 40 times as great when compared to the otherwise applicable $25 fee for retail liquor dealers such as respondent. *Ibid*. When compared to the Montana tax, two points are noteworthy. First, unlike the situation in *Constantine*, no tax or fee is otherwise collected from individuals engaged in the illicit drug business. Thus, an entire business goes without taxation. Second, the Montana tax is not as disproportionate as the additional excise tax in *Constantine*. The Court makes much of the fact that the bulk of the assessment—that imposed on the low-grade "shake"—was more than eight times the market value of the drug. *Ante*, at 12. But the Court glosses over the fact that the tax imposed on the higher quality "bud" amounted to only 80% of that product's market value.[4]

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[4]The Kurths were taxed for their possession of 130 ounces

After averaging the effective tax rates on the two marijuana products, the Court concludes that Montana's tax rate of four times the market value appears to be "unrivaled." *Ante,* at 13, n. 17. That may be so. But the proper inquiry is not whether the tax rate is "unrivaled," but whether it is so high that it can only be explained as serving a punitive purpose. When compared to similar types of "sin" taxes on items such as alcohol and cigarettes, these figures are not so high as to be deemed arbitrary or shocking. This is especially so given both the traditional deference accorded to state authorities regarding matters of taxation, and the fact that a substantial amount of the illegal drug business will escape taxation altogether.[5]

In short, I think the Court's conclusion that the tax here is a punishment is very much at odds with the purpose and effect of the Montana statute, as well as our previous decisions. After reviewing the structure and language of the tax provision and comparing the rate of taxation with similar types of sin taxes

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of marijuana "bud," a substance of higher quality than the marijuana "shake." The Bankruptcy Court found that the bud had a market value of approximately $2,000 per pound. The product was taxed at a minimum rate of $100 per ounce ($1,600 per pound), or 80% of market value.

[5]The federal tax on cigarettes is currently at 1.2 cents per cigarette, or 24 cents per package. 26 U. S. C. §5701(b). While this does not exceed the cost of a pack of cigarettes, the current proposal to boost the cigarette tax to 99 cents per pack could lead to a total tax on cigarettes in some jurisdictions at a rate higher than the 80% rate utilized in this case for the marijuana bud. That the shake is taxed at a higher rate is consistent with the effect of a fixed rate tax on a very low-quality, inexpensive product. See 26 U. S. C. §4131(b)(1) (fixed tax on vaccines, ranging from 6 cents to $4.56 per dose); 26 U. S. C. §4681 (1988 ed., Supp. IV) (fixed tax on ozone-depleting chemicals).

imposed on lawful products, I would reach the contrary conclusion—that the Montana tax has a nonpenal purpose of raising revenue, as well as the legitimate purpose of deterring conduct, such that it should be regarded as a genuine tax for double jeopardy purposes.