A Reach: The DC Circuit Rules The IRS Cannot Regulate Return Preparers.

As is pretty obvious at this time of year, tax return preparation is a big business. Historically, it has not been regulated. And there are some very bad preparers out there.

In 2011, the IRS adopted regulations that required return preparers to register and to take a qualifying examination. They also imposed continuing education requirements. Today, the DC Circuit issued its decision on the validity of the IRS regulations, which were challenged by a group of preparers. *Loving v. Internal Revenue Service*, 2014 U.S. App. LEXIS 2512 (DC Cir. Feb. 11, 2014). The IRS lost, as the Court concluded that it lacked Congressional authority to regulate preparers.

The IRS had premised its authority to regulate return preparers on 31 U.S.C. § 330(a)(1), which authorizes the Department of Treasury to "regulate the practice of representatives of persons before the Department of the Treasury." The DC Circuit rejected this contention for several reasons.

First, it concluded that someone preparing a tax return is not "representing" anyone, as they are not acting as an agent with the authority to bind the taxpayer. 2014 U.S. App. LEXIS 2512, slip op. at *7-*10. *Second*, the Court concluded that tax return preparers were not engaged in practice before the IRS, as they were not involved in an adversarial proceeding or investigation. *Id.*, slip op. at *10-*13. *Third*, the DC Circuit reasoned that the history of Section 330 indicated that it was not intended to reach tax preparers, noting that as originally drafted in 1884, it had clearly not reached tax preparers and that Congress had never adopted any change that would broaden the groups of professionals that Section 330 would reach. *Id.*, slip op. at *16-*18. *Fourth*, the Court concluded that the broad interpretation of Section 330 didn't make sense in the surrounding context, noting that Congress had enacted very specific provisions dealing with return preparers that would be unnecessary if the IRS's view of Section 330 were correct. *Id.*, slip op. at *18-*19. *Fifth*, in the Court's view, the IRS was claiming sweeping new authority to regulate a multi-billion dollar industry, a factor that cautioned against accepting its position. *Id.*, slip op. at *20-*21.

The sixth (and final) factor cited by the Court was a killer: the idea that the IRS had authority to regulate preparers under Section 330 was asserted for the very first time when it promulgated its regulations in 2011. Up until that time, it had never asserted that it had that authority. In fact, it had periodically sent senior personnel before Congress to testify and they had indicated that the IRS lacked the authority to regulate preparers. *See id.*, slip op. at *21-*22.

My reaction is that this is a very solid opinion; it does look like the IRS was overreaching its authority in attempting to regulate return preparers. That, of course, does not mean that there shouldn't be any regulation of return preparers. It simply means that Congress should decide what regulation it wants to authorize.

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