Out With A Fizzle: Accountants' Challenge to Voluntary Return Preparer Program Is Dismissed.

After the DC Circuit invalidated the effort by the IRS to regulate return preparers in *Loving v. IRS,* 742 F.3d 1013 (D.C. Cir. 2014), the Treasury Department went back to the drawing board. Two initiatives emerged: first, the Department recommended to Congress that it be granted authority to regulate all return preparers; second, it set up a voluntary program for uncredentialed preparers.

This latter proposal was challenged by the American Institute of Certified Public Accountants, which filed suit in July. On Monday, that case was dismissed. *American Institute of Certified Public Accountants v. Internal Revenue Service,* Civil Action No. 14-1190, slip op. at 5-15 (D.D.C. Oct. 27, 2014).

The program at issue had all of the basic features of the regime struck down in *Loving*: it was aimed at uncredentialed preparers, (those who were not CPAs, attorneys, or enrolled agents), it involved testing and continuing education, and those who completed it would be subject to the professional standards of Circular 230. *American Institute,* slip op. at 4. The key difference was that the program was voluntary: individuals who complete the program will receive a record of their completion and would be listed in a directory on the IRS website. *Id.*

The AICPA's case was dismissed because the district court concluded that it lacked standing because it had not suffered an injury that was causally linked to the new IRS initiative. The AICPA had posited three different theories on how the program injured accountants.

First, the AICPA argued that its member firms were injured because of the impact on their employees. This contention rested on two arguments, neither of which was availing. Initially, the plaintiff asserted that its members' employees would be injured by additional regulatory burdens. This failed since an injury to the employees of member firms was not sufficient to give the AICPA standing. *Id.*, slip op. at 9. Alternatively, the plaintiff argued that the costs of employees' compliance would be shifted to member firms due to lost hours and reimbursement of expenses. The court concluded that the decision to permit an employee to miss work to participate or to reimburse expenses associated with participation were voluntary actions that broke the chain of causation between the claimed injury and the IRS program. *Id.*, slip op. at 10.

Second, AICPA argued that its members were injured because they would need to take reasonable steps under Circular 230 to assure that their newly regulated employees complied with the requirements of Circular 230. This argument failed as the court noted that CPAs already had a duty to assure that all of their employees comply with Circular 230. *Id.*, slip op. at 11-12 (citing 31 C.F.R. § 10.36(a)).

Third, the AICPA asserted that the program would confuse consumers. This argument rested on two different prongs.

- Initially, the plaintiff argued that preparers who completed the program would be able to advertise their services in a fashion that suggested they had special training or an IRS endorsement. The court rejected this assertion because the terms of the program itself barred any such claim by a participant. *Id.*, slip op. at 12-13 (citing Rev. Proc. 2014-42, § 4.07).

- Alternatively, the AICPA argued that the program would spawn new categories of return preparers that would confuse consumers. The court rejected this argument, concluding that the injury was both overblown and speculative. *Id.*, slip op. at 13-14.

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