RETURN PREPARER REGULATION: THE D.C. CIRCUIT REINSTATES THE AICPA'S CHALLENGE TO THE VOLUNTARY PREPARER PROGRAM

Posted on **November 2, 2015** by **Jim Malone**

When most people think about tax return preparers, they think of CPAs. But a large proportion of the individuals who prepare tax returns are not accountants. As many as sixty percent of return preparers are not regulated by anyone. This creates problems for the IRS and also for consumers, who may wind up with an incompetent preparer. The IRS initially sought to regulate all return preparers, but that regulation was struck down. *Loving v. IRS*, 742 F.3d 1013, 1021-22 (D.C. Cir. 2014).

The IRS then shifted to a voluntary approach which it called the Annual Filing Season Program. *See* Rev. Proc. 2014-42, 2014-29 I.R.B. 192. This program offered credentials to unregulated preparers who completed it, and they would be listed in a searchable data base. The AICPA filed a challenge to this regime, arguing, among other things, that consumers would be confused by the new program. That challenge was rebuffed: in October of 2014, a district judge granted the government's motion to dismiss, ruling that the AICPA lacked standing. *AICPA v. IRS*, Civil Action No. 2014-1190 (JEB), 2014 U.S. Dist. LEXIS 157723, *10-*21 (D.D.C. Oct. 27, 2014). For more details on the district court opinion, review my prior post.

On October 30, the D.C. Circuit Court of Appeals reversed, focusing on an argument that received limited attention in the district court: competitive injury. *AICPA v. IRS*, No. 14-5309, 2015 U.S. App. LEXIS 18900 (D.C. Cir. October 30, 2015).

After reviewing the basics of Article III standing and organizational standing, the court of appeals focused on what it considered the central issue: the argument that the voluntary return preparer program would create intensified competition in the market for return preparation services. *AICPA v. IRS*, 2015 U.S. App. LEXIS 18900 at *9. The court initially distinguished its opinion in *State*

National Bank of Big Spring v. Lew, 795 F.3d 48 (D.C. Cir. 2015), which had rejected a competitor's challenge to the designation of a competing bank as "too big to fail." In the court's view, the link between the challenged regulatory scheme and the claimed injury to the plaintiff was "far tighter here." 2015 U.S. App. LEXIS 18900 at *10.

The court also observed that "basic economic logic" suggested that return preparers would only participate in the voluntary program if they thought its reputational benefits would help them to compete. *Id*. at *11. The IRS countered that its voluntary program merely helped unregulated preparers compete with each other, not CPAs, but the court rejected that argument, noting that the IRS itself considered unenrolled preparers as part of the tax return preparation market. Id. at *12-*13. Concluding that the AICPA had demonstrated sufficient potential injury from increased competition, the court of appeals reversed. *Id.* at *14-*15.

The outcome is the result of clever lawyering. In the district court, the AICPA focused upon three arguments to support standing:

- It argued that AICPA member firms employed uncredentialed preparers who would be injured by the rule;
- It asserted that AICPA member firms would suffer direct harm because they would be required to take appropriate measures to assure that newly regulated employees complied with Circular 230; and
- It contended that AICPA members and member firms would suffer injury as the new return preparer program would confuse consumers.

AICPA v. IRS, 2014 U.S. Dist. LEXIS 157723 at *9; *see* also Complaint ¶ 12, *AICPA v. IRS*, Civil Action No. 14-1190 (JEB). When the district court found these arguments less than persuasive, the AICPA's lawyers refocused their arguments to center upon competitive injury, an argument that resonated with the court of appeals.

By: **Jim Malone**

Jim Malone is a tax attorney in Philadelphia and Co-Chair of Post & Schell's Tax Controversy Practice Group. He focuses his practice on federal, state and local tax controversies. Learn more about Post & Schell's Tax Controversy Group >>

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