

Contingent Fees and Tax Refund Claims.

Earlier this year, the D.C. Circuit ruled that the Department of the Treasury could not regulate return preparers; the basic rationale was that the preparation of tax returns is not “practice before” the Department. As a consequence, the Court ruled that the Department exceeded its authority in regulating preparers. *Loving v. IRS*, 742 F.3d 1013, 1016-1022 (D.C. Cir. 2014).

Section 10.27(b) of Circular 230 also limits the ability of a practitioner to render services on a contingent fee basis and bars contingent fees in the context of most tax returns. Given *Loving’s* holding that the Department of the Treasury cannot regulate the preparation of tax returns, the question then becomes whether its bar on contingent fees can hold up.

Last week, a district court concluded that the Department of the Treasury cannot bar contingent fees in the context of return preparation. *Ridgely v. Lew*, 2014 U.S. Dist. LEXIS 96447, slip op. at *11-*19 (D.D.C. July 16, 2014).

Mr. Ridgely, a CPA, challenged the Circular 230 bar on contingent fees in the context of ordinary refund claims. Since Circular 230 rests upon a delegation of authority to “regulate the practice of representatives of persons before the Department of the Treasury,” 31 U.S.C. § 330(a)(1), the basic question before the court was whether Mr. Ridgeley was a “representative” engaged in “practice before the Department of the Treasury” when he prepared an ordinary refund claim for a taxpayer.

The district court, noting that it was “not the first to venture down this particular rabbit hole,” concluded that *Loving* was controlling. *Ridgely*, 2014 U.S. Dist. LEXIS 96447, slip op. at *12, *14. The court then examined the text of Section 330, its context, and its history and concluded that the bar on contingent fees was beyond the scope of the Department’s authority to regulate practice before it under *Loving*.

Jim Malone is a tax attorney in Philadelphia; he focuses his practice on federal, state and local tax controversies. © 2014, MALONE LLC.