

The Current Status of Circular 230

Presented by:

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THE IRS'S STATUTORY AUTHORITY

- (a) Subject to section 500 of title 5, the Secretary of the Treasury may-
- (1) regulate the practice of representatives of persons before the Department of the Treasury; and
 - (2) before admitting a representative to practice, require that the representative demonstrate—
 - (A) good character,
 - (B) good reputation;
 - (C) necessary qualifications to enable the representative to provide to persons valuable service; and
 - (D) competency to advise and assist persons in **presenting their cases**.

- A tax return preparer is a person who “prepares for compensation, or who employs one or more persons to prepare for compensation, all or a substantial portion of any return of tax or any claim for refund of tax under the Internal Revenue Code.”

26 C.F.R. §301.7701-15(a).

- Practice as a registered tax return preparer is limited to preparing and signing tax returns and claims for refund, and other documents for submission to the Internal Revenue Service.

Circular 230 at §10.3(f)(2).

- *Loving v. I.R.S.*, 917 F.Supp.2d 67 (D.D.C. 2013)

“Filing a tax return would never, in normal usage, be described as presenting a case. At the time of filing, the taxpayer has no dispute with the IRS; there is no case to present. This definition makes sense only in connection with those who assist taxpayers in the examination and appeals stages of the process.”

- *Loving v. I.R.S.*, 917 F.Supp.2d 67 (D.D.C. 2013).

“[S]tatutes scattered across Title 26 of the U.S. Code create a careful, regimented schedule of penalties for misdeeds by tax-return preparers. If the IRS had open-ended discretion under §330(b) to impose a range of monetary penalties on tax-return preparers for almost any conduct the IRS chooses to regulate, those Title 26 statutes would be eclipsed.”

- *Loving v. I.R.S.*, 917 F.Supp.2d 67 (D.D.C. 2013).

“[I]f §330 covers tax-return preparers, the IRS could sidestep every protection §7407 affords—judicial review, the demanding standards for the extraordinary remedy of an injunction, and the elevated hurdle for enjoining preparation of tax returns (instead of further violation)—while effectively obtaining the same result.”

- Circular 230 §10.27 Fees.

(a) In general. A practitioner may not charge an unconscionable fee in connection with any matter before the Internal Revenue Service.

(b) Contingent fees—

(1) Except as provided in paragraphs (b)(2), (3), and (4) of this section, a practitioner may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.

- *Ridgely v. Lew*, 55 F.Supp.3d 89 (D.D.C. 2014)

“As to the meaning of the term “representative,” *Loving* is clear: a “representative” is traditionally one “with authority to bind others.”

* * *

CPAs preparing and filing [Ordinary Refund Claims] before possessing any power of attorney possess no “legal authority to act on behalf of taxpayers.”

- *Ridgely v. Lew*, 55 F.Supp.3d 89 (D.D.C. 2014).

“As the Court explained, “practice . . . before the department of the Treasury,” like practice before any agency or court, “ordinarily refers to practice during an investigation, adversarial hearing, or other adjudicative proceeding. The process of filing an Ordinary Refund Claim—again, before any back-and-forth with the IRS—is similar to the process of filing a tax return in that both take place prior to any type of adversarial assessment of the taxpayer’s liability.”

- *Ridgely v. Lew*, 55 F.Supp.3d 89 (D.D.C. 2014).

[Section 330] does not regulate “practitioners” generally; it regulates a specific kind of activity they may undertake: “practice . . . before the [IRS].”

* * *

The Court therefore disagrees with the IRS that simply because CPAs may at times practice before the IRS, the IRS has authority to regulate their conduct without limit.

- Consequences of *Loving* and *Ridgely*:

- The IRS abandoned its Regulated Tax Return Preparer (RTRP) program.

- The IRS instituted the Annual Filing Season Program (AFSP).

- A number of provisions are likely not enforceable.

- But, Circular 230 has *not* been updated to reflect these changes.

“Fraudulent tax return preparation has become an epidemic. According to the Treasury Inspector General for Tax Administration, the IRS identified more than two million returns for tax year 2014 reflecting fraudulently claimed refunds totaling more than \$15.7 billion. In addition, the U.S. Department of Justice reports that it is seeking and being granted more injunction orders than ever before in its efforts to shut down fraudulent tax return preparers.”

--2016 IRSAC OPR Subgroup Report

IRC PREPARER PENALTY PROVISIONS

- §6694(a): For an understatement of tax liability due to an unreasonable position, the greater of \$1,000 or 50% of the income that the preparer earned on the return.
- §6694(b): For an understatement of tax liability due to willful or reckless conduct, the greater of \$5,000 or 50% of the income that the preparer earned on the return.
- §6695(a): For failing to give a taxpayer a copy of her return without reasonable cause, \$50 (with an annual maximum of \$25,000).
- §6695(b): For failing to sign a return without reasonable cause, \$50 (with an annual maximum of \$25,000).
- §6695(c): For failing to list an identifying number without reasonable cause, \$50 (with an annual maximum of \$25,000).

IRC PREPARER PENALTY PROVISIONS

- §6695(d): For failing to retain a copy or a list of returns without reasonable cause, \$50 (With an annual maximum of \$25,000).
- §6695(f): For endorsing or otherwise negotiating a check issued to a taxpayer, \$500.
- §6695(g): For failing to comply with the due-diligence IRS regulations on the earned income tax credit, \$500.
- §6713: For disclosing or otherwise using information the taxpayer shares for use in preparing a tax return, \$250 (with an annual maximum of \$10,000).
- §7216: For knowingly or recklessly disclosing or otherwise using information the taxpayer shares for use in preparing a tax return, one year in prison or \$1,000 fine.

The Secretary may obtain an injunction, if the court finds—

(1) That a tax return preparer has—

- (A) Engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by this title,
- (B) Misrepresented his eligibility to practice before the IRS, or otherwise misrepresented his experience or education as a tax return preparer,
- (C) Guaranteed the payment of any tax refund or the allowance of any tax credit, or engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue Laws.