

RTRP and CE Requirements Ruled Invalid

Cross References

- *Loving v. IRS*, U.S. District Court for the District of Columbia, January 18, 2013

U.S. District Judge James E. Boasberg has ruled that the IRS lacks statutory authority to issue and enforce regulations under Circular 230 concerning Registered Tax Return Preparers (RTRPs), their requirement to pass a competency test, and their requirement to take annual continuing education (CE). The judge also permanently enjoined the IRS from enforcing these regulations on other tax return preparers.

Background. In 2011, the IRS began regulating hundreds of thousands of unlicensed tax return preparers who prepare and file tax returns for compensation. The IRS regulations require each preparer to pass a qualifying exam, pay an annual application fee, and take 15 hours of continuing-education courses each year. The IRS interprets an 1884 statute as enabling them to regulate all tax return preparers.

Under Title 31 of the U.S. Code, Section 330, the Treasury Secretary has authority to regulate people who practice before the Treasury Department. As the IRS is a bureau of the Treasury Department, this statute covers practice before the IRS as well. Using this statutory authority, the IRS issued regulations under Circular 230 with a long list of duties and restrictions relating to practice before the IRS. These regulations have historically applied to attorneys, CPAs, Enrolled Agents (EAs), and other specified tax professionals. The 2011 revision to Circular 230 brought all tax return preparers under its coverage. The IRS estimated that the new rule brings 600,000 to 700,000 new tax return preparers who were previously unregulated at the federal level.

Among other things, these new rules defined “practice” as a tax return preparer as including the preparing and signing of tax returns and claims for refund and other documents for submission to the IRS.

Lawsuit. Three paid tax return preparers who were not previously regulated by the IRS brought a lawsuit against the IRS. Sabina Loving worked on the South Side of Chicago, serving low-income clients. Elmer Kilian had for decades prepared tax returns in his house. Giovanni Gambino was a financial planner who prepared tax returns for his clients. Loving declared that she would have to increase her prices if forced to comply with the rule, likely losing customers. Kilian and Gambino declared that they would likely close their tax businesses if forced to comply.

Seeking injunctive and declaratory relief, these plaintiffs sued the IRS, the Commissioner of Internal Revenue, and the U.S. government under the Administrative Procedure Act and the Declaratory Judgment Act.

Judge's opinion. In ruling against the IRS, the judge said the following:

- The text of Title 31 of the U.S. Code, Section 330, defines the practice of representatives in a way that does not cover tax return preparers.
- The IRS' interpretation would displace an existing statutory scheme that comprehensively regulates penalties on tax return preparers.
- Under the IRS' interpretation, a federal statute that remedies abusive practice by tax return preparers would be relegated to oblivion.

Practice of representatives. The IRS argued that Title 31 of the U.S. Code, Section 330, is ambiguous because it does not define representative or practice, and both terms can have broad meanings. The judge said although these terms are not defined, the statute does say what representatives do and what their practice is. The statute says representatives advise and assist persons in presenting their cases. Filing a tax return would never, in normal usage, be described as presenting a case because at the time of filing, the taxpayer has no dispute with the IRS. There is no case to present. Thus, according to the judge, Section 330 cannot apply to the preparation of tax returns.

Author's Comment: Title 31 of the U.S. Code, Section 330, was written prior to the 16th Amendment to the U.S. Constitution which authorized the federal government to impose a federal income tax. Thus, there were no individuals preparing income tax returns for clients at the time this Code was written.

Conflicts with other statutes. Title 31 of the U.S. Code, Section 330, allows the IRS to penalize and disbar practicing representatives for misconduct. However, there are also numerous statutes in Title 26 of the U.S. Code (also known as the Internal Revenue Code), that impose penalties for misdeeds by tax return preparers. The judge said if the IRS had open ended discretion under Section 330 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. Thus, the federal statutes under Title 26 would lose all relevance.

Invalid regulations. The judge ruled the regulations invalid with regards to the three plaintiffs. The judge also ruled the public interest would be served by a permanent injunction against the IRS implementing these regulations.

IRS Statement on Court Ruling Related to Return Preparers

As of Friday, January 18, 2013, the United States District Court for the District of Columbia has enjoined the Internal Revenue Service from enforcing the regulatory requirements for registered tax return preparers. In accordance with this order, tax return preparers covered by this program are not currently required to register with the IRS, to complete competency testing, or secure continuing education. The ruling does not affect the regulatory practice requirements for CPAs, attorneys, enrolled agents, enrolled retirement plan agents or enrolled actuaries.

The Internal Revenue Service, working with the Department of Justice, continues to have confidence in the scope of its authority to administer this program. It is considering how best to address the court's order and will take further action shortly. Please continue to check this site as additional information becomes available.