

AICPA Loses Lawsuit over Voluntary IRS Program

Cross References

- American Institute of Certified Public Accounts, DC District, October 27, 2014

The IRS has statutory authority to regulate the practice of representation before the IRS. Tax practitioners generally subject to these regulations include CPAs, attorneys, and enrolled agents (EAs). Unenrolled tax-return preparers have historically not been subject to regulation by the IRS. In June 2011, the IRS issued regulations in an attempt to include unenrolled preparers under its authority to regulate. The IRS attempted to implement rules whereby unenrolled preparers would have to become Registered Tax Return Preparers (RTRPs) in order to continue to practice as tax-return preparers. As a result of these regulations, a lawsuit was filed against the IRS claiming it had no statutory authority to regulate unenrolled preparers. The IRS lost in District Court, and the D.C. Circuit Court of Appeals upheld the District Court decision. (*Loving*, U.S. Court of Appeals for the District of Columbia, February 11, 2014)

As a result of this loss, the IRS is in the process of continuing the concept of regulating unenrolled preparers through a voluntary program called the Annual Filing Season (AFS) program. Under this voluntary program, unenrolled preparers who participate will receive a certificate of completion and have their names included in a national registry that informs the public that they have completed a specified number of hours of continuing education (CPE) for the year.

On July 15, 2014, the American Institute of Certified Public Accountants (AICPA) filed suit against the IRS alleging that the voluntary program constitutes arbitrary and capricious agency action promulgated in excess of the agency's statutory authority. The AICPA claimed that its members:

- Employ unenrolled preparers who will be injured by the additional regulatory burden created by the AFS rules,
- Will be directly injured by the AFS rules because they require CPA firms to take reasonable steps to ensure that their newly regulated employees comply with Circular 230, and
- Will suffer injuries because the rules will cause confusion among consumers.

Under the theory that AICPA member employees may be injured, the court said there is no reason to believe that the alleged injuries could be characterized as anything but voluntarily self-inflicted. CPA firms are under no obligation to reimburse employees for the costs of voluntary compliance, nor are they obligated to credit the time employees spend voluntarily complying with the program as hours worked on behalf of the firm.

Under the second theory that AICPA members may be injured by AFS rules, the court noted that Circular 230 requires CPA firms to take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees to comply with the standards laid out in Circular 230. The court said the AICPA's argument rests on a mistaken premise. Whether unenrolled tax preparers participate in the voluntary program or not is immaterial to the supervisory obligation imposed by Circular 230. IRS regulations under Circular 230 impose a responsibility on managerial CPAs to oversee all of their employees involved in the preparation of tax returns, regardless of whether those employees are themselves subject to Circular 230. Thus, the new voluntary program imposes no new burden on AICPA members' supervisory duties.

Under the third theory that the voluntary program will cause confusion among consumers, the court noted that there are already several categories of tax return preparers, namely CPAs, attorneys, EAs, and unenrolled preparers. The new program does create one additional category of tax return preparer who participates in the voluntary program and receives a Record of Completion. However, nothing about that category is inherently confusing. The AICPA provides no reason to believe that the introduction of this particular terminology into the tax-preparer lexicon will result in so confusing a state of affairs as to injure its members.

The court granted the IRS' motion to dismiss the case.