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Loving and the RTRP Program

In the latest development related to the Registered Tax Return Preparer (RTRP) program, the U.S. District Court for the District of Columbia has issued a decision that enjoins the IRS from enforcing the full program, sharply curtailing IRS oversight of tax preparers.

The Registered Tax Return Preparer (RTRP) program was established as part of an effort to curtail tax preparers who lack the knowledge necessary to prepare tax returns. It involves requirements for registration, competency testing, and continuing education for paid tax preparers. Now a U.S. District Court in *Loving v. IRS* has suspended the education and testing requirements and brings into question the authority of the IRS to establish those requirements.

The Preparer Tax Identification Number

The IRS website states that all those who are compensated for preparing, or assisting in preparing, all or substantially all of a Form 1040 series tax return or claim for refund—including CPAs (Certified Public Accountants), attorneys, enrolled agents, and others—must register for a Preparer Tax Identification Number

(PTIN). There are two exceptions: (1) individuals who perform clerical tasks related to tax return preparation, including typing, reproduction, or other mechanical assistance, and (2) a supervised preparer, which is defined as a nonsigning preparer employed by a law firm, CPA firm, or firm that is at least 80% owned by attorneys, CPAs, or enrolled agents. In addition, because the PTIN requirement is only for compensated preparers, those volunteering for uncompensated tax preparation programs such as Volunteer Income Tax Assistance (VITA) or other low-income assistance programs are also exempt. All others can obtain a PTIN via the IRS website for \$64.25.

The RTRP Program

In her 2002 Annual Report to Congress, Nina Olson, the National Taxpayer Advocate, recommended registering and annually testing paid preparers, exempting only CPAs, attorneys, and enrolled agents from testing requirements. Two studies illustrate the validity of Olson's concerns. In 2006, U.S. Government Accountability Office (GAO) employees posed as tax clients at 19 tax chain offices (such as H&R Block, Jackson Hewitt,

and Liberty Tax Service). All 19 tax preparers produced at least one mistake on the tax returns, and only two preparers arrived at the correct tax liability. In 2008, preparers in a similar study failed to show the correct tax liability, and six of the 17 acted willfully or recklessly in preparing the returns.

In response, the IRS issued Notice 2009-60, which solicited ideas from the public as part of the IRS's effort to ensure high-quality tax preparation. Of the 500 comments submitted, 89% favored registration and 90% favored minimum education or testing requirements. On January 4, 2010, the IRS released Publication 4832, *Return Preparer Review Report*, which recommended implementation of a registration program, competency testing, continuing education requirements, and that Circular 230 rules extend to all tax return preparers.

From these recommendations, the RTRP program was born. In its original form, this program called for all compensated preparers of Form 1040 series returns to acquire a PTIN, successfully complete competency testing, and complete 15 hours of continuing education credits, including two hours of ethics or professional

conduct, three hours of federal law updates, and 10 hours of federal law topics. CPAs, attorneys, and enrolled agents were exempted from the testing and continuing education requirements, while nonsigning preparers were exempted from all requirements.

The Case that Changed the Rules

On January 18, 2013, the U.S. District Court for the District of Columbia granted a permanent injunction that halted the RTRP program. This was the result of the court case *Loving v. IRS* (*Loving*, No. 12-385 (D.D.C. 1/18/13)). The plaintiffs were Sabina Loving, a tax preparer who serves low-income clients; Elmer Kilian, a tax preparer who meets with clients at his dining room table; and John Gambino, a Certified Financial Planner (CFP) and registered investment advisor who offers tax preparation as a convenience to his clients. They challenged the licensing requirements by arguing that the unreasonable cost of compliance creates an economic hardship for low-volume preparers. In other words, they argued that the cost of testing and continuing education credits would cause them to increase prices and, thus, lose clients or force them out of business.

In arriving at its decision, the Court applied the test from *Chevron U.S.A. Inc., v. Natural Resources Defense Council* (467 U.S. 837 (1984)). The first step of this test asks whether “the intent of Congress is clear.” The Court found that the *Loving* case is reduced to one issue: “Is IRC §330 ambiguous as to whether tax return preparers are ‘representatives’ who ‘practice’

before the IRS?”

The Court found that the IRS’s interpretation that preparers are “representatives” who “practice” before the IRS fails for three reasons. First, IRC §330(a)(2)(D) defines the “practice of representatives” in a way that doesn’t cover tax return preparers. The Court equated “practice” with advising and assisting with the presentation of a case, and, at the time of filing,

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the taxpayer has no dispute with the IRS—in other words, there is no case to present. Second, the Court found that the IRS’s interpretation would displace an existing statutory scheme that comprehensively regulates penalties on tax return preparers. Within Title 26 of the U.S. Code, statutes “create a careful, regimented schedule of penalties for misdeeds by tax return preparers.” If the IRS had open-ended discretion under IRC §330, “then the Title 26 statutes would lose relevance.” Third, the Court stated that under the IRS’s interpretation, “a federal statute that remedies abusive practice by tax return preparers would be rele-

gated to oblivion.” Title 26 includes at least 10 penalties specific to tax return preparers. These penalties range from modest fines (such as \$50) to one year in prison.

The IRS Response

In response to the decision, the IRS filed a motion asking the Court to stay the injunction while the IRS appeals. The motion was denied by the judge, U.S. District Court Judge James E. Boasberg, but he did clarify that the injunction doesn’t affect the regulations that require tax preparers to obtain a PTIN. Additionally, the IRS may continue to operate its testing and continuing education centers—but participation by tax preparers must be on a strictly volunteer basis.

The official IRS statement, published on its website, states that the IRS will challenge the U.S. District Court’s decision, but there’s no information about the Service’s defense or how quickly it plans to appeal: “The IRS continues to have confidence in the scope of its authority to administer this program and is working with the Department of Justice to address all options, including a planned appeal.”

Why Not Regulate Tax Preparers?

Licensing and certification exist in many professions to ensure or signal that an individual has met a minimum standard of competence. A licensed profession requires that all market entrants must comply with certain requirements (such as competency testing, ethics training, or background checks) before pro-

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viding a service. This restricts the supply of market participants to those willing or able to comply with licensing requirements. Voluntary certification, unlike licensing, allows an unrestricted supply of professionals in an occupation.

For many years, the tax preparation industry remained unregulated, yet tax preparers could choose to become certified (such as a CPA or enrolled agent). This is similar to the automotive repair industry: No licensing standards exist for automotive technicians, but they can become certified via the National Institute for Automotive Service Excellence.

Only four states, California, Oregon, Maryland, and New York, require tax preparer licensing. State licensing in occupations, such as for educators, follows a similar path as the licensing of tax preparers in those four states. Educators in the primary and secondary school systems are licensed at the state level, but they can obtain certifications beyond licensing, such as the National Board Certification.

The IRS enacted the RTRP program to create a licensed profession for which there were minimum standards. But licensing tax preparers at the federal level by enacting the RTRP program instead of initiating licensing at the state level may be an insurmountable obstacle to tax preparer competency reform. The IRS currently has one foot in the door with the Court's clarification that the IRS can still require tax preparers to acquire a PTIN, but the final fate of the RTRP program

won't be known until the outcome of the IRS appeal. **SF**

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