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MARCH 4, 2013

Officials Optimistic Government Will Prevail in Preparer Oversight Appeal

by Jeremiah Coder

Summary by taxanalysts

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Gilbert Rothenberg, appellate section chief, Justice Department Tax Division, said he expects the circuit court to reverse the district court's decision in *Loving v. IRS*, No. 1:12-cv-00385 (D.D.C. 2013). The government last month filed a notice of appeal in the case as well as a motion asking the D.C. Circuit to stay enforcement of the district court's order enjoining the IRS from enforcing its return preparer regulations (T.D. 9527).

The district court's opinion is incomprehensible in its view of the Title 31 statute, Rothenberg said, particularly because the court acknowledged that if decided on *Chevron* step two, the regulations and the IRS's oversight of preparers are reasonable. "It shuts down an entire program because of what supposedly the plain meaning [of the statute] is," he said at the Federal Bar Association Section on

Taxation meeting in Washington.

Rothenberg said the government is seeking a stay of the injunction because the court did not sufficiently analyze the appropriate factors dealing with irreparable harm to the IRS. However, the injunction puts the Tax Division in a rare position because most injunctive remedies sought in tax cases involving Title 26 are precluded by the Anti-Injunction Act, he said. Judges should look carefully at enjoining a national regulatory program, he added.

But Stuart J. Bassin of Baker & Hostetler LLP sided with the district court, saying it is questionable that the IRS could construe as covering tax return preparation Title 31's statutory authority to regulate individuals who present cases before Treasury. There was no IRS or income tax code when 31 U.S.C. 330 was first passed in 1884, he said, arguing that a plain reading of the statute would indicate that case presentation occurs when a practitioner shows up at the IRS to represent a taxpayer.

However, Kathryn Zuba, acting IRS deputy associate chief counsel (procedure and administration), said that approach is inflexible because "the world changes."

Kevin M. Johnson of Pepper Hamilton LLP criticized the court's reliance on the existence of penalties as adequate to regulate tax professionals.

That the IRS return preparer oversight regime is an important program does not convey authority, Bassin countered, saying that only the statute can grant authority. He said he was surprised at how much oversight the IRS has constructed over tax professionals based on a small phrase comprising a few words, adding that it is astonishing that the IRS did not seek explicit authority from Congress to regulate tax return preparers.

If presenting cases before Treasury can't be limited to what Congress intended when the statute was enacted, "there is nothing that can't be done in regulating people and their conduct in doing anything related to the tax system," Bassin said. "What's the limit in that statute?"

Rothenberg responded that the requirement of reasonableness in *Chevron* step two is an appropriate limiting boundary.

Tamara Ashford, deputy assistant attorney general (appellate and review) in the Justice Department's Tax Division, said at a separate session that the IRS return preparer oversight program has "overwhelming public support" and should be pursued to ensure competent and ethical tax return preparation.

The injunction of the Service's testing and education requirements for registered tax

return preparers will cause irreparable harm to tax administration because "the IRS will effectively be forced to abandon its regulatory scheme until the 2015 tax preparation season, [and] because of financial costs ranging from those associated with redesigning computer systems to renegotiating vendor contracts."

Ashford said the IRS is waiting only for the solicitor general's approval to appeal.

Deference

Judge Francis M. Allegra of the Court of Federal Claims said that application of *Chevron* step one requires a court to decide whether the statute is ambiguous or unambiguous and that despite the seemingly uniform body of judicial precedent on the subject, the distinction between ambiguity and non-ambiguity varies from court to court. Context is extremely important in construing a statute, especially for *Chevron* step one, he said. An individual word is rarely unambiguous, he said, noting that unabridged dictionaries can list dozens of meanings for a single term. "Any one term in the English language doesn't have a set meaning" apart from context, he said.

Allegra said that generalist judges, like those in federal district courts, approach tax matters the same way they approach other legal areas. Those judges approach judicial interpretation, such as deference, by looking at "analogues in things that they do every day of the week," he said.

Speaking on the broader subject of judicial deference in tax cases, Allegra said that opinions involving deference standards are more often case specific than acknowledged. "If you sit there and take boilerplate from one case and think you have gospel that you can pick up and take into the other realm, you are probably already heading down the path of destruction," he said. The shifting of deference among Supreme Court opinions is guidance, he said, but will probably change based on the facts of future cases. "My caution is not to overread any of these opinions," he said.

Rothenberg said the previous dichotomy between legislative and administrative regulations is no longer useful in applying deference. All IRS regulations are now issued with a notice and comment period, regardless of how they are described, he said.

Bassin said that in administrative law, "there is a lot of attention paid to what the agency said at the time, like in a preamble to a regulation." The IRS wasn't very good about retaining applicable documents for regs issued decades ago, he said, meaning they may be more susceptible to challenge.

Zuba said that Treasury and the IRS haven't changed the tax regulation process much following *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011). In looking to see if there is statutory ambiguity that allows a specific regulation interpretation, the government doesn't "try to promulgate regs that don't adopt a correct meaning of the statute," she said, adding, "We don't think about whether the statute is ambiguous or unambiguous. We try to understand the statute -- how it works and what it means."

That sometimes means that reg drafters have a hard time articulating reasons under *Chevron* for why a regulation position is adopted, Zuba said. "But we are probably thinking about that issue more closely and making sure that when we adopt a position it is in line with a statute, because that's what we think the statute means unambiguously or we think that we have some room to interpret the statute based on its language," she said.

Tax Analysts Information

Code Sections: Section 7701 -- Definitions
Section 7407 -- Return Preparer Injunctions
Section 6694 -- Understatement by Return Preparer
Section 6695 -- Return Preparer's Penalties
Section 6713 -- Disclosure by Return Preparer
Section 7216 -- Data Disclosure by Preparers
Section 6103 -- Tax Return Disclosure

Other Statutory Classification: 31 U.S.C. 330

Jurisdiction: United States

Subject Areas: Litigation and appeals
Return preparation
Practice and procedure
Professional responsibility
Tax system administration issues

Author: Jeremiah Coder

Institutional Author: Tax Analysts

Tax Analysts Document Number: Doc 2013-5006

Tax Analysts Electronic Citation: 2013 TNT 42-16
