Tax Notes Today

October 30, 2014

LEGISLATION NEEDED TO STRENGTHEN CIRCULAR 230, HAWKINS SAYS
By William Davis

With practitioners' recent success using litigation to chip away at Circular 230, Karen Hawkins, director of the IRS Office of Professional Responsibility, said October 28 that legislation is necessary to halt the decreasing importance of Circular 230 in the return preparer industry and to clarify roles of offices within the IRS.

Appearing at the Tax Controversy Institute in Beverly Hills, California, Hawkins called Ridgely v. Lew, No. 1:12-cv-00565 (D.D.C. 2014), a confusing opinion in which the court decided that the IRS lacks the authority to regulate persons during the preparation of ordinary refund claims. (Prior coverage (Doc 2014-23095).)

And Ridgely is not the end of the litigation pipeline. Hawkins discussed two cases in federal district court that have the potential to greatly influence Circular 230 and the OPR. (Prior coverage (Doc 2014-20456).)

In the first case, Davis v. IRS, No. 1:14-cv-00261 (N.D. Ohio 2014), the petitioner is a CPA seeking reinstatement to the mandatory IRS e-filing system after he was dismissed from the program for committing a tax crime. Davis argued in his complaint (Doc 2014-20501) that the IRS e-filing office abused its discretion by disallowing him from using the e-filing system after OPR and the Ohio Board of Accountancy determined that he was fit to continue practice.

"So what this lawsuit has done is pitted two pieces of the Internal Revenue Service up against each other," Hawkins said. "It's unbecoming -- I'm very conscious of that -- but it does give me some concern, and it should give you some concern, too. I think Mr. Davis is exercising his rights in asking the agency, 'How can I be OK over here and not OK over there?'"

Hawkins said Davis is not an outright attack on Circular 230, but said she sees it as possibly having unintended results. The government is basing its argument on old case law from before electronic filing was mandatory, saying that electronic filing is a privilege that the e-filing office can take away anytime it wants, she explained.

Hawkins said that because electronic filing has become mandatory under the code, the electronic filing identification number has become a property right. However, many people within the IRS disagree with that position, she said.

Hawkins said that if the court agrees with the IRS and decides that it is within its rights to deny reinstatement to the e-filing program, she isn't sure where that leaves OPR in relation to the e-filing office, which has its own sets of rules and regulations.

Hawkins said that the other case, Sexton v. Hawkins, No. 2:13-cv-00893 (D. Nev. 2013), once had seemingly laughable arguments, but that after Ridgely, judges may side in favor of the petitioner. In Sexton, the petitioner is arguing (Doc 2014-20500) that because OPR suspended him from practice in 2004, he is no longer a practitioner covered by Circular 230 and that his status as a mere tax return preparer gives OPR no jurisdiction over him.

"I laughed at that argument after I saw it two years ago when the litigation started, but after Ridgely, my laughing has stopped because there are some judges out there that would buy that now," Hawkins said.

The potential impact of the two cases is a compelling reason for detailed and specific legislation that will clarify the rules for everyone, Hawkins said. "I say that knowing we need to go to this Congress and ask them for it, so I'm not sure we will get anything articulate," she joked.

Court Dismisses AICPA Case

Hawkins asked practitioners to look at the U.S. District Court for the District of Columbia opinion (Doc 2014-25805), released October 27, dismissing an American Institute of Certified Public Accountants claim seeking to halt the IRS's voluntary regulation regime for unenrolled tax return preparers, because the opinion places some limits on the decision in Loving v. IRS, Dkt. 13-5061 (D.C. Cir. 2014) (Doc 2014-3158). (Prior coverage (Doc 2014-25808).)

In dismissing the case, Judge James E. Boasberg, who also wrote the Loving opinion, gave an articulate opinion that went to great lengths to clarify his thinking on Loving, Hawkins said.

Boasberg dismissed the AICPA suit in part for lack of standing because employers generally don't have standing based on injuries of its employees.

ACA Rollout

Practitioners need not worry much about their exposure under Circular 230 as they provide guidance to clients regarding the Affordable Care Act in the early stages of the law's implementation, Hawkins said October 29.

Speaking on a webcast sponsored by the IRS Small Business/Self-Employed Division, Hawkins said she is aware how uneasy practitioners are about giving advice regarding, and preparing returns affected by, the ACA.

"The best thing I can say is that I have no intention of immediately starting to leap all over people who are making their best efforts to get this right," Hawkins said. She added that as long as practitioners are researching the facts provided by clients, noting developments with the law, and trying to educate themselves, OPR won't "crucify" them if they get something wrong.

OPR is likely to provide guidance within the next year on practitioner due diligence under the ACA, Hawkins said. She said the guidance may be distributed via the office's e-subscription service.