



## U.S. Department of Justice

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October 21, 2013

Mark J. Langer, Esquire  
Clerk, U.S. Court of Appeals  
for the District of Columbia Circuit  
U.S. Courthouse, Room 5423  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001

Re: Sabina Loving, *et al.* v. Internal Revenue Service  
(D.C. Cir. – No. 13-5061)

Dear Mr. Langer:

The instant appeal was argued before Circuit Judge Kavanaugh, and Senior Circuit Judges Sentelle and Williams on September 24, 2013. Pursuant to Fed. R. App. P. 28(j), the Internal Revenue Service draws the Court's attention to an article written by former Commissioner of Internal Revenue Lawrence B. Gibbs, which addresses the above-entitled case. Lawrence B. Gibbs, "*Loving v. IRS: Treasury Has the Authority to Regulate Unregulated Commercial Preparers*" ("Article"), Tax Notes, October 21, 2013, pp. 1-7.

In the article, former Commissioner Gibbs disputes appellees' contention that return preparers are not "representatives" within the meaning of that term as used in 31 U.S.C. § 330(a). Article at 4-7. Gibbs explains that a return preparer serves as a taxpayer's "representative" in that he "advises the taxpayer about ways to accomplish the taxpayer's objectives" and prepares "the return on the taxpayer's behalf to reflect the taxpayer's choices and to accomplish the taxpayer's objectives." *Id.* at 5. Gibbs compares return preparers to lawyers who draft wills, noting that such lawyers provide a representative service even if the client ultimately signs the document, and that return preparers, like such lawyers, can be "reasonably viewed as having represented [a] client." *Id.* Gibbs notes that the conclusion that return preparers are representatives is confirmed by the

fact that a taxpayer can authorize a return preparer to continue such representation before the IRS, if the IRS chooses to examine a return that the return preparer prepared. *Id.* Gibbs asserts that there is no indication that Congress in 1884 meant to restrict the Treasury's ability to regulate unscrupulous preparers to only those who presented claims *in person*, rather than those who prepared the claims that were ultimately submitted. *Id.* at 5-6. Gibbs thus concludes that the term "practice of representatives" is "fairly susceptible to more than one interpretation and, therefore, is ambiguous." *Id.* at 7.

We ask that you please distribute copies of this letter to the panel assigned to this case. A copy of this letter will be transmitted to opposing counsel via the CM/ECF system.

Sincerely yours,

KATHRYN KENEALLY  
Assistant Attorney General  
Tax Division

By: /s/ GILBERT S. ROTHENBERG  
GILBERT S. ROTHENBERG  
Chief, Appellate Section

Enclosure

## CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature /s/ Gilbert S. Rothenberg

## CURRENT AND QUOTABLE

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**Loving v. IRS: Treasury Has the Authority to Regulate Unregulated Commercial Preparers**

By Lawrence B. Gibbs

Lawrence B. Gibbs is a member of the law firm of Miller & Chevalier, Washington, and a former commissioner of the Internal Revenue Service (1986-1989). Gibbs wishes to thank Alan I. Horowitz, his friend and colleague at Miller & Chevalier, for his assistance with this article.

Earlier this year a federal district court held that Treasury did not have authority to issue regulations in 2011 enabling the IRS to regulate the tax return preparation conduct of unregulated, commercial preparers who process more than 42 million individual federal income tax returns each year. Gibbs explains why Treasury has the authority to issue the 2011 regulations and why the district court decision should be reversed.

The article below are from Gibbs's presentation at the Norman J. Shachoy Symposium sponsored at the Villanova Law school on September 27, 2013. These remarks will also be published in the upcoming third issue of volume 53 of the Villanova Law Review. The views expressed herein are Gibbs's alone.

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Individual taxpayers filed almost 143.6 million Federal income tax returns in 2011.<sup>1</sup> Paid preparers prepared a majority of these returns.<sup>2</sup> Paid preparers fall into two categories, regulated preparers (including certified public accountants, attorneys, enrolled agents, and enrolled actuaries) and unregulated commercial preparers. Regulated preparers prepared almost 36 million individual returns in 2011; unregulated commercial preparers, over 42

million returns.<sup>3</sup> The IRS has long and repeatedly exercised authority to regulate the tax return preparation conduct of regulated preparers.<sup>4</sup> The District Court in *Loving* held the IRS had no authority to regulate such conduct of unregulated commercial preparers and enjoined the IRS from enforcing the 2011 regulations that purported to do so.<sup>5</sup> For reasons I will explain, I respectfully disagree with the District Court's holding and its analysis. If the District Court's decision is affirmed on appeal and the IRS is unable to regulate the conduct of unregulated commercial tax return preparers, I believe the Congress will see the need to take steps to enable the IRS to do so.

The District Court in *Loving* based its decision primarily on its analysis of the language of the

<sup>3</sup>*Id.* According to Olson, the IRS data indicates that of the 78,088,554 returns prepared by paid preparers, 35,934,027 (or 46 percent) were prepared by regulated preparers (attorneys, certified acceptance agents, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and state regulated preparers) and 42,154,527 (or 54 percent) were prepared by unregulated commercial preparers (that Olson defines as "individuals with preparer tax identification numbers who did not list a profession when registering with the IRS").

<sup>4</sup>Circular 230 represents the authority by which the IRS has regulated the conduct of tax practitioners for over 92 years. See Circular 230, 1921-4 C.B. 408 (Feb. 15, 1921). For at least 61 years Circular 230 has required practitioners to exercise due diligence in preparing or assisting in the preparation of, approving, or filing tax returns. See Circular 230 (rev.), section 10.2(w), 1952-2 C.B. 275, 279 (1952). For at least 19 years Circular 230 has precluded a practitioner from charging a contingent fee for preparing an original tax return or for any tax advice rendered in connection with a position taken or to be taken on an original tax return and also has provided standards with respect to tax return positions and for preparing and filing or signing returns. See T.D. 8545, amending sections 10.28 and 10.34 of Circular 230, 1994-2 C.B. 415, 419-20 (1994). In addition, for at least 26 years prior to the issuance in 2011 of the regulations that are the subject of the litigation in the *Loving* case, Circular 230 has contained a specific grant of authority to prepare income tax returns to anyone who wished to do so. See Circular 230 (rev.), section 10.7(c), 1985-2 C.B. 742 (1985).

<sup>5</sup>*Loving v. IRS*, 917 F. Supp.2d 67, 81 (D.D.C. 2013), *on appeal*, No. 13-5061 (D.C. Cir.). See District Court's Order dated January 18, 2013 ("Defendants lack statutory authority to enforce the new regulatory scheme for 'registered tax return preparers' created by 76 Fed. Reg. 32,286 . . . Defendants are permanently enjoined from enforcing such scheme."). Note that the 2011 regulations in question, *i.e.*, those issued by the Treasury to regulate the tax return preparation conduct of unregulated commercial preparers, may be found at 76 Fed. Reg. 32,286 (June 3, 2011).

<sup>1</sup>2012 IRS Data Book, Table 2, Col. 2.

<sup>2</sup>See Nina E. Olson, "More Than a 'Mere' Preparer: *Loving* and Return Preparation," *Tax Notes*, May 13, 2013, p. 767, 769, cites data from the IRS Compliance Data Warehouse, *Individual Returns Transaction File and Return Preparers Database* (Tax Year 2011), which I have been unable to access, to indicate that 78,088,554 returns (or more than 54 percent of the 143.6 million returns) were prepared by paid preparers.

statutory authority that enables the IRS to regulate the conduct of tax practitioners under Circular 230.<sup>6</sup> The statutory authority for Circular 230 is an 1884 statute passed almost 130 years ago.<sup>7</sup> The 1884 language was re-codified in 1982 as Section 330 of Title 31 of the United States Code, but the legislative history makes it clear there was no intention to change the meaning of the 1884 statute at the time of the 1982 re-codification.<sup>8</sup>

After reviewing the language of the original 1884 statute and that of the 1982 re-codification, the District Court in *Loving* held that Congress intended to draw a bright line between the authority of the IRS to regulate, on the one hand, the conduct of tax practitioners who advise and assist taxpayers in preparing their tax returns to be filed with the IRS and, on the other hand, the conduct of tax practitioners who advise and assist taxpayers in dealing with the IRS on return-related issues after the returns are filed. The court held that the IRS has authority to regulate the conduct of tax practitioners who defend positions taken in returns after the returns are filed but the IRS has no authority to regulate the conduct of unregulated commercial preparers who prepare the returns taking such positions before the returns are filed.<sup>9</sup>

The 1884 statute was a rider on an annual appropriations bill to fund the War Department. The rider reflected Congressional concerns about the unscrupulous conduct of representatives that were soliciting, advising, and assisting soldiers who were making claims against the Treasury Department for compensation for back pay or for lost property after the Civil War. Specifically, the Congress was worried about unreasonable fees being charged to soldiers by the attorneys, claims agents, and other persons. The 1884 rider gave the Secretary of the Treasury authority to prescribe rules to regulate the conduct of representatives of the claimants before the Treasury.<sup>10</sup>

The concerns expressed in passing the 1884 rider piqued my curiosity because out of the 143.6 million individual income tax returns filed in 2011, about 80 percent involved claims by taxpayers for

refunds.<sup>11</sup> About 80 percent of the annual returns prepared by paid preparers (regulated and unregulated) in 2011 also involved refund claims.<sup>12</sup> If Congress in 1884 was worried about regulating the conduct of those assisting claimants who were pursuing Civil War claims against the Treasury, I was curious why the District Court in *Loving* felt that Congress, when it re-codified the law in 1982, would be any less concerned about the IRS regulating the conduct of unregulated commercial preparers who were preparing taxpayers' returns that sometimes claimed excessively high refunds as a result of incompetent or fraudulent tax advice for which taxpayers often were charged unreasonably high fees.<sup>13</sup>

I realized, of course, that about 20 percent of taxpayers annually file balance due income tax returns instead of refund returns. Over the last forty years, the non-stop changes in, and the enormous complexity of, our tax laws have driven more and more taxpayers to use preparers to assist them in properly filing their returns. Over the same period, tax shelters and other overly aggressive tax planning transactions have made the IRS regulation of return preparation much more important to deter tax non-compliance. These trends are well known. The point is that return preparers can help taxpayers claim all the tax benefits to which they lawfully are entitled, or return preparers can help taxpayers claim tax benefits to which they are not entitled, regardless of whether taxpayers wind up getting a refund or having to pay a balance due. Therefore, although it is easier to analogize today's tax refund claims to the Civil War claims of the 19th century, it was hard for me to believe a court would conclude that Congress might intend to distinguish between the authority of the IRS to regulate the conduct of

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<sup>11</sup>See Olson, "More than a 'Mere' Preparer: *Loving* and Return Preparation," *Tax Notes*, May 13, 2013, p. 767, 776, n. 78, citing data from the *IRS Compliance Data Warehouse, Individual Returns Transaction File* (Tax Year 2011).

<sup>12</sup>*Id.* at page 776, footnote 79.

<sup>13</sup>See, for example, the consumer protection concerns over incompetent and even fraudulent conduct of some unregulated commercial tax return preparers expressed in the Brief for *Amici Curiae* National Consumer Law Center and National Community Tax Coalition in Support of Defendant-Appellants and Arguing for Reversal of the District Court, *Loving v. IRS*, No. 13-5061 (D.C. Apr. 5, 2013). The brief also expresses concern about unreasonable tax preparation fees charged to taxpayers by some commercial preparers. For example, the brief at page 6 states that: "low-income consumers face tax preparation fees that are already very high, and inflated, in many instances. Mystery shopper testing, discussed below, has documented preparation fees of \$400 or \$500 in some cases. Government enforcement actions also have revealed fees up to \$1,000 for as little as 15 minutes worth of work."

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<sup>6</sup>*Loving v. IRS*, 917 F. Supp.2d 67, 74-75 (D.D.C. 2013).

<sup>7</sup>Act of July 7, 1884, ch. 334, 28 Stat. 236, 258-259 (1884).

<sup>8</sup>H.R. Rep. No. 651, 97th Cong., 2d Sess. 19 (1982).

<sup>9</sup>*Loving v. IRS*, 917 F. Supp.2d 67, 75, and 79 (D.D.C. 2013), *on appeal*, No. 13-5061 (D.C. Cir.) ("Congress could well desire that those who represent taxpayers in examinations or appeals be more closely regulated than those who merely prepare returns. . . . [T]he Court concludes that together the statutory text and context unambiguously foreclose the IRS's interpretation of 31 U.S.C. section 330.").

<sup>10</sup>See the debate and floor statements in House of Representatives for a further discussion of the background of the 1884 rider, at 48 Cong. Rec. H5219-H5222 (June 16, 1884).

tax return preparers, depending upon whether the returns they prepared were refund or balance due returns.

As I helped prepare an amicus brief of former IRS Commissioners supporting the government's position on appeal in the *Loving* case,<sup>14</sup> I reviewed the District Court's decision as well as the appellate briefs of the various parties.<sup>15</sup> I was impressed by the remarkable abilities of the District Court and the various advocates to carefully parse, and reach differing conclusions about, the meaning of statutory phrases in Section 330 of Title 31 of the U.S. Code.<sup>16</sup> The statute in section 330(a)(1) gives the Treasury the authority "to regulate the practice of representatives of persons before the Department of Treasury," and section 330(a)(2)(D) also gives the Treasury the authority to require the representatives to demonstrate "competency to advise and assist persons in presenting their cases."

The government in the *Loving* case found ambiguity in the scope of the Treasury's authority under section 330(a) because the phrase authorizing the Treasury to "regulate the practice of representatives" did not define what constituted "the practice of representatives."<sup>17</sup> The District Court, however, found certainty in the scope of the Treasury's authority under section 330(a) because the District Court interpreted the grant of authority to "regulate the practice of representatives of persons before the Department of the Treasury" in conjunction with the Treasury's authority to determine the represen-

tative's "competency to advise and assist persons in presenting their cases" to conclude that Treasury's authority was limited to regulating the conduct of representatives who were actually appearing before the IRS to defend taxpayers' positions before the IRS Examination and Appeals functions.<sup>18</sup> Therefore, the District Court concluded that the preparation of tax returns by commercial preparers did not involve either the presentation of taxpayers' "cases" or the "practice of representatives" before Treasury.<sup>19</sup>

It is these specific conclusions of the District Court with which I disagree. They seem to me to fail to properly apply the relevant statutory language, legislative history, and Congressional intent in light of the changes that have occurred in the tax law, in tax administration, and in the representation of taxpayers not only over the last 130 years but even over the last 30 years since 31 U.S.C. section 330 re-codified the original 1884 statute.

The conclusion that tax return preparers do not present taxpayers' cases to the IRS when they prepare tax returns is simply not true, based on my experience over the last fifty years.<sup>20</sup> A return preparer presents a taxpayer's case each time the preparer makes specific decisions about how to reflect the taxpayer's income, deductions, exemptions, and credits on the taxpayer's return,<sup>21</sup> or how

<sup>14</sup>Brief of *Amici Curiae* Former Commissioners of Internal Revenue in Support of Defendant Appellants, *Loving v. IRS*, No. 13-061 (D.C. Apr. 5, 2013).

<sup>15</sup>Brief for Appellants, *Loving v. IRS*, No. 13-5061 (D.C. Mar. 29, 2013); Brief of Appellees, *Loving v. IRS*, No. 13-5061 (D.C. May 17, 2013); Brief of Rhonda Gordon, Dennis Tafelski, Jason Dinsen, Christine Engel, Russell Fox, Joe Kristan, Richard Schiveley, and The Tax Foundation as *Amici Curiae* in Support of Plaintiffs-Appellees, *Loving v. IRS*, No. 13-5061 (D.C. May 24, 2013); Reply Brief for Appellants, *Loving v. IRS*, No. 13-5061 (D.C. June 5, 2013).

<sup>16</sup>31 U.S.C. section 330(a) provides:

a. Subject to section 500 of title 5, the Secretary of the Treasury may —

1. regulate the practice of representatives of persons before the Department of the Treasury; and
2. before admitting a representative to practice, require that the representative demonstrate —
  - A. good character;
  - B. good reputation;
  - C. necessary qualifications to enable the representative to provide to persons valuable service; and
  - D. competency to advise and assist persons in presenting their cases.

<sup>17</sup>Brief for Appellants, *Loving v. IRS*, No. 13-5061, at pages 37-42 (D.C. May 24, 2013).

<sup>18</sup>*Loving v. IRS*, 917 F. Supp.2d 67, 74-75 (D.D.C. 2013), *on appeal*, No. 13-5061 (D.C. Cir.).

<sup>19</sup>*Id.*

<sup>20</sup>A principal reason many, if not most, taxpayers use return preparers is to obtain the benefit of an experienced professional who can advise the taxpayer about how much tax must be paid, how such amount can legitimately be minimized, how any tax risks can be minimized, and how the return can be prepared in order to most effectively reflect the foregoing advice and assistance (i.e., to present the taxpayer's case).

<sup>21</sup>Examples of advice and assistance preparers provide to taxpayers in preparing their returns to minimize the possibility of IRS confusion and resulting incorrect adjustments to the returns include: (1) advice about when and how to report income items for which the taxpayer has received a Form 1099 from a payor (or to reflect deductions for which the taxpayer has received a Form 1098 from a payee) in order to avoid or minimize adjustments that otherwise could be triggered by innocuous differences in descriptions when IRS matches the income items reported to IRS by the payors (or the deduction items reported to the IRS by the payees) against such items reported in the taxpayer's return (See generally, Saltzman, Saltzman, and Stanislaw, "IRS Procedural Forms and Analysis," *Thomson Reuters*, paragraphs 4.06[10] and [11] (2013); see also, the cases cited in footnote 42, *infra*); (2) advice about whether to claim and how to document deductions for cash charitable contributions in excess of \$250 (see section 170(f)(8) of Internal Revenue Code of 1986, as amended) and for non-cash charitable contributions in excess of \$500 (see section 170(f)(11)(A)(i) of IRC) in order to minimize or avoid subsequent IRS audits (or

(Footnote continued on next page.)

to present tax benefits and the effects of tax planning transactions in the return,<sup>22</sup> or when and how to make disclosures in tax returns to minimize or avoid penalties,<sup>23</sup> or when and how to file amended tax returns to correct errors in previously filed returns.<sup>24</sup> These are just a few examples of the key roles played by return preparers in presenting the cases of taxpayers to the IRS.<sup>25</sup> Indeed, the failure of a preparer to properly present a taxpayer's case in the preparation of the tax return can be grounds for malpractice.<sup>26</sup>

One of the biggest changes in the Federal tax area during the last twenty-five years has been the increasing number of socio-economic spending programs that have been run through the Internal Revenue Code.<sup>27</sup> The economists have convinced the politicians that the most cost-efficient way to deliver the benefits of these programs is through the use of tax credits, many of them refundable credits. I and other former IRS Commissioners, in helping to prepare our amicus brief to the D.C. Circuit Court of Appeals, decided to exemplify how tax return preparation enables taxpayers to make their cases to qualify for and obtain refunds attributable to these

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adjustments during such audits) of these items; and (3) advice and assistance to low income taxpayers about whether and how to appropriately claim, and to reflect such claim of, earned income tax credits to minimize the risk of later IRS adjustments (see reg. section 1.6695-2(b)).

<sup>22</sup>Because of the inherent uncertainty and complexity of the tax laws and because each taxpayer's circumstances and appetite for tax risk may vary, the extent and type of the return preparer's advice and assistance to taxpayers may vary, as may the amounts and the presentation of the items of income, deductions, exemptions, and credits reflected on each taxpayer's return. Knowing when and how to use schedules and statements in a tax return to best and most effectively present a taxpayer's case to support the positions taken on these tax benefits in the return is part of the art of tax return preparation.

<sup>23</sup>An individual can be penalized for a substantial understatement of the individual's income tax liability, and the amount of such penalty can equal 20 percent (or more) of the amount of the understatement. See section 6662(a) and (b)(2) of IRC. Under certain circumstances, however, a proper disclosure in the individual taxpayer's return may be sufficient to avoid the penalty. See section 6662(d)(2)(B)(ii) of IRC.

<sup>24</sup>See Wolfman, Holden, and Harris, *Standards of Tax Practice*, section 207.4 at pp. 120-130 (6th Ed. 2004) (discussing various considerations a preparer should take into account in advising a taxpayer whether or not to prepare and file an amended return).

<sup>25</sup>For additional examples, see Olson, "More Than A Mere Preparer: *Loving* and Return Preparation," *Tax Notes*, May 13, 2013, p. 767, 771-773.

<sup>26</sup>Routh, "Liabilities of Tax Preparers: An Overview," 13 *Cap. Univ. L. Rev.* 479, 517-519 (1984) (discussing theories in tort and contract law under which return preparers may be held liable for failing to properly advise and assist taxpayers in preparing their tax returns).

<sup>27</sup>See Gibbs, "Great Plains Federal Tax Institute: 50th Anniversary Dinner in Omaha, Nebraska on November 29, 2012" 46 *Creighton Law Review* 139, 144-147 (2013).

tax credits. The District Court in *Loving* had concluded that "filing a tax return would never, in normal usage, be described as 'presenting a case.'" <sup>28</sup>The former Commissioners disagreed. We explained refundable credits attributable to government assistance programs being run through the Internal Revenue Code, such as assistance for low income families, health care, education, and homebuyers.<sup>29</sup> We demonstrated why and how preparing a tax return is the best means to enable a taxpayer to qualify for the benefits under these programs and to obtain a refund from the IRS.<sup>30</sup> We argued that a preparer who advises and assists a taxpayer to obtain these financial assistance benefits by preparing the taxpayer's return for that purpose is representing the taxpayer in making the taxpayer's case to the IRS, which qualifies the preparer as a "representative" within the meaning of 31 U.S.C. section 330.<sup>31</sup>

The term, "representative," has become a focal point of the plaintiffs and some of the commentators who have weighed in on the District Court's decision in *Loving*.<sup>32</sup> They have pointed to dictionary definitions of "representative" as an agent who "stands for or acts on behalf of another." They have insisted that a preparer cannot qualify as a representative of a taxpayer because the preparer can never act as an agent for the taxpayer to sign the taxpayer's return on the taxpayer's behalf. Therefore, they argue, preparers cannot be "representatives of persons before the . . . Treasury" within the meaning of section 330(a).<sup>33</sup> I have no quarrel with the definition of a representative as someone who acts on behalf of another, but I disagree that the preparer must act as the agent for the taxpayer in a principal-agent relationship in order to be considered a "representative" for purposes of section 330(a). Let me explain why I disagree by comparing an attorney's preparation of a will for a client with a preparer's preparation of a tax return for a taxpayer.

The client could prepare his or her own will, but because of the importance of the will and the complexities involved, clients often choose to use

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<sup>28</sup>*Loving v. IRS*, 917 F. Supp.2d 67, 75 (D.C.C. 2013), *on appeal*, No. 13-5061 (D.C. Cir.).

<sup>29</sup>See Brief of *Amici Curiae* Former Commissioners of Internal Revenue in Support of Defendant-Appellants, *Loving v. IRS*, No. 13-5061 at pages 3-7 (D.C. Apr. 5, 2013).

<sup>30</sup>*Id.* at pages 7-9.

<sup>31</sup>*Id.* at pages 12-16.

<sup>32</sup>See Brief of Appellees, *Loving v. IRS*, No. 13-5061, at page 37 (D.C. May 17, 2013); see also, Bryan T. Camp, "'Loving' Return Preparation Regulation," *Tax Notes*, July 29, 2013, p. 457, 466-468; Johnson, "*Loving* and Legitimacy: IRS Regulation of Tax Return Preparation," \_\_\_ *Villanova L. Rev.* \_\_\_, \_\_\_ (2013).

<sup>33</sup>*Id.*

an attorney to prepare their wills. The attorney reviews, among other things, the client's assets and liabilities and determines the client's objectives at the time of the client's death. Then the attorney advises the client about ways to accomplish the client's objectives, including ways to lawfully minimize taxes payable at the client's death. Once the attorney understands the client's objectives, the attorney prepares the will on the client's behalf to reflect the client's choices and to accomplish the client's objectives. The client must sign the will because signing the will is a non-delegable duty of the client.

Similarly, a taxpayer could prepare his or her own income tax return, but because of the importance and complexities involved, many taxpayers choose to use a preparer to prepare their returns. The preparer reviews the taxpayer's income and expenses and other circumstances and determines the taxpayer's objectives in filing the return. Then the preparer advises the taxpayer about ways to accomplish the taxpayer's objectives, including ways to either minimize the tax payable or obtain a refund. Once the preparer understands the taxpayer's objectives, the preparer prepares the return on the taxpayer's behalf to reflect the taxpayer's choices and to accomplish the taxpayer's objectives. The taxpayer must sign the return because signing the return is a non-delegable duty of the taxpayer.

Surely, the attorney is reasonably viewed as having represented the client in advising, assisting, and preparing the client's will on the client's behalf, and I submit that the preparer also may be reasonably viewed as having represented the taxpayer in advising, assisting, and preparing the taxpayer's income tax return on the taxpayer's behalf. No principal-agent relationship was established because none was needed to enable the representation to occur.

Finally, in recognition of the importance the tax return preparer plays in the presentation of the taxpayer's case in the tax return, the IRS now specifically permits taxpayers on the face of the Form 1040 income tax return to express a desire, when the return is filed, for the preparer to continue to represent the taxpayer before the IRS after the return is filed with regard to the information provided on the tax return.<sup>34</sup> Importantly, the most recent data available from the IRS indicate that

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<sup>34</sup>On page 2 of the Form 1040 U.S. Individual Income Tax Return, right above the line for the taxpayer's signature, each taxpayer may check a "Yes" box and provide a preparer's name, telephone number, and personal identification number in order to authorize the preparer to "discuss this return with the IRS." The instructions to the Form 1040 state: "If you check the "Yes" box, you, and your spouse if filing a joint return, are authorizing (Footnote continued in next column.)"

more than two-thirds of the taxpayers who use return preparers authorize their preparers to continue to represent them before the IRS to discuss any questions the IRS may raise about the return information during the processing of the return by the IRS.<sup>35</sup> The large number of commercial preparer returns containing preparer authorizations suggests that substantially all unregulated commercial return preparers are authorized by at least some, if not many, of their clients to represent the clients before the IRS after the returns are filed with the IRS.<sup>36</sup>

Bearing all of the foregoing in mind, it is hard to believe the Treasury in 1884 would have concluded that anyone advising and assisting a claimant in the preparation and submission of a Civil War claim would be exempt from regulation simply because the representative did not make an actual appearance before Treasury, especially if the representative unscrupulously collected a fee to pursue the claim and then failed or refused to follow up with Treasury after the initial claim was filed. On the other hand, if the representative did such a good job in preparing and submitting the claim that the Treasury paid the claim, as submitted and without requiring any actual appearance, it would seem

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the IRS to call the designee to answer any questions that may arise during the processing of your return." See *1040 Instructions 2012* at page 77 (Jan. 18, 2013).

<sup>35</sup>For the tax year 2010 taxpayers filing 81,107,021 individual income tax returns authorized 57,491,941 paid preparers (regulated and unregulated) to act on their behalf before the IRS during the processing of the returns after the returns were filed with the IRS. See "2010 Estimated Data Lines Counts Individual Income Tax Returns," available at <http://www.irs.gov/pub/irs-soi/10inlinecount.pdf> at page 15 (rev. 11-2112). Although taxpayers are permitted to designate family members, friends, or others to act on their behalf, I understand from my discussions with the IRS that substantially all of the authorizations are believed to be preparer related. Therefore, it would appear that between 66.6 percent and 71 percent of the paid-preparer returns contain such authorizations.

<sup>36</sup>It has been estimated that 600,000 to 700,000 unregulated commercial preparers are affected by the provisions of the 2011 regulations. See Brief for Appellees, *Loving v. IRS*, No. 13-5061 (D.C. May 17, 2013) at pp. 13-14 ("The IRS originally estimated that 600,000 to 700,000 tax preparers would be subject to the licensing scheme."). Assuming that almost 44 million returns were prepared by unregulated commercial preparers in 2010 (i.e., by applying the 54 percent in footnote 3, *supra*, to the 81,107,021 returns prepared by paid preparers to determine the approximate number of returns prepared by unregulated commercial preparers in 2010), and assuming that two-thirds of the 44 million returns contained preparer authorizations, the result would be that, in more than 29 million returns prepared by unregulated commercial preparers, taxpayers authorized such preparers to act on their behalf before the IRS during the processing of the returns after the returns are filed. That would result in, on average, about 41 to 48 returns prepared by each unregulated commercial tax return preparer that contained such preparer authorizations.



strange that anyone would suggest that the representative had not represented the claimant before Treasury in obtaining the compensatory payment.<sup>37</sup>

I see no difference between such a situation in 1884 and a situation today in which a preparer advises and assists a taxpayer with regard to the information to be provided on an income tax return concerning the amount of income to be reported and the tax benefits in the form of personal exemptions, deductions, and credits to be claimed, which either result in a refund or reduce the balance due the taxpayer must pay. When a preparer reflects such advice in the manner in which the preparer presents these tax items in the taxpayer's return and when, on the face of the return, the preparer identifies himself or herself by name, address, telephone number, and PIN number as the person who has represented the taxpayer in preparing the return, knowing the return will be filed with the IRS, I submit that all of these combined actions should be sufficient to cause the preparer to be considered as being engaged "in the practice of representing persons before the Department of the Treasury" within the meaning of the provisions of section 330(a).

If, in addition, the taxpayer authorizes the IRS to discuss with the preparer on the taxpayer's behalf any questions the IRS may have about the information in the return after it is filed, I submit that not only has the preparer represented the taxpayer in presenting the taxpayer's initial case to the IRS in the tax return but also, because of the specific authorization made by the taxpayer, the preparer has made an initial appearance, on behalf of the taxpayer, before the IRS to answer questions and, if necessary, to explain and defend the accuracy of the return information when the IRS processes the return after it is filed.<sup>38</sup> Therefore, such actions should be sufficient under the 1884 statute and under 31 U.S.C. section 330 to enable a court to

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<sup>37</sup>The legislative history to the 1884 statute makes reference to "applications" to be submitted by claimants to the Treasury Department. See Clerk's statement of proposed legislation, 48 Cong. Record H5219 (June 16, 1884) ("This act shall apply to pending as well as all future applications for horses, bounty, and arrears of pay.") Although there are references in the legislative history of the 1884 statute and in the related literature to appearances before Treasury as a characteristic activity of claimants and their advisors, I have been unable to find anything that suggests that a personal appearance by a claimant or a claimant's representative before Treasury was actually required.

<sup>38</sup>I submit there is little or no substantive legal difference between the authorization by the taxpayer on page 2 of Form 1040 tax return for the preparer to represent the taxpayer before the IRS during the processing of the tax return and a later authorization by the taxpayer in a power of attorney for the preparer to represent the taxpayer in an IRS audit of the tax

conclude that the promulgation by the IRS of the 2011 regulations under Circular 230 to regulate the return preparation conduct of previously unregulated commercial preparers constituted an authorized regulation of "the practice of representatives of persons before the Department of the Treasury."<sup>39</sup>

That a return preparer is so authorized to represent a taxpayer in dealing with the IRS during the processing of the taxpayer's return by the IRS is significant. The IRS National Taxpayer Advocate, Nina Olson, in her excellent recent article has provided a detailed description of the many different ways the IRS may engage a return preparer in adversarial discussions about the accuracy of the taxpayer's return during the time the IRS is processing a taxpayer's return and before the IRS Examination function opens a formal audit of the return.<sup>40</sup> For example, section 6213(g) provides the IRS with authority to summarily assess tax with respect to

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return pursuant to Rev. Proc. 81-38, 1981-1 C.B. 386 (1981). See also, Circular 230, section 10.3(f)(3), 76 Fed. Reg. 32,286 (June 3, 2011).

<sup>39</sup>The plaintiffs in the *Loving* case have made a variety of other arguments to the contrary in their appeal to the Court of Appeals for the District of Columbia Circuit. They have argued that the attempted regulation of the conduct of commercial tax return preparers in the 2011 regulations either conflicts with or renders superfluous other specific statutes in the IRC. See Appellees Brief, *Loving v. IRS*, No. 13-5061, pp. 39-49 (D.D.C. May 17, 2013). The IRS response has been that these other statutes were enacted for different purposes and are not inconsistent with the authority of the IRS under Circular 230 to regulate commercial return preparers. See Appellants Reply Brief, *Loving v. IRS*, No. 13-5061, pp. 16-23 (D.D.C. June 5, 2013). The plaintiffs also argue that prior statements by the IRS to the effect that the IRS lacked the authority to regulate the conduct of commercial return preparers are inconsistent with and undercut the authority asserted by the IRS in the 2011 regulations. See Appellees Brief, *Loving v. IRS*, No. 13-5061, pp. 57-59 (D.C. May 17, 2013). The IRS response has been that these prior statements were either legally incorrect or were policy statements made before the IRS decided to exercise its authority to regulate such conduct. See Appellants Reply Brief, *Loving v. IRS*, No. 13-5061, pp. 27-30 (D.C. June 5, 2013). As Professor Bryan Camp has explained at length, the relevant IRS policies in this area have changed greatly over the last 92 years since Circular 230 was initially promulgated as the role and importance of tax return preparers have changed. See Camp, "'Loving' Return Preparer Regulation," *Tax Notes*, July 29, 2013, p. 457, 457-466. Finally, the plaintiffs have argued that various Congressional proposals to authorize the IRS to regulate commercial return preparers indicate that Congress did not believe it previously had granted the IRS authority to regulate commercial preparers. See Appellees Brief, *Loving v. IRS*, No. 13-5061, pp. 55-57 (D.C. May 17, 2013). The IRS response has been to rely on the authority cited by the *Loving* District Court in refusing to base its holding in any way on such failures and on other authority to the same effect. See Appellants Reply Brief, *Loving v. IRS*, No. 13-5061, pp. 26-27 (D.C. June 5, 2013).

<sup>40</sup>Olson, "More Than a 'Mere' Preparer: *Loving* and Return Preparation," *Tax Notes*, May 13, 2013, p. 767, 773-775.

(Footnote continued in next column.)

certain tax return related items that the IRS considers to be erroneous.<sup>41</sup> The IRS document matching program under which the IRS matches Forms 1099 received from certain third-party payors with amounts to be reported as income on taxpayer-payees' returns has led to litigation in which courts have upheld the right of the taxpayer-payee to overcome the presumption of correctness that normally attaches to amounts reflected on the payor's Form 1099.<sup>42</sup> There have been reports that the IRS is using its authority under section 6213(g) to summarize assess tax on income reported by a payor on a Form 1099 that is not reported on a taxpayer-payee's return.<sup>43</sup> The advice and assistance of the return preparer with respect to such income items during the return preparation process and during the processing of a taxpayer's return can be important to minimize the time and expense of extended administrative hassles with the IRS and to avoid litigation in these situations.

In any event, based upon the analysis, arguments, and interpretations presented above, I submit that the meaning of the key statutory phrase of section 330(a), "the practice of representatives of persons before the Department of the Treasury," is fairly susceptible to more than one interpretation

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<sup>41</sup>See section 6213(g) of IRC.

<sup>42</sup>See *Portillo v. Commissioner*, 932 F.2d 1128 (5th Cir. 1991); *Santa Maria v. Commissioner*, 68 T.C.M. 1468, 1472-73 (1994). See also section 6201(d) of IRC.

<sup>43</sup>See Amy S. Elliott, "Practitioners Plan to Challenge IRS on Math Error Exception," *Tax Notes*, Jan. 31, 2011, p. 515. A preparer may be able to persuade the IRS not to make an erroneous assessment if the IRS contacts the preparer by telephone before making the assessment, or if an assessment already has been made, the preparer may request an abatement of the assessment pursuant to the provisions of section 6404(a)(1) of IRC. See Olson, "More Than A 'Mere' Preparer: *Loving* and Return Preparation," *Tax Notes*, May 13, 2013, p. 767, 773 ("For the 2012 filing season, the IRS issued 2,042,458 math error notices for individual returns. About 10 percent of the amounts assessed were later abated.").

and, therefore, is ambiguous. Any such ambiguity would appear to make the government's position and argument in the *Loving* case credible and persuasive. The government on appeal in the *Loving* case has argued that:

Under *Chevron*, unless Congress has spoken to the precise issue presented, an agency's regulation is valid if the regulation fills a statutory gap, or defines a term, in a reasonable fashion. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecomms. Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 980 (2005). As demonstrated below, the critical statutory term in 31 U.S.C. section 330(a)(1), *i.e.*, "practice of representatives of persons before the Department of the Treasury" is ambiguous and therefore is a proper subject for interpretation by the Secretary of the Treasury.<sup>44</sup>

The District Court in the *Loving* case rejected the government's above argument on the basis that the plain meaning of the words in the critical phrase of section 330(a)(1), *i.e.*, "practice of representatives of persons before the Department of the Treasury," was clear and unambiguous. Based on my above analysis, I respectfully submit that the meaning of the words in the critical phrase is fairly susceptible to more than one interpretation and therefore is unclear and ambiguous. For that reason, I believe the 2011 regulations of the Treasury regulating the tax return preparation conduct of commercial preparers are authoritative and should be upheld.

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<sup>44</sup>Brief of Appellants, *Loving v. IRS*, No. 13-5061, at page 36 (D.C. Mar. 29, 2013).