

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADAM STEELE, et al.,)	
)	Case No. 1:14-cv-1523-RCL
Plaintiff,)	
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

**REPLY IN SUPPORT OF THE UNITED STATES’ MOTION FOR PARTIAL
SUMMARY JUDGMENT**

The parties have cross-moved for summary judgment regarding whether the Service has “legal authority to charge a fee for the issuance and renewal of a PTIN.” (Am. Compl., Count I, ¶39 (Doc. 41).) In its motion, the United States established that the requirements that all tax return preparers obtain and use a PTIN (the “PTIN Requirement”) and pay the PTIN User Fee are lawful, because they were authorized by Congress under 26 U.S.C. § 6109 and 31 U.S.C. § 9701 respectively. (Doc. 66-1.)

Plaintiffs pitch their opposition as answering a different question, namely “whether the IRS’s collection of PTIN fees – an integral part of its unprecedented effort to impose eligibility requirements on tax-return preparers – is lawful in light of the D.C. Circuit’s invalidation of those requirements in *Loving v. IRS*, 742 F.3d 1014 (D.C. Cir. 2014).” (Doc. 70 at 1.) Their entire opposition, just like their motion for summary judgment, is predicated on their mistaken belief that the PTIN Requirement and PTIN User Fee are part and parcel of the regulations aimed at *uncredentialed* tax return

preparers struck down in *Loving* (the “RTRP Program”). The PTIN Requirement and PTIN User Fee, which apply to all tax return preparers, exist independently from the regulations at issue in *Loving*. (See Doc. 69 at 11-16.) By fixating on *Loving*, plaintiffs fail to address the congressional authority justifying the PTIN Requirement and PTIN User Fee. The United States’ motion should therefore be granted.

Both the D.C. Circuit and District Court opinions in *Loving* held that the Service could not rely upon 31 U.S.C. § 330 to require *uncredentialed* tax return preparers to demonstrate competence through testing and continuing education. See *Loving v. I.R.S.*, 742 F.3d 1013, 1015 (D.C. Cir. 2014)¹; 917 F. Supp. 2d 67, 69 (D.D.C. 2013) (same). The D.C. Circuit did not address the PTIN Requirement or the PTIN User Fee. This is unsurprising given that the District Court, in denying a stay pending appeal, held that the PTIN Requirement and User Fee were unaffected by its ruling because “Congress has *specifically authorized* the PTIN scheme by statute.” *Loving*, 920 F. Supp. 2d 108, 109 (D.D.C. 2013) (emphasis added) (citing 26 U.S.C. § 6109(a)(4)). In other words, the *Loving* court already ruled that its opinion has no effect on the PTIN Requirement.

Despite the fact that *Loving* had nothing to do with the PTIN Requirement or PTIN User Fee, plaintiffs insist that *Loving* stands for the proposition that the Service

¹ The D.C. Circuit uses the term “tax-return preparers” to refer to those individuals covered by the RTRP Program. See *id.* As discussed in the United States’ opposition, the RTRP Program applied only to uncredentialed tax return preparers and specifically exempted attorneys, CPAs, and Enrolled Agents. (See Doc. 69 at 7-9.) For clarity, the term “uncredentialed tax return preparers” is coextensive with the D.C. Circuit’s use of “tax-return preparers” as those other than attorneys, CPAs, and Enrolled Agents.

may not rely upon any statutory authority to impose a “licensing requirement” upon tax return preparers. (See Doc. 70 at 3 (“Because the IRS lacks licensing authority, it has no power to confer ‘the ability to prepare tax returns and refund claims for compensation.’” (quoting Doc. 66-1 at 1).) Plaintiffs make the extraordinary claim that “[i]f someone violates [section 6109(a)(4)], the IRS has *no authority* to prevent them from preparing returns for others, and it is not unlawful for them to prepare returns for others.” (Doc. 70 at 8 (emphasis in original).) Although plaintiffs acknowledge failure to furnish the required identifying number would subject individuals to a \$50 per return penalty, they argue that the penalty “would be assessed for failing to disclose the number – not for the unauthorized filing of returns.”² (*Id.* at 9.) But the District Court in *Loving* states that the Service has authority to penalize tax return preparers for improper and erroneous returns (26 U.S.C. §§ 6694, 6695) and to seek to enjoin such conduct in the future (26 U.S.C. §§ 7404, 7408). See *Loving*, 917 F. Supp. at 75-79.

As a general matter, the Service is authorized “to charge for services which assist a person in complying with his statutory duties.” *Elec. Indus Ass’n v. FCC*, 554 F.2d 1109, 1115 (D.C. Cir. 1976). Plaintiffs argue that *Electrical Industries* does not apply to the PTIN Requirement because they contend it is a regulatory rather than statutory requirement. (Doc. 70 at 6.) Under plaintiffs’ view, section 6109(a)(4) is not a

² This contention is akin to arguing that carrying a valid driver’s license on your person while driving is not a legal requirement. While the legal requirements to obtain a license in order to drive and to carry it when driving are similar, they are not the same. However, both obtaining a license and carrying it *are legal requirements*.

“substantive condition on who may prepare tax returns on behalf of others for compensation.” (*Id.* at 5.) Plaintiffs’ argument misapprehends the necessary import of the congressional authority provided in section 6109(a)(4), as well as sections 6695(c) and 7407, which penalize individuals who fail to comply with section 6109(a)(4).

By mandating that any return or claim for refund prepared by a tax return preparer bear an identifying number, Congress made clear that only those individuals who furnish the required identifying number are lawfully entitled to prepare tax returns and refund claims for compensation. To enforce this provision, Congress authorized the assessment of a \$50 penalty per return, up to a maximum of \$25,000 per year, for failure to comply with section 6109(a)(4). *See* 26 U.S.C. § 6695(c). In addition, Congress authorized the United States to bring suits for an injunction against a tax return preparer who “engaged in any conduct subject to penalty under section 6694 or 6695.” 26 U.S.C. § 7407(a), (b)(1)(A). Furnishing the required number, therefore, is a statutory duty of all tax return preparers. *See Elec. Indus Ass’n*, 554 F.2d at 1115.

Congress also authorized the Service to require an identifying number other than an SSN through regulations. *See* 26 U.S.C. § 6109(d). Congress specifically granted regulatory authority to the Service to specify the required number. The Service exercised that authority and required the use of a PTIN as the exclusive identifying number under section 6109(a)(4). An individual who fails to obtain and use a PTIN, yet continues to prepare tax returns and refund claims for others for compensation, may be prohibited from acting as a tax return preparer. *See* 26 U.S.C. § 7407(b)(2). The PTIN Requirement, therefore, is a congressionally-authorized, statutory requirement.

Once that predicate is established, the PTIN User Fee is justified under 31 U.S.C. § 9701 because the PTIN provides specific individuals with a “service or thing of value,” namely the ability to prepare tax returns and refund claims for others for compensation. Without a PTIN, a tax return preparer cannot comply with his or her statutory duties under section 6109(a)(4).³ The Service may charge a fee to assist individuals with complying with such statutory duties. *See Elec. Indus Ass’n*, 554 F.2d at 1115. The fact that the Service did not previously charge any fee is irrelevant. *See Jesse E. Brannen, III, P.C. v. United States*, 682 F.3d 1316, 1319-20 (11th Cir. 2012) (stating that there is nothing in the language or logic of section 9701 that requires a user fee to be charged “at the first moment that Congress confers the authority,” or prohibits an agency from implementing a fee for services that it had previously provided for free).

Finally, plaintiffs inaccurately contend that the Service did not provide any justification for the PTIN Requirement independent from the RTRP Program. (*See* Doc. 70 at 2-3.) The United States’ opposition to plaintiffs’ summary judgment motion contains a detailed summary of the regulations promulgating the PTIN Requirement and PTIN User Fee as well as the justifications provided for each. (*See* Doc. 69 at 3-7.) It was determined that requiring the PTIN as the exclusive identifying number would

³ Even under plaintiffs’ strained reasoning, they cannot contest that absent a PTIN a return preparer could not prepare tax returns and refund claims for others for compensation without incurring section 6695 penalty of \$50 per return, up to a maximum of \$25,000 per year. Nor can they contest that not being subject to such penalties is a benefit or thing of value.

improve tax administration by “allow[ing] the IRS to better identify tax return preparers, centralize information, and effectively administer the rules relating to tax return preparers.” *Furnishing Identifying Number of Tax Return Preparer*, 75 Fed. Reg. 60309-01 (Sept. 30, 2010). In addition, requiring the use of a PTIN “will also benefit taxpayers and tax return preparers and help maintain the confidentiality” of SSNs. *Id.* Both of these justifications have an independent basis from the RTRP Program.

CONCLUSION

In support of its motion for partial summary judgment and in opposition to plaintiffs’ motion, the United States has established that the PTIN Requirement and PTIN User Fee are lawful under 26 U.S.C. § 6109 and 31 U.S.C. § 9701 respectively. Accordingly, this Court should enter partial judgment in favor of the United States and determine that the Service has “legal authority to charge a fee for the issuance and renewal of a PTIN.” (Am. Compl., Count I, ¶39 (Doc. 41).)

Dated: October 27, 2016

Respectfully submitted,

CAROLINE D. CIRAOLO
Principal Deputy Assistant Attorney General,
Tax Division

/s/ Christopher J. Williamson
CHRISTOPHER J. WILLIAMSON
VASSILIKI E. ECONOMIDES
JOSEPH E. HUNSADER
United States Department of Justice
Trial Attorneys, Tax Division
Ben Franklin Station, Post Office Box 227
Washington, D.C. 20044
Tel/Fax: (202) 307-2250/(202) 514-6866
christopher.j.williamson@usdoj.gov

OF COUNSEL

CHANNING D. PHILLIPS
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY IN SUPPORT OF THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT was filed with the Court's ECF system on October 27, 2016, which system serves electronically all filed documents on the same day of filing to all counsel of record including upon:

Allen Buckley
The Law Office of Allen Buckley LLC
2802 Paces Ferry Road
Suite 100-C
Atlanta, GA 30339

William H. Narwold
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103

Nathan D. Finch
Elizabeth Smith
MOTLEY RICE LLC
3333 K Street NW, Suite 450
Washington, DC 20007

Deepak Gupta
Jonathan E. Taylor
Peter Conti-Brown
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009

Christopher S. Rizek
Caplin & Drysdale, Chartered
One Thomas Circle, NW, Suite 1100
Washington, DC 20005

/s/ Christopher J. Williamson
CHRISTOPHER J. WILLIAMSON
Trial Attorney