Gauging the AICPA's Case Against the Filing Season Program

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With the IRS's brief imminent in the appeal of a legal challenge of its voluntary tax return preparer program by the American Institute of CPAs, two practitioners have said they find the AICPA's position compelling.

In *American Institute of Certified Public Accountants v. IRS*, 804 F.3d 1193 (D.D.C. 2016), Judge James E. Boasberg of the U.S. District Court for the District of Columbia granted the IRS's motion for judgment on the pleadings and dismissed the AICPA's suit challenging the annual filing season program under the Administrative Procedure Act (APA). In November 2016 the D.C. Circuit reversed a previous dismissal of the case, finding that the AICPA had standing to bring the case under a competitive standing theory. (*American Institute of Certified Public Accountants v. IRS*, No. 14-5309 (D.C. Cir. 2015).)

The district court had found that while it had standing to sue under Article III of the Constitution, the AICPA failed to show that its interests fall within the "zone of interests" Congress intended to protect by enacting 31 U.S.C. section 330. While zone of interests issues used to bear a "standing" label, the Supreme Court recently distinguished the two concepts in *Lexmark International Inc. v. Static Control Components Inc.*, 134 S.Ct. 1377 (2014). The district court rejected both the competitive interest that the circuit court found justified standing and two other theories the AICPA had previously raised but that the circuit court did not reach, including some AICPA members hiring unenrolled tax return preparers, holding that the AICPA was limited to the competitive interest theory because "the zone-of-interests test may only be satisfied by an extant Article III injury."

The district court found that the interests protected by section 330 are only those of consumers of tax return preparation services and not competing providers of those services. It also rejected the AICPA’s attempt to ground its suit in the APA (specifically 5 U.S.C. section 702) because any interest protected by the APA would actually come from the underlying substantive statute.

In its appellate brief, filed in February, the AICPA argued that the district court was incorrect in holding that the zone of interests that Congress intended to protect by enacting section 330 excluded commercial competitors, citing case law from the Supreme Court and circuit courts, including the D.C. Circuit. It raised not only times when competitive interests have been found to lie within the zone of interests of a statute, but also the Supreme Court’s willingness to insert competitive interests that Congress may not have initially intended.

The IRS’s appellee brief is due April 26.

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said that after reading the AICPA’s appellate
brief, he is now more sympathetic to the institute’s position than he was when the district court issued its opinion. While the voluntary nature of the annual filing season program had seemed important, “the AICPA appellate brief makes a good argument that the voluntariness of the program does not excuse the IRS from needing to have statutory authority to do what they are doing,” he said.

Smith said that the zone of interests question is “awkward” because of the holding in Loving v. IRS that the IRS does not have the authority to regulate tax return preparation under section 330. “How, given that lack of fit, is the AICPA supposed to say that it comes within the zone of interest requirement?” he asked. The AICPA persuasively argues that the benefit conferred on annual filing season program participants places their competitors, including the AICPA, within the zone of interests protected by section 330, he said.

Boasberg, who also wrote the district court opinion in Loving, previously implied his approval of a voluntary program in that litigation concerning a mandatory program and may be protecting the concept, Smith said.

The AICPA also disagreed with the district court’s derogation of its competitive interest as focusing merely on maximizing profits and avoiding competition and pointed out that “‘purely commercial interests routinely satisfy the zone of interests test’ ... precisely because [of the incentive] to police congressional limits on regulation of the marketplaces.”

The brief raises other arguments rejected by the district court, including the arguments that the AICPA can satisfy the zone of interests test either because some of its members employ unenrolled tax return preparers or based on the APA independently of section 330.

Finally, the AICPA asks the D.C. Circuit to rule on the merits of its challenge if the decision is to reverse the district court on the AICPA’s ability to maintain the suit.

Steve R. Johnson of Florida State University College of Law said that the case will likely turn on whether the D.C. Circuit chooses to take a broad view of the zone of interests test, as the AICPA presents, or a narrow view of the issue presented, as the district court emphasized. This dichotomy between broad and narrow points of view will also appear in the D.C. Circuit’s interpretation of its previous opinion in this case and whether the AICPA is limited to only the standing found to exist in the 2015 opinion, he said.

Johnson said that he prefers the AICPA’s position that the case be decided on the merits, but added that “the exercise of prediction is hazardous.” The zone of interests doctrine is one of those manipulable rules that allow judges to avoid or engage some substantive questions, he said.

While it is uncertain whether the D.C. Circuit will choose to take advantage of the flexibility of the zone of interests test, the district court judge may have dismissed the case on a preliminary matter in order to “get rid of the case as easily as possible” once the IRS had followed the suggestion that a voluntary program would be permissible, Johnson said. “I am not saying that the judge was consciously going in that direction, but I am saying that inevitably, our views of matters are affected by our underlying feelings on the substance,” he said.

Johnson added that the Supreme Court’s removal of the standing label from the zone of
interests test in *Lexmark* will present difficulties because of the deep connection between the two concepts, an issue raised by the district court’s limiting of the zone of interests inquiry to the standing explicitly found by the circuit court.

The AICPA’s attempt to base the zone of interest analysis on the APA will not likely be effective because it would make the analysis too broad, Johnson said. “If that argument is right, then [the] zone of interests [test] is essentially dead,” he said.

The National Association of State Boards of Accountancy received permission to file an amicus brief on the matter, in which it takes issue with the district court’s characterization of the AICPA’s competitive interest as “brand dilution” because “CPA” is a statutory title rather than a brand.