UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION



ALLEN BUCKLEY and ALLEN BUCKLEY LLC,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION

NO. 1:13-CV-1701-RLV

O R D E R

In their complaint, the plaintiffs claim that the Department of Treasury and Internal Revenue Service ("IRS") lack statutory authority to charge a user fee for tax return preparers to obtain and renew a preparer tax identification number ("PTIN"). Additionally, the plaintiffs contend that the $50.00 annual user fee-charged to those who prepare returns for compensation-is arbitrary and capricious as well as excessive. This matter comes before the court on the cross-motions for summary judgment filed by the parties [Doc. Nos. 12 and 36].

While the parties have submitted extensive briefs, this court confronts only two legal issues. First, this court must determine whether 26 U.S.C. § 6109(a)(4) permits the United States Treasury Department to issue regulations that assess user fees as well as annual renewal fees associated with PTIN assigned to those who

prepare tax forms for compensation.[1] Second, this court must determine whether the annual renewal fee assessed for renewing one's PTIN number is either arbitrary and capricious or excessive.

According to the plaintiffs, no law allows the United States Treasury Department or the IRS to assess the user fees and associated annual renewal fees in question. Additionally, the plaintiffs argue that the annual fee is either arbitrary and capricious or excessive. Relying upon Loving v. Internal Revenue Service, 2013 U.S. Dist. LEXIS 7980 (D.D.C. Jan. 18, 2013), the plaintiffs argue that this court should strike down what they characterize as improper licensing and annual registration fees assessed against those individuals who prepare taxes for compensation. In contrast, the defendant relies upon the Eleventh Circuit's decision Brannen v. United States, 682 F.3d 1316 (11th Cir. 2012), and argues that the $50.00 annual PTIN user fee is lawful. Moreover, the defendant argues that the Loving decision does not invalidate the PTIN user fee at issue in this case. Lastly, the defendant argues that because the $50.00 annual user fee satisfies all of the statutory requirements and presidential

[1] In relevant part, § 6109(a)(4) states: "Any return or claim for refund prepared by a tax return preparer shall bear such identifying number for securing proper identification of such preparer, his employer, or both, as may be prescribed."

policies, the $50.00 annual fee is neither arbitrary and capricious nor excessive. On all points, the court agrees with the defendant.

As a preliminary matter, the court notes that the Eleventh Circuit in Brannen v. United States, 682 F.3d 1316 (11th Cir. 2012), held that the regulation imposing a user fee to obtain a PTIN passed constitutional muster for the reasons set forth on pages 8-11 of the defendant's motion for summary judgment. Specifically, the Eleventh Circuit in Brannen held that the imposition of a user fee was established in accordance with the statutory authority set forth in 31 U.S.C. § 9701, which enables agencies to charge agency user fees. Moreover, the Eleventh Circuit in Brannen held that the user fee associated with the PTIN number confers a special benefit on tax return preparers who prepare the tax returns of others for compensation and therefore satisfies the Independent Offices Act, 31 U.S.C. § 9701. Because this court can find no reason for ignoring the Eleventh Circuit's clear guidance in Brannen, the court GRANTS the defendant's motion for summary judgment to the extent that the plaintiffs challenged the constitutionality of the imposition of the original user fee.

One of the main arguments in the plaintiffs' pleadings is that anyone has the right to prepare a tax return for compensation without having to obtain a PTIN, pay an initial user fee, or pay

renewal user fees. However, this argument was clearly rejected by the Eleventh Circuit in Brannen. According to the Eleventh Circuit in Brannen, a PTIN user fee could be charged for the issuance of a PTIN number because the issuance of a PTIN number confers a benefit upon those who prepare the tax returns of others for compensation. Thus, while the plaintiffs now argue that the individuals have a right to prepare the tax returns of others for compensation without paying for a PTIN user fee, the Eleventh Circuit already has addressed and rejected this argument in Brannen.

In their pleadings, the plaintiffs also attempt to argue that they are not challenging the same fee as reviewed in Brannen. According to the plaintiffs, Brannen examined the original user fee, while they are now challenging the assessment of the annual renewal fee. While the plaintiffs are correct that the Eleventh Circuit in Brannen only examined the original user fee rather than the renewal fee that is at issue here, the court concludes that this difference is of no legal consequence. As the defendant correctly notes on page 11 of its motion for summary judgment, the renewal user fee is authorized for the same reasons the original user fee is authorized. Like the imposition of the original user fee, which was held lawful by the Eleventh Circuit in Brannen, this court concludes that charging a renewal user fee is also well

within the agency's statutory authority. In reaching this conclusion, the court notes that the renewal fee, like the original fee, confers a special benefit upon tax return preparers, i.e., the ability to file tax returns on behalf of others for compensation.

Next, the plaintiffs argue that the Eleventh Circuit incorrectly decided Brannen. According to the plaintiffs, the Eleventh Circuit not only misunderstood the challenge to the user fee in question in Brannen, but also rendered the wrong decision in that case. In the view of the plaintiffs, this court should ignore the clear decision of the Eleventh Circuit because "the ultimate goal of the federal legal system is, or should be, to administer justice." However, this court finds this line of argument to be completely unpersuasive. Even if this court were to disagree with the Eleventh Circuit's precedent in Brannen, which it does not, the court cannot, as the plaintiffs suggest, merely ignore the precedent established in that case.[2]

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[2] In their pleadings, the plaintiffs spend an extended amount of time discussing how this court should ignore the Eleventh Circuit's precedent in Brannen. However, arguments regarding the wisdom of Brannen's reasoning should have been directed to the Eleventh Circuit or the Supreme Court. Because it appears that the plaintiffs' writ of certiorari of the Eleventh Circuit's Brannen opinion was denied, the plaintiffs cannot collaterally attack the reasoning and the conclusions of the Eleventh Circuit in Brannen here.

Next, the court turns to the plaintiffs' argument that this court should look to Loving, for guidance. The court concludes that the Loving case has no applicability to this case. In reaching this conclusion, the court notes that the D.C. District Court in the Loving case reviewed the competency testing and continuing education requirements for return preparers who are not attorneys, accountants, or enrolled agents, i.e., so-called "registered tax return preparers." However, the competency testing and continuing education requirements for "registered tax return preparers" are not being challenged by the plaintiffs here. In this case, like in Brannen, the plaintiffs challenge the authority of the government to charge user fees associated with the issuance of PTINs. As the defendant correctly noted, the Eleventh Circuit disagreed with a prior challenge of the government's authority to impose the PTIN user fees. Again, as the defendant correctly notes in its motion for summary judgment, the Loving case specifically held that Congress authorized the PTIN scheme via a different statutory authority than the testing and competency requirements for registered tax return preparers, which were at issue in the

Loving case. Therefore, the court concludes that Loving has no applicability to the facts of this case.[3]

Having concluded that the original as well as the renewal PTIN user fees are lawful, the court turns to the plaintiffs' remaining argument, i.e., that the $50.00 annual user fee is either arbitrary and capricious or excessive. In reviewing the plaintiffs' challenge of the amount of the annual fee, the court reviewed 31 U.S.C. § 9701. According to § 9701(b), "each charge shall be (1) fair; and (2) based on-(A) the costs to the Government; (B) the value of the service or the thing to the recipient; (C) public policy or interest served; and (D) other relevant facts." For the reasons set forth on pages 17-19 of the defendant's motion for summary judgment, the court concludes that the $50.00 annual user fee satisfies the requirements of § 9701(b). While the plaintiffs focus on the costs of the program to the government, the court notes that 31 U.S.C. § 9701 requires an evaluation of several factors and not just on the costs of the program to the government.

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[3] In their pleadings, the plaintiffs also seem to ignore the fact that the Loving case is not a final order as the government in that case appealed the district court's order. Furthermore, the court notes that the Loving case has no impact on any of the PTIN fees at issue in this case.

Next, the plaintiff argues that the annual fee in question is not linked directly to the costs of the program. However, the court concludes that this argument ignores the evidence submitted by the defendant that indicates that the government calculated the full costs to the government of administering the PTIN application and renewal program to be $50.00 per application or renewal. See 75 Fed. Reg. 60316, 60318. Given this evidence, the court concludes that the $50.00 annual fee was not arrived at in an arbitrary and capricious manner.

Next, the court turns to the plaintiffs' argument that the fee in question is excessive.

In an attempt to defeat the government's motion for summary judgment, the plaintiffs also submitted two declarations from Carol A. Campbell, who is the Director of the Return Preparer Office with the IRS. According to these declarations, the IRS received approximately $105 million in PTIN fees and competency testing fees as of 2012, while incurring only $54 million in costs as of the end of 2012. In the view of the plaintiffs, this evidence creates a question of material fact regarding whether the annual fee or the renewal fees are excessive. However, this argument ignores the fact that a government agency such as the IRS may permissibly spread its costs over multiple years. See generally Barahona v.

Napolitano, 2011 WL 4840716 (S.D.N.Y Oct. 11, 2011). As the defendant correctly notes, the United States Supreme Court in Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc., 405 U.S. 707, 719-720 (1972), held that the validity of a tax could be determined by comparing the total revenue with total outlays. However, the Supreme Court in Massachusetts v. United States, 435 U.S. 444, 470 n.25 (1978), also held that a user fee may not be excessive even if the agency's revenues in any one year exceeded the agency's outlays in any given year. Here, there is evidence in the record that the PTIN program has not been fully implemented. According to the defendant, excess monies collected by the IRS in 2012 will be used in future years to roll out other aspects of the program. And, this fact has not been disputed by the plaintiffs. Given this evidence and because Ms. Campbell's declarations do not challenge the government's evidence on this point, the court concludes that Ms. Campbell's declarations do not establish that there is a material fact in dispute regarding whether the $50.00 annual renewal fee is excessive.

Lastly, the court notes that the plaintiffs argue that the government should not be allowed to allocate any monies to do suitability or compliance checks associated with the issuance of PTIN numbers in light of Loving. According to the plaintiffs, any

monies allocated by the government for suitability or compliance checks associated with the issuance of PTIN numbers should be excluded when this court evaluates whether the fees are excessive. However, as the defendant correctly notes on page 10-12 of its reply brief, Loving has no applicability here because that case did not examine the PTIN user fees that are at issue in this case.

For the above reasons and for those set forth in the defendant's pleadings, the court GRANTS the defendant's motion for summary judgment [Doc. No. 36] and DENIES the plaintiffs' motion for summary judgment [Doc. No. 12].

SO ORDERED, this 4th day of December, 2013.

Robert L. Vining, Jr.

ROBERT L. VINING, JR.
Senior United States District Judge