



INSTITUTE FOR JUSTICE

October 22, 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: FRAP 28(j) Response Letter in re Sabina Loving, *et al.* v. Internal Revenue Service (D.C. Cir. No. 13-5061)

Dear Mr. Langer:

The article submitted yesterday by the IRS (“Article”) is advocacy by an *amicus* who has already filed a brief; it is not “pertinent and significant authorit[y]” as required by FRAP 28(j). It cites no new legal developments and makes no previously unavailable arguments. Using FRAP 28(j) to file post-argument *amicus* reply briefs violates FRAP 29(f), and could lead to endless supplemental filings.

The article recapitulates arguments offered in the former Commissioners’ *amicus* brief, which conflict with the position taken by the IRS in briefing, *see* IRS Br. 21-22, 31, 37-38, and were disavowed by the IRS at oral argument. *See* Audio Recording, September 24, 2013 Oral Argument at 18:37–19:00. This may explain why the IRS fails to “refer[] either to the page of the brief or to a point argued orally.” FRAP 28(j).

FRAP 28(j) also does not permit new arguments or extra-record evidence. *See Intermountain Ins. Serv. of Vail v. Comm’r*, 650 F.3d 691, 705 (D.C. Cir. 2011); *Boston Carrier, Inc. v. Interstate Commerce Comm’n*, 746 F.2d 1555, 1563 n.5 (D.C. Cir. 1984). To the extent the article impermissibly advances new arguments, it cites extra-record hearsay evidence, *see, e.g.*, Article, notes 2, 3, 11, 20, 22, 35, 43, and fails to address record evidence cited in Appellees’ brief and at oral argument. *See, e.g.*, Appellees’ Br. at 53; J.A. 60-61. The article also claims that “Third Party Designee” status—which is simply a taxpayer confidentiality waiver under 26 U.S.C. § 6103(c)—is equivalent to power of attorney. *See*

Article, note 38. But the Form 1040 instructions explicitly refute this: “You are not authorizing the designee to receive any refund check, bind you to anything (including any additional tax liability), or otherwise represent you before the IRS. If you want to expand the designee's authorization, see Pub. 947 [Practice before the IRS and Power of Attorney].” *1040 Instructions 2012* at 77. Moreover, an optional, agency-created “Third Party Designee” status—which can be conferred on *anyone*—cannot trump Congress’s definitions of “[t]ax return preparer” in 26 U.S.C. § 7701(a)(36) or “[r]epresentatives holding power of attorney” in 26 U.S.C. § 7521(c).

Sincerely,

/s/ Dan Alban

William H. Mellor

Scott G. Bullock

Dan Alban

Ari S. Bargil

INSTITUTE FOR JUSTICE

901 N. Glebe Road, Suite 900

Arlington, VA 22203

Tel: (703) 682-9320, Fax: (703) 682-9321

Email: wmellor@ij.org; sbullock@ij.org;

dalban@ij.org, abargil@ij.org

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2013, I electronically transmitted the attached FRAP 28(j) Response Letter to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

PATRICK J. URDA
GILBERT S. ROTHENBERG
RICHARD FARBER
Attorneys, Tax Division
U.S. Department of Justice
Post Office Box 502
Washington, D.C. 20044

Attorneys for Defendants-Appellants

/s/ Dan Alban

Dan Alban
Institute for Justice