

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

H&R BLOCK, INC.;
2SS HOLDINGS, INC.; and
TA IX L.P.,

Defendants.

Civil Action No. 11-00948 (BAH)
Judge Beryl A. Howell

NOTICE OF JOINT STIPULATION OF FACTS IN LIEU OF TESTIMONY

In an effort to narrow the issues in dispute and expedite the upcoming hearing, the Parties have agreed to and hereby submit stipulated facts in lieu of testimony by two witnesses on Plaintiff's witness list, Paul Mamo and Phyllis Gattos. Mr. Mamo and Ms. Gattos, both of whom are employed by the Internal Revenue Service, will accordingly not testify during Plaintiff's case-in-chief.

Dated: September 2, 2011

FOR PLAINTIFF UNITED STATES
OF AMERICA

/s/ Lawrence Buterman
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FOR DEFENDANTS H&R BLOCK, INC.,
2SS HOLDINGS, INC. AND TA IX L.P.

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Stipulated Facts in Lieu of Testimony by Paul Mamo, Deputy Director of Submission Processing, IRS, and Phyllis Gattos, Chief of Strategy and Innovation for Electronic Tax Administration and Refundable Credits Division, IRS

1. The IRS piloted e-filing of individual federal tax returns in 1986. E-filing first became available on a nation-wide basis in 1990. The IRS then began to market e-filing more actively. Only professional tax preparers were permitted to e-file returns until the mid-1990s, when the IRS began allowing individual consumers to e-file their own returns with digital tax preparation products.
2. The Internal Revenue Service Restructuring and Reform Act of 1998 (“RRA98”) set a goal of having eighty percent of individual taxpayers e-filing their returns by 2007. The IRS is close to achieving that goal. The IRS Oversight Board has recommended that the 80% benchmark be achieved by 2012. Gattos Dep. 58:19-59:8.
3. In 2001, the President’s Management Council announced the establishment of various initiatives intended to expand electronic services (“e-services”) within the federal government. One was the EZ Tax Filing Initiative. IRS-DOJ-000826.
4. The objective of the EZ Tax Filing Initiative was to decrease the tax preparation and filing burden of wage earners by providing greater access to free online tax preparation and filing options for a significant number of taxpayers. IRS-DOJ-000231
5. Year 2000 tax return filing statistics showed that seventeen percent of the 115 million taxpayers manually prepared and filed their returns on paper. Based on that data, the IRS estimated that it could save roughly \$1.50 per filer that transitioned from paper to electronic filing (“e-filing”). IRS-DOJ-000231.
6. The IRS determined that the most effective and efficient way to accomplish the goals of the EZ Tax Filing Initiative was to work with the Free File Alliance, LLC (“FFA”), a consortium of companies in the electronic tax preparation and filing industry. IRS-DOJ-000231.
7. FFA members had to meet certain requirements, including the capability to provide free services to a minimum number of individual taxpayers and having a security seal certification program. IRS-DOJ-000004.
8. H&R Block, 2nd Story Software (“TaxACT”), and Intuit were among the original members to make offers through the FFA. IRS-DOJ-001006.
9. On October 30, 2002, the IRS and the FFA entered into a “Free On-Line Electronic Tax Filing Agreement” (“Agreement”) to provide free online tax return preparation and filing to individual taxpayers. (IRS-DOJ-000004).
10. Before entering into the Agreement, the IRS requested and received comments and/or suggestions on its provisions in a Federal Register Notice. In a subsequent Federal Register Notice dated November 4, 2002, the IRS summarized the feedback it received.

The vast majority of the feedback supported the Agreement and its benefits to taxpayers. The most common concern raised was that the availability of free services would adversely impact accounting and legal tax professionals by attracting their clients to FFA products. However, that same 2002 Federal Register notice explained that IRS historical data showed that the migration of taxpayers from accounting and legal tax professionals to low cost online filing options had been minimal. IRS-DOJ-000050.

11. As outlined in the November 2002, Federal Register notice, the next most common concern expressed about the Agreement was that online tax software products do not provide the same level of quality and service as a tax return preparer, thus possibly resulting in greater tax obligation or more errors. In response, the IRS noted in that notice that free offerings were not comparable to the services provided by an accounting or legal tax professional, because they service two distinct groups of taxpayers. The IRS also noted that, regardless of the vehicle used to prepare and e-file a return, e-filed returns had a lower error rate than paper returns. IRS-DOJ-000050.
12. Pursuant to the Agreement, members of the FFA offered free, online tax preparation and filing services (“free services”) to taxpayers. The IRS provided taxpayers with links to those free services through a web page, hosted at irs.gov and accessible through firstgov.gov. IRS-DOJ-000004.
13. The offerings of the FFA members, when taken in the aggregate, were intended to provide for free services to be available to at least sixty percent of all taxpayers. The IRS could terminate the agreement if free services were available to fewer than sixty percent of taxpayers. IRS-DOJ-000004.
14. In 2003, the first year in which free services were available to taxpayers through the FFA, none of the FFA members offered free services to all taxpayers. Each member set eligibility criteria. Most members, including H&R Block, TaxACT, and Intuit, used adjusted gross income (“AGI”) as a way to define which taxpayers were eligible for free services. For example, H&R Block offered free services to taxpayers with AGI of \$28,000 or less. Some members that offered free services based on AGI also offered free services to taxpayers who met other conditions such as eligibility to file a Form 1040EZ. Several members did not define eligibility based on AGI. Of the eleven FFA members that offered free services based on AGI, only TaxACT’s AGI-based offering was available to individuals with AGI over \$33,000. TaxACT made its free services available exclusively to taxpayers who had AGI over \$100,000 or were eligible to file a Form 1040EZ. IRS-DOJ-001006.
15. In 2004, the second year in which free services were available to taxpayers through the FFA, some members changed the terms under which taxpayers were eligible for their free services. Among those was TaxACT, which Mr. Mamo recalls having been the first FFA participant to offer all taxpayers the opportunity to prepare and e-file their federal returns for free, regardless of their income. Three other companies also offered all taxpayers the opportunity to prepare and e-file their federal returns for free later that season, regardless of their income. Mamo Dep. 135:7-137:3. H.R. Rep. No. 108-671, at 121 (2004).

16. The IRS has taken a number of steps to achieve the eighty percent goal for e-filing of individual tax returns set by RRA98, including budgeting funds for marketing to encourage e-filing, offering various e-services of use to tax preparers and requiring them to be e-filers to use the services, and hosting nationwide tax forums to address topics of interest to tax preparers and promote e-filing. Gattos Dep. 59:14-60:15.
17. In addition, the IRS's Electronic Tax Administration and Refundable Credits Division ("ETARC") has sought to encourage e-filing and promote awareness of the FFA. Recently, because of budgetary constraints, ETARC's marketing has been for the most part limited to banner advertisements on internet web pages. The IRS refers taxpayers to the FFA program through a hyperlink on irs.gov. The IRS does not currently promote the FFA in any other way. Gattos Dep. 10:21-11:10; 14:6-16; 56:20-57:10; 57:13-18.
18. The FFA's existence and its offerings contribute to the IRS's goal of advancing e-filing. Gattos Dep. 92:4-12.
19. Any company that wants to begin offering e-filing of individual federal tax returns through a digital tax preparation product must be an "authorized e-file provider," which means that the company must undergo a background investigation. The company's principal owners and officers also are subject to background investigations. In addition, the company's product must comply with rules regarding file specifications and record layouts. Gattos Dep. 97:15-98:17.
20. The IRS's Free On-Line Electronic Tax Filing Agreement with the FFA provides "performance standards" for FFA members and states that "[i]f the IRS determines a particular offering of Free Services is deficient or that Free Services are not being properly performed, it will notify the Consortium in writing of that fact, and provide information regarding corrective actions it believes are needed." FFA000098; IRS-DOJ-000004. The IRS reviews and approves FFA member websites before those websites are linked to the IRS website to ensure they are in compliance with the Memorandum of Understanding between the FFA and the IRS. Gattos Dep. 98:22-99:6. The IRS relies on software developers to ensure that FFA's participants' digital tax preparation products are providing accurate tax returns. The IRS also conducts an annual Participants Acceptance Test ("PAT") on each digital tax preparation product to ensure that the returns generated by each product can be processed correctly. However, the PAT does not detect all deficiencies in tax preparation products or prevent all errors that could occur in the e-filing of an individual's tax return with a given product. Even after a successful PAT, a digital tax preparation product may generate many error codes. Ms. Gattos believes that the IRS has never taken an action against a digital tax preparation provider based on a high error rate. Gattos Dep. 48:17-51:6.
21. Of the firms that electronically filed Form 1040 tax returns this filing season (tax year 2010), only three began e-filing after 2006. This tax season, those three firms filed 4, 7, and 189 returns, respectively.