United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellee,

v. **Complaint No. 2006-23**

Martin M. Chandler, C.P.A.,
Respondent-Appellant.

Decision on Appeal

Authority

Under the Authority of General Counsel Order No. 9 (January 19, 2001) and the authority vested in him as Assistant General Counsel of the Treasury who was the Chief Counsel of the Internal Revenue Service, through a series of Delegation Orders (most recently, an Order dated January 15, 2008) Donald L. Korb delegated to the undersigned the authority to decide disciplinary appeals to the Secretary of the Treasury filed under Part 10 of Title 31, Code of Federal Regulations ("Practice Before the Internal Revenue Service," sometimes known and hereafter referred to as "Treasury Circular 230"). This is such an Appeal from a June 1, 2007 Decision of Administrative Law Judge Arthur J. Amchan[1] (the "ALJ") granting Complainant-Appellee's Motion for Summary Judgment in this proceeding, in which the ALJ suspended Respondent-Appellant from practice before the Internal Revenue Service for a period of eighteen (18) months and further required Respondent-Appellant to file his delinquent tax returns and otherwise comply with his Federal income tax obligations before his authorization to resume practice before the Internal Revenue Service could be restored.[2]

The charges that formed the basis of the original Complaint in this proceeding related to Respondent's failure to timely file his Federal income tax returns for the tax years 2000, 2001 and 2003, and to his failure to timely pay his tax liabilities for some of those years.[3] Complainant-Appellant charged that each of

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[1] Administrative Law Judge Amchen is an Administrative Law Judge of the National Labor Relations Board ("NLRB") acting as the Administrative Law Judge in this proceeding under authority granted him under an inter-agency agreement between the NLRB and the Department of the Treasury.

[2] The ALJ's Decision appears as Attachment 1 to this Decision on Appeal. Complainant-Appellee's Motion for Summary Judgment appears as Attachment 2 to this Decision on Appeal. Complainant-Appellee's Complaint in this proceeding appears as Attachment 3 to this Decision on Appeal. Each of these Attachments is incorporated in this Decision on Appeal as if fully set forth herein.

[3] See Attachment 3.

these failures constituted disreputable conduct under Treasury Circular 230, and that cumulatively, those failures supported a thirty-six (36) month suspension from practice before the Internal Revenue Service. By the time Complainant-Appellee filed its Motion for Summary Judgment, the failure to pay charges had been dropped and Complainant-Appellee had reduced its requested sanction from a thirty-six (36) month suspension to a thirty-three (33) month suspension.[4]

Pursuant to § 10.77 of Treasury Circular 230,[5] Respondent-Appellant timely appealed the Decision of the ALJ, and Complainant-Appellee timely filed his opposition to that appeal.

Role and Functions of the Appellate Authority

Before turning to the particular issues raised by Respondent-Appellant in his Appeal, let me briefly discuss my role and functions as the Appellate Authority in a Treasury Circular 230 proceeding.

I review the entire administrative record in the proceeding.[6] I do so to determine whether the jurisdictional prerequisites establishing the Director, Office of Professional Responsibility's jurisdiction over a practitioner have been met. In his Complaint in this proceeding, Complainant-Appellee has alleged that Respondent-Appellant is a Certified Public Accountant and, as such, is authorized to practice before the Internal Revenue Service, and that Respondent-Appellant has in fact practiced before the Internal Revenue Service. Respondent-Appellant has not contested either of these assertions, and these jurisdictional assertions are therefore deemed admitted.

I also examine the facts in the administrative record and the law to determine whether the Complainant has met each element of each of his burdens of proof by the requisite evidentiary standard. Given the sanction that the Director, Office of Professional Responsibility initial sought to impose in this proceeding, the requisite standard of proof that the Complainant-Appellee must meet in this proceeding is clear and convincing evidence.[7]

The Complainant-Appellee's burdens of proof exist with respect to each element of each specific charge that remains in issue at the time of an appeal in a proceeding, as well as with respect to certain other evidentiary burdens imposed on Complainant-Appellee based on the sanction he sought to impose against

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[4] See Attachment 2.

[5] As the ALJ indicates in his Decision, at least 3 different versions of Treasury Circular 230 (a 1994 version, a 2002 version and a 2005 version) were in effect at various times relevant to this proceeding.

[6] The ALJ's Certification of Record in this proceeding appears as Attachment 4 to this Decision on Appeal and is incorporated as if fully set forth herein.

[7] See § 10.76(a) of Treasury Circular 230. The same standard of proof would apply if measured by the sanction sought to be applied by Complainant-Appellant after the failure to timely pay charges against Respondent-Appellant were dropped, or if the sanction imposed by the ALJ were the measure, which it is not.

Respondent-Appellant. Specifically, given the sanction that Complainant-Appellee sought to impose, Complainant-Appellee must show by clear and convincing evidence that Respondent-Appellant willfully failed to timely file a Federal income tax returns for the taxable years 2000, 2001 and 2003, both because a willful failure is required to sustain a specific charge or disreputable conduct under §§ 10.51 and 10.51(d)/(f) of Treasury Circular 230 and because a willful failure of a violation of a violation of Treasury Circular 230 must be shown to disbar or suspend a practitioner under §10.52(a) of Treasury Circular 230. The administrative record shows by clear and convincing evidence that for each of the 3 taxable years in issue Respondent-Appellant had an obligation to timely file a Federal income tax return and failed to do so. Moreover, for the reasons hereafter specified, I find that each of Respondent-Appellant's failures were "willful" within the meaning of §§ 10.51(d)/(f) and 10.52(a) of Treasury Circular 230 and therefore constituted disreputable conduct appropriately sanctioned by suspension from practice before the Internal Revenue Service.

The Appellate Authority's standard of review of an Administrative Law Judge's actions differ depending on whether the Appellate Authority is reviewing a purely factual issue or a mixed question of law and fact (where the Appellate Authority reviews the actions of the ALJ under a "clearly erroneous" standard of review), or involves a purely legal issue (where the Appellate Authority reviews the issue *de novo)*. § 10.78 of Treasury Circular 230. Under either standard, I affirm the ALJ's findings and conclusions with respect to the charges

Finally, the Appellate Authority reviews the sanction sought by the Complainant and imposed by the Administrative Law Judge in light of the charges proved and in light of other "aggravating:" and "mitigating" circumstances. The Appellate Authority does so *de novo* with the full authority of the Secretary of the Treasury and the Internal Revenue Service (the charging agency). In doing so, the Appellate Authority can affirm the sanction imposed by the ALJ, decrease the sanction imposed or increase the sanction imposed in light of the charges proved and in light of the "aggravating" or "mitigating" factors found present. I discuss these issues below.

"Willfulness"

Treasury Circular 230 does not contain a regulatory definition of "willful." However, Treasury Circular 230 in many respects proscribes and sanctions conduct that is also sanctioned under the criminal tax provisions of the Internal Revenue Code. See, e.g., Sections 7201 through 7212 of the Internal Revenue Code of 1986, as amended and in effect during the years here in issue. See specifically, see Section 7203 (relating to a willful failure to file returns). In the absence of a regulatory definition of "willfulness," I have adopted the case precedents under the criminal provisions of the Internal Revenue Code to interpret the term "willful" for Treasury Circular 230 purposes.

I have had many occasions to interpret the term "willful" in Treasury Circular 230 proceedings. I first addressed this issue in a Decision on Appeal in Director, Office of Professional Responsibility v. Joseph R. Banister, Complaint No. 2003-02, a proceeding made public by mutual agreement of the parties.[8] Of particular relevance to this proceeding are four United States Supreme Court cases cited in Attachment 5 – Bishop,[9] Pomponio,[10] Cheek[11] and Boyle.[12] As explained in greater detail in Attachment 5, the Bishop/Pomponio line of cases establish that the term "willful" merely means a voluntary, intentional violation of a known legal duty.

In Cheek, the issue was whether the defendant was entitled to an instruction that it was a valid defense to a willful failure to file charge if his beliefs that he was not required to file were honestly held (subjectively) and entitled to be so treated even if they were not reasonable (objectively). Cheek had two reasons for believing that he was not required to file, one based on an objectively unreasonable interpretation of a substantive provision of the Internal Revenue Code and the other based on his belief that the income tax was unconstitutional. As to the former statutory claim, the Supreme Court, per Mr. Justice White, held that the taxpayer was entitled to the requested instruction. As to the latter constitutional claim, the Supreme Court found that he was not. The Court noted that there was a general rule deeply rooted in the American legal system that ignorance of the law or a mistake of law is no defense to a criminal prosecution, based on the notion that the law is definite and knowable, and the common law presumed that every person knew the law. Mr. Justice White noted:

> **"Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." 469 U.S. at 201.**

With regard to the second of the three required proofs, Mr. Justice White noted that, with respect to matters of statutory construction under the tax laws, when Congress imposed a "willfulness" standard, it intended to depart from the common law rule presuming knowledge of the law (a rule of presumed general intent) to a rule requiring the Government to prove specific knowledge of the law on the part of the defendant (a rule requiring the Government to prove a specific subjective intent). But the Court adopted this heighten proof requirement only for matters of statutory interpretation under the Internal Revenue Code, not with respect to Cheek's beliefs regarding the unconstitutionality of the income tax. As to those

[8] Pages 40 through 52 of the Decision on Appeal in Banister appear as Attachment 5 to this Decision on Appeal and are incorporated as if fully set forth herein.
[9] United States v. Bishop, 412 U.S. 346 (1973).
[10] United States v. Pomponio, 429 U.S. 10 (1976).
[11] Cheek v. United States, 498 U.S. 192 (1991).
[12] United States v. Boyle, 469 U.S. 241 (1985).

matters, the Court found that Cheek was not entitled to an instruction that an honestly held but unreasonable belief was a defense to willfulness.

As to whether a person has an obligation to file a tax return and when, and whether that question falls into the first category or the second, the Supreme Court has also answered that question, albeit in a different context. In Boyle, the issue before the Supreme Court was whether the duty to file a tax return was personal or could be delegated to a tax advisor assisting the taxpayer (in that case, an estate fiduciary). The Supreme Court found that the duty to file a tax return was a non-delegable duty and that the person with the duty to file could not rely on a tax advisor to do so and thereby remove himself from exposure to penalty. In doing so, the Supreme Court distinguished between situations where it was reasonable to allow a person to rely on an attorney's or accountant's advice (as when determining whether a liability exists) and situations where one does not have to be an expert to know that an obligation exists (such as knowing that tax returns have fixed filing dates and that taxes must be paid when due). 469 U.S. at 249-251. Given that the Instructions in the Form 1040 packages for the years in issue and for each taxable year since I began practicing tax law (in 1971) have clearly set forth who had an obligation to file a Federal income tax return each year, I find it improbable that Respondent-Appellant would have honestly believed that he only had a duty to file a Federal Income tax return if he had tax liability.[13] In any event, I find such a belief, even if honestly held, objectively unreasonable and hence not a defense to willfully failing to timely file his returns for 2000, 2001 and 2003. I therefore find each of Respondent-Appellant's three failures to file to have been "willful."

Issues Raised on Appeal

Respondent-Appellant has raised only two issues on appeal. The first has already been dealt with, supra, in the discussion of "willfulness." The second is the issue of whether the sanction imposed by the ALJ is excessive for the conduct charged and proved. That issue is discussed below.

The Sanction

In reducing the sanction imposed from the thirty-three (33) months requested by Complainant-Appellant to the eighteen (18) months imposed, I read the ALJ's Decision as implying some or all of the following. First, that as the original charges involved both a failure to timely file the three returns and failures to timely pay, and since the failure to timely pay charges had been dropped, the sanction should have been more substantially reduced. Second, the Respondent-Appellant's lack of contrition should not have been treated as an "aggravating" factor. Third and finally, Respondent-Appellant's age should have been treated as a "mitigating factor." For the reasons discussed below, I disagree on each point.

[13] In each of the three years in issue, the obligation to file a Federal income tax return depended solely on the taxpayer's filing status and whether the taxpayer(s) gross income exceeded specified "floor" amounts that differed based on the taxpayer(s)' filing status.

In Boyle, supra, the Supreme Court stated:

> **"Deadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results. The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards. Any less rigid standard would risk encouraging a lax attitude toward filing dates. Prompt payment of taxes is imperative to the Government, which should not have to assume the burden of ad hoc determinations."**

469 U.S. at 249-251. That statement was true in 1985 and is even truer today. The time and energy the Internal Revenue has spent securing tax returns from Respondent-Appellant could have been devoted to securing returns or devoting its limited resources to collecting monies due from other taxpayers. In short, Respondent-Appellant has imposed lost opportunity costs on the Internal Revenue Service and, indirectly, on his fellow citizens who are compliant taxpayers and who do not impose excess burdens on our system of tax administration.

I view Respondent-Appellant's consistent adherence to a belief that his conduct is "no big deal" or some sort of "foot fault"[14] to be an "aggravating factor" that supports a severe sanction. I also agree with Complainant-Appellant that Respondent-Appellant's age, without some added showing of mental or physical disability, should not be considered a "mitigating factor," particularly given how long these violations have continued.

For the above reasons, I impose as a sanction for his conduct a suspension

[14] My paraphrasing, not Respondent-Appellant's actual language.

from practice before the Internal Revenue Service for a period of thirty-six (36) months from the date of issuance of this Decision on Appeal, which suspension shall further continue for whatever time it takes Respondent-Appellant to become compliant with all his Federal tax obligations, including but not limited to his obligations to timely file all his Federal tax returns and pay all Federal taxes owed.

Conclusion

For the reasons stated, I hereby AFFIRM the ALJ's findings of fact and conclusions of law with respect to the three charges relating to Respondent-Appellant's failures to timely file his 2000, 2001 and 2003 tax returns, and INCREASE the suspension from practice before the Internal Revenue Service from eighteen (18) to thirty-six (36) months from the date of issuance of this Decision on Appeal. This constitutes FINAL AGENCY ACTION in this proceeding.

David F. P. O'Connor
Special Counsel to the Senior Counsel
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of Henry M. Paulson,
Secretary of the Treasury)

April __, 2008
Washington, D.C.