

United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellee

v.

Complaint No. 2009-21

Donald J. Petrillo,
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 the Chief Counsel of the Internal Revenue Service (IRS), through a delegation order dated March 2, 2011, William J. Wilkins delegated 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, reprinted by the Treasury Department and hereinafter referred to as Circular 230 – all references are to Circular 230 as in effect for the period(s) at issue). This is such an appeal from an Order Granting Complainant's Motion for Summary Judgment (ALJ Order) entered into this proceeding by Chief Administrative Law Judge Susan L. Biro (the ALJ) on November 16, 2010.

Procedural History

This proceeding was commenced on June 29, 2010, when the Complainant-Appellee Director of the Office of Professional Responsibility (OPR) filed a Complaint against Respondent-Appellant Donald J. Petrillo ("Mr. Petrillo"), an attorney. The Complaint alleges that Mr. Petrillo has practiced before the IRS as defined in § 10.2(a)(4) of Circular 230; that he willfully failed to timely file his federal individual income tax returns for 2001 through 2006 and willfully failed to file his federal income tax return for 2007, as required by 26 U.S.C. §§6011, 6012, and 6072; and that he willfully failed to pay his federal income taxes for 2001 through 2006, as required by 26 U.S.C. §§6011, 6012, and 6072 (the failure to pay citation should be to §6151(a)). The Complaint asserts that Mr. Petrillo's conduct constitutes disreputable conduct under §10.51 of Circular 230 that warrants Mr. Petrillo's disbarment from practice before the IRS. OPR requested that Mr. Petrillo be disbarred from practice before the IRS pursuant to §§10.50 and 10.70 of Circular 230.

Information as to the due dates of Mr. Petrillo's returns is set out in tabular form below:

Count	Tax Year	Original Return Due Date ¹	Extension Due Date	Date Return Filed
1	2001	April 15, 2002	Not applicable	April 13, 2006
3	2002	April 15, 2003	August 15, 2003	April 13, 2006
5	2003	April 15, 2004	October 15, 2004	February 21, 2007
7	2004	April 15, 2005	August 15, 2005	August 1, 2007
9	2005	April 15, 2006	Not applicable	January 7, 2008
11	2006	April 15, 2007	Not applicable	January 7, 2008
13	2007	April 15, 2008	Not applicable	

Mr. Petrillo had not filed his 2007 return as of the date he filed his answer, but he states in his appeal that the 2007 return has been filed.²

On July 29, 2010, Mr. Petrillo filed his answer. Mr. Petrillo did not deny the allegations in the Complaint that he failed to properly file his returns and pay his income tax. However, the answer asserted that the failure to timely file and pay "was not the result of willful conduct; but rather due to medical, factual and financial circumstances beyond the control of respondent." Each party submitted a pretrial memorandum, and the parties submitted a set of jointly stipulated facts and exhibits. On September 28, 2010, an extensive deposition of Mr. Petrillo was held. On October 7, 2010, OPR submitted a motion for summary adjudication. The motion was granted on November 16, 2010, prior to the November 30, 2010, hearing date. The ALJ found that Mr. Petrillo had willfully failed to file or timely file his returns for 2001 through 2007. See ALJ Order at 9-10. In finding that the failure to properly file returns was willful, the ALJ found that Mr. Petrillo's explanation as to why he did not timely file or file did not vitiate proof of willfulness. The ALJ found that the appropriate sanction was disbarment. In imposing the disbarment sanction the ALJ only considered Mr. Petrillo's liability under Counts 7, 9, 11, and 13. See ALJ Order at n. 9. Mr. Petrillo timely appealed the ALJ Order and Mr. Petrillo and OPR have briefed the issues.

Findings of Fact and Analysis

The Appellate Authority reviews the ALJ's findings of fact under a clearly erroneous standard of review, and matters of law with de novo review. Section 10.78 of Circular 230.

It is undisputed that Mr. Petrillo did not file or timely file his tax returns for the years at issue. The issue on appeal is whether his failure to file or timely file his returns was

¹ Return due dates are exclusive of the additional time to file provided for in 26 U.S.C. §7503, which have no bearing on the result herein.

² In his appeal, Mr. Petrillo also states that he did not timely file his 2008 individual income tax return, but that he has since filed that return as well.

willful. On appeal, Mr. Petrillo states four bases for appeal: (i) the ALJ applied a willful negligence standard rather than a willfulness standard; (ii) the ALJ applied the wrong standard for willfulness; (iii) summary adjudication was inappropriate because of the presence of material issues of fact; and (iv) Mr. Petrillo was denied due process because the standards were changed from willfulness rather than willful negligence subsequent to the issuance of the Complaint. Mr. Petrillo sets out in great detail medical, financial, marital, and other personal difficulties and setbacks that run from 1998 through September 2010 in support of his claim that his failure to timely file returns was not willful.

The standard of willfulness that the ALJ applied was a voluntary, intentional violation of a known duty. ALJ Order at 9. This was a proper standard under §10.51 of Circular 230 and is in accord with the Supreme Court holdings in *Cheek v. United States*, 498 U.S. 192, 12 (1991) and *United States v. Pompino*, 429 U.S. 10, 12 (1976). Mr. Petrillo's statements that the ALJ applied a different standard are incorrect. It is clear that Mr. Petrillo's personal circumstances do not vitiate his duty to timely file his returns and do not make his failure to timely file his tax returns anything other than willful. During the periods in question, Mr. Petrillo prepared the returns of others, represented clients in legal matters, and carried on numerous other activities. See ALJ Order at 6. He filed extensions for some years, but then did not timely file. Further, Mr. Petrillo's claim is belied by his own conduct as to his own returns. As shown in the table above, Mr. Petrillo filed some of his own returns from April 13, 2006 through January 7, 2008, but chose to be delinquent for others. Mr. Petrillo's willful failure to file and failure to timely file have been proven by clear and convincing evidence.

Mr. Petrillo also claims that summary adjudication was inappropriate because of material issues of fact as to Mr. Petrillo's medical condition during the periods in question, and that the medical conditions support a lack of intent to violate the law. However, the undisputed evidence shows that Mr. Petrillo prepared the returns of others, represented clients in legal matters, and carried on numerous activities during the periods in question. He also prepared and filed some of his own returns, on his own time schedule, while constantly remaining delinquent for other years. I find that that [sic] the ALJ correctly decided that there was no genuine issue of fact as to whether Mr. Petrillo willfully failed to file and timely file his tax returns and that granting summary adjudication as provided for in §10.68 of Circular [sic] was appropriate. See generally *OPR v. Banister*, Complaint No. 2003-02 (Decision on Appeal, June 25, 2004) at p. 96, with regard to procedural rights in OPR proceedings.

The ALJ's findings of fact are well supported by the record and are not clearly erroneous. Mr. Petrillo's willful failure to file establishes that he engaged in disreputable conduct within the meaning of §10.51 of Circular 230.

Sanction

The ALJ determined that the appropriate sanction was disbarment of Mr. Petrillo from practice before the IRS. In doing so the ALJ found disbarment was appropriate because (a) Mr. Petrillo willfully failed to timely file for 2004 through 2006 and willfully failed to file for 2007, as per Counts 7, 9, 11, and 13 of the Complaint; (b) Mr. Petrillo was previously suspended from practice for the period of January 1993 to December 1997 for nonpayment of taxes; and (c) Mr. Petrillo was not in current compliance. I agree that the appropriate sanction for Mr. Petrillo's willful failure to file or timely file for 2004 through 2007 supports his disbarment, especially given that Mr. Petrillo was previously suspended from practice. Because the violations of Counts 7, 9, 11 and 13 were proven and provided clear and convincing support for this summary adjudication and Mr. Petrillo's disbarment, I have not considered or addressed the validity of the other Counts or whether they were appropriate for summary adjudication.

I have considered all of the arguments made by OPR and Mr. Petrillo, and to the extent not mentioned herein, I find them to be irrelevant or without merit.

Conclusion

For the reasons stated, I hereby determine that Donald J. Petrillo is disbarred from practice before the IRS. This constitutes FINAL AGENCY ACTION in this proceeding.

/s/ _____
Bernard H. Weberman
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of the
Secretary of the Treasury)

April 22, 2011
Lanham, MD