

**United States
Department of the Treasury**

**Director, Office of Professional Responsibility,
Complainant-Appellee**

v.

Complaint No. 2008-19

**Phillip E. Koenig,
Respondent-Appellant**

Decision on Appeal

Authority

Under the Authority of General Counsel Order No. 9 (January 19, 2001) and the authority vested in her as Acting Assistant General Counsel of the Treasury who was the Acting Chief Counsel of the Internal Revenue Service, through a delegation order dated June 26, 2009, Clarissa C. Potter delegated to the undersigned the authority to decide disciplinary appeals to the Secretary of the Treasury filed under Subpart D of Part 10 of Title 31, Code of Federal Regulations 31 C.F.R. Part 10, *Practice Before the Internal Revenue Service* (reprinted in and hereinafter referred to as Treasury Department Circular No. 230). This is such an Appeal from a Decision on Motion for Default Judgment entered in this proceeding against Phillip E. Koenig by Administrative Law Judge Susan E. Jelen (the ALJ) on July 2, 2009.¹

Background

This proceeding was commenced on February 5, 2009, when Russ E. Eisenstein, an attorney acting as the authorized representative of the Director of the Office of Professional Responsibility (OPR), filed a Complaint against Respondent-Appellant. The Complaint alleges that Respondent-Appellant: (i) has engaged in practice before the Internal Revenue Service, as defined by 31 C.F.R. § 10.2(d) as an attorney, (ii) had willfully failed to timely file Federal income tax returns as required by 26 U.S.C. §§ 6011, 6012, and 6072 for the years 2001, 2002, 2003, 2004, and 2005, (iv) that with respect to the 2001 tax year such willful failure constituted disreputable conduct within the meaning of 31 C.F.R. § 10.51 generally et. seq. and a willful violation of 31 C.F.R. § 10.51 and 10.51(d) (Rev. 1994) more

¹ A copy of the ALJ's Decision appears as Attachment 1.

particularly, (v) that with respect to the years 2002, 2003, 2004 and 2005, each such willful failure constituted disreputable conduct within the meaning of 31 C.F.R. § 10.51 generally and a willful violation of § 10.51(f) (Rev. 2002) more particularly, (vi) had willfully failed to timely pay his Federal income taxes as required by 26 U.S.C. §§ 6011, 6012, and 6072 for the years 2001, 2002, 2003, 2004 and 2005, (vii) that with respect to the years 2001 such willful failure to pay/timely pay constituted disreputable conduct within the meaning of 31 C.F.R. § 10.51 generally and 10.51(d) (Rev. 1994) more particularly, (viii) that with respect to the years 2002, 2003, 2004 and 2005, each such willful failure to timely pay constituted disreputable conduct within the meaning of 31 C.F.R. § 10.51 generally and a willful violation of § 10.51(f) (Rev. 2002) more particularly. The complaint proposes that Respondent-Appellant should receive as a sanction for his conduct a suspension of at least forty-eight (48) months from practice before the Internal Revenue Service. The complaint further proposes that OPR only entertain his petition for reinstatement provided that:

(a) Respondent-Appellant “has filed any Federal tax returns that were required to have been previously filed, and that he has paid, or arranged with the IRS to pay, any outstanding Federal tax liabilities now due and owing;”

(b) “During the term of the suspension,” Respondent-Appellant “timely filed any Federal tax returns and paid or arranged with the IRS to pay, any Federal tax liabilities that become due and owing;”

(c) “During the term of the suspension,” Respondent-Appellant “did not engage in practice before the IRS or attempt to do so;”

(d) “During the term of the suspension, OPR did not contact” Respondent-Appellant “concerning any alleged violation of Circular 230;”

(e) “At the time he submits his petition,” Respondent-Appellant “is otherwise in compliance with Circular 230; and”

(f) Respondent-Appellant “submits documentary evidence with his petition to prove that, if his petition were granted, he will be eligible, as defined in Circular 230, to practice before the IRS as an attorney, certified public accountant, and/or enrolled agent.”

The Complaint notified Respondent-Appellant that an Answer must be filed within 30 days after service of the Complaint and that failure to answer the Complaint may result in a decision by default. Respondent-Appellant failed to file a timely Answer to the Complaint. On March 23, 2009, Complainant-Appellee filed Complainant’s Motion for Default Judgment. On March 28, 2009, Respondent-Appellant filed an Answer to the Complaint. In the Answer, Respondent-Appellant admitted that he was required to timely file Federal tax returns for the tax years 2001, 2002, 2003, 2004 and 2005 and that he failed to timely file these tax

returns. Respondent-Appellant denied that his failure to timely file these tax returns was willful and that such failures constitute disreputable conduct pursuant to 31 C.F.R. § 10.51 et. seq. Furthermore, Respondent-Appellant admitted that he was required to timely pay his Federal income taxes for the years 2001, 2002, 2003, 2004, and 2005 and that he failed to timely pay these taxes. Respondent-Appellant denied that such failures to timely pay were willful and that such failures constitute disreputable conduct pursuant to 31 C.F.R. § 10.51 et. seq.² In his belated Answer, Respondent-Appellant failed to meet the requirements of 31 C.F.R. § 10.64(b), which provides in part that the Answer must “contain a statement of facts that constitute the Respondent’s grounds for defense. General denials are not permitted. . . . The Response also must state affirmatively any special matters of defense on which he or she relies.” Respondent-Appellant only made general denials in his Answer.

On March 31, 2009, the Complainant-Appellee filed the Complainant’s Reply to Respondent-Appellant’s Answer to the Complaint. Complainant-Appellee asserted that Respondent’s Answer was untimely and deficient. Complainant-Appellee requested that the Answer be stricken, that the ALJ grant Complainant’s Motion for Default Judgment, and that the ALJ enter a decision suspending the Respondent-Appellant from further practice before the IRS for a period of at least four years.

On April 8, 2009, the ALJ issued an Order to Show Cause why Respondent-Appellant’s Answer should not be stricken as untimely and procedurally deficient and why Complainant-Appellee’s Motion for Default Judgment should not be granted. Respondent-Appellant submitted an undated Declaration in Response to Show Cause which was received by counsel for OPR on April 22, 2009. The substance of Respondent-Appellant’s Declaration is that he did not timely file an Answer because he was busy with his legal practice. Respondent-Appellant never requested an extension of time for filing the Answer.

On July 2, 2009, the ALJ issued a Decision on Motion for Default Judgment holding that the reasons given by Respondent-Appellant for not filing a timely Answer were insufficient, and, therefore, refused to consider the Answer. Accordingly, the ALJ found that Respondent-Appellant is deemed to have admitted the allegations of the Complaint and ordered that Respondent-Appellant is disbarred from practice before the Internal Revenue Service.

On August 3, 2009, the Respondent-Appellant appealed the decision of the ALJ. On September 3, 2009, Complainant-Appellee filed a Response to Respondent-Appellant’s Appeal.

² I have chosen not to discuss the allegations of willful failure to pay taxes for the years 2001-2005 since there is insufficient information in the file I have reviewed regarding these allegations.

Decision on Motion for Default Judgment

I concur with the decision of the ALJ that a decision on the Motion for Default Judgment is appropriate. Respondent-Appellant has not given sufficient reasons for failing to file a timely Answer to the Complaint. Nor did Respondent-Appellant request an extension of time to file an Answer to the Complaint. The Answer was filed only after Complainant-Appellee moved for a default judgment. Even then, the Answer did not comply with the requirements of 31 C.F.R. § 10.64(b). The allegations in the Complaint are deemed admitted as detailed in the opinion of the ALJ. Respondent-Appellant engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51(d) by willfully failing to timely file Federal income tax returns for the years 2001, 2002, 2003, 2004, and 2005.

Merits of the Action Taken by the Office of Professional Responsibility

The Respondent-Appellant has engaged in practice before the Internal Revenue Service as defined in 31 C.F.R. § 10.2(a). As noted above, Respondent-Appellant failed to timely file Federal tax returns for five years. Respondent-Appellant does not provide a reason for his failure to timely file his returns in his belated Answer, in his response to the show cause order, or in his appeal. Prior to the Complaint filed in this matter, Respondent-Appellant did write to the Office of Professional Responsibility indicating that his failure to timely file his returns was due to a medical condition and due to personal family matters.

Willfulness is not defined in Treasury Circular 230. The Appellate Authority previously has applied the definition of willfulness used in criminal cases, in particular Cheek v. United States, 498 U.S. 192 (1991) and United States v. Pomponio, 429 U.S. 10 (1976). For the purposes of this case, I will analyze the facts as if such standard applies. As described in Cheek and Pomponio, willful means the voluntary, intentional violation of a known duty. It does not require any showing of motive. Throughout the period of time when he failed to timely file his income tax returns, Respondent-Appellant worked full time as an attorney and represented clients before the Internal Revenue Service. As an attorney representing clients before the Internal Revenue Service, Respondent-Appellant knew about his obligations to timely file tax returns. He has failed to provide any valid reasons for his failure to timely file Federal income tax returns for five consecutive years. I concur in the finding of the Administrative Law Judge that Respondent-Appellant's failure to timely file returns was willful and constitutes a violation of Sections 10.51(f)³ and 10.52 of Treasury Circular 230.

³ As in effect July 26, 2002. While the specific provision dealing with willfully failing to file an income tax return under section 10.51 has changed designation, the language has not. For example, in the 1994 version, this was designated section 10.51(d). For simplicity, I will refer to this as section 10.51(f).

Appropriate Sanction

Complainant-Appellee requests that Respondent-Appellant be suspended for a term of at least four (4) years subject to specified conditions for reinstatement. The ALJ disbarred Respondent-Appellant from practice before the Internal Revenue Service. While I believe that the failure to timely file returns for five years supports disbarment of Respondent from practice before the Internal Revenue Service, I will defer to OPR.

Conclusion

For the reasons stated, I hereby determine that the Respondent-Appellant is suspended from practice before the Internal Revenue Service for a period of forty-eight (48) months, reinstatement thereafter being at the sole discretion of OPR and subject to the conditions set forth in the Complaint as listed in the Background section above. This constitutes FINAL AGENCY ACTION in this proceeding.

**Ronald D. Pinsky
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
(As authorized delegate of
Timothy F. Geithner,
Secretary of the Treasury)**

**May 26, 2010
Lanham, MD**