United States

Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellant
("C-A")

v. **Complaint No. 2008-03**

Alex J. Llorente, Esq.
Respondent-Appellee
("R-A")

Decision on Appeal

Authority

Under the authority of Treasury General Counsel Order No. 9 (January 19, 2001) and the authority vested in her as Acting Assistant General Counsel of the Treasury who was acting Chief Counsel of the Internal Revenue Service, through a Delegation Order dated February 9, 2009, Clarissa Potter delegated to the undersigned the authority to decide disciplinary appeals to the Secretary of Treasury filed under Part 10 of Title 31, Code of Federal Regulations ("Practice Before the Internal Revenue Service," sometimes known and hereinafter referred to as "Treasury Circular 230"). This is such an Appeal from a Decision By Default entered by Judge Robert A. Giannasi, Chief Administrative Law Judge of the National Labor Relations Boar(the "ALJ"), against R-A, on September 23, 2008.[1]

Background

This proceeding was commenced on June 18, 2008, when C-A issued a Complaint against R-A alleging that R-A had committed five separate acts of disreputable conduct under § 10.51 and §10.51(d) of Treasury Circular 230 (Rev. 1994) or § 10.51(f)(Rev. 2002) by willfully failing to timely file or willfully failing to file his personal Federal income tax returns (Forms 1040) for the 2000, 2001, 2002, and 2003 tax years, and the 2005 tax year.[2] The Complaint also alleged that R-A:

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[1] The ALJ's Decision By Default appears as Attachment 1 to this Decision on Appeal. This Attachment, together with all other Attachments referred to in this Decision on Appeal, are hereby incorporated by reference in this Decision on Appeal as if fully set forth herein.

[2] At the time the Complaint was filed, the charge pertaining to the 2000, 2001, 2002 and 2003 tax years was that R-A willfully failed to timely file his personal income tax returns (Form 1040), and the charge

had engaged in practice before the Internal Revenue Service as an attorney, and was subject to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility. The Complaint also informed R-A that he was required to Answer the Complaint within 30 calendar days of the date of service and informed R-A that a failure to timely answer the Complaint could result in a Decision by Default being entered against him.

R-A did not file a timely Answer to the Complaint. On September 8, 2008, after R-A's time to file an Answer had passed, C-A filed a Motion for Decision By Default with the ALJ, accompanied by a Declaration and Certificate of Service. Copies of the foregoing documents were served upon R-A.[3] When R-A filed no response to C-A's Motion, the ALJ entered his Decision by Default on September 23, 2008.

R-A then filed his Notice of Appeal on October 23, 2008.[4] The Notice of Appeal is unclear and subject to two interpretations. Under one interpretation, the Notice of Appeal states that a late filing of personal Federal income tax returns can never be viewed as disreputable conduct as described in § 10.51, §10.51(d)(Rev. 1994) or § 10.51(f)(Rev.2002) of Treasury Circular 230. Under the other interpretation, you can read R-A's Appeal as limited to the particular circumstances that pertained to R-A given the circumstances of his unraveling marriage in a community property jurisdiction. I find the first argument without merit and the second argument unpersuasive given other courses of action that may have been available to R-A for some, if not all, of the taxable years in issue. Cf. Section 66 of the Internal Revenue Code.[5] Whatever difficulties he faced in filing his returns given his awkward marital status and hoped for resolution of his marital difficulties, late filing or non-filing over five years was not an appropriate

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pertaining to R-A's 2005 tax year was initially the failure to file at all. Subsequently, the charge relating to the 2005 tax year was amended to willful failure to timely file R-A's personal Federal income tax return (Form 1040) for the 2005 tax year.

[3] Copies of these documents appear as Attachment 2 to this Decision on Appeal.

[4] A copy of R-A's Appeal and the April 9, 2006 letter from R-A to Elizabeth Ahn of the Office of Professional Responsibility (which accompanied it) collectively appear as Attachment 3 to this Decision on Appeal.

[5] There is a hint in R-A's April 9, 2006 letter to Ms. Ahn that his reason for late filing may have been his belief that his best interests (and his wife's) would be served by delaying filing until they could file a joint return. While R-A may have been correct that their best interests would have been served by filing a joint Federal personal income tax return, R-A had no right to fail to timely file returns when it became evident that circumstances would not permit him to file a timely joint Federal income tax return for those years. In his letter to Ms. Ahn, R-A described a spouse "coming apart at the seams," personally and financially. It is hard to know where the truth lay. The administrative record does not include the version of events from R-A's spouse. Even if she were to confirm R-A's version of events, it hardly justifies the late filing of R-A's returns for the years in issue. In years where he could meet each of the requirements of Section 66 of the Internal Revenue Code, he could file a complete return complying with that provision as "married filing separately." In any years when he did not meet each of the requirements of Section 66, he could have filed a timely return on the basis of all the information available to him, accompanied by a statement explaining his circumstances and reserving the right to file an amended return reflecting more inclusive information when that information was made available to him. Of course, such a schedule could and probably should have prompted an audit of R-A's wife for the years in issue.

response. See United States v. Boyle, 469 U.S. 241 (1985), where 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 with strict filing standards. Any less rigid standard would risk a lax attitude toward filing dates. Prompt payment of taxes is imperative to the Government, which should not have to assume the burden of unnecessary ad hoc determinations.**

469 U.S. at 249. I find this statement equally true in the case of refund and balance due returns, where the burdens imposed on the Internal Revenue Service can be significant.

Subsequently, C-A filed both a Reply and an Amended Reply to R-A's Appeal.[6] In her Amended Reply to R-A's Appeal, C-A properly noted that R-A had not timely raised these issues either in an Answer to the Complaint or in a timely Response to C-A's Motion for Default Judgment. C-A noted that R-A had provided no explanation of either of these failures and stated that R-A should not now be permitted to raise these issues on Appeal. I agree. In fact, I see a disturbing commonality between R-A's conduct with respect to his personal Federal income tax returns (i.e., the underlying charges against him) and his conduct during this proceeding. I therefore AFFIRM the ALJ's findings and conclusions with respect to the charges against R-A.

Sanction

I review the ALJ's sanction determination *de novo* and with the full authority of the Secretary of the Treasury and the charging agency. Accordingly, I may increase the penalty, decrease the penalty or affirm the penalty. For the reasons stated by the Supreme Court in Boyle, supra, I view the willful failure to file a personal Federal income tax return as a serious offense. When confronted by a pattern of willful[7] failures to file personal Federal income tax returns extending over five years, I have uniformly imposed a sanction of disbarment. I do not find R-A's ongoing marital discord to constitute a mitigating factor that I should consider in deviating from my prior practice of disbarring practitioners for such conduct. According, I hereby DISBAR R-A from practice before the Internal Revenue Service.

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[6] These documents appear as Attachments 4 and 5 to this Decision on Appeal.

[7] R-A has not raised in his Appeal the issue of whether his failures to timely file were "willful." I have had many occasions to discuss this issue in Treasury Circular 230 disciplinary proceedings. I first did so in a Decision on Appeal in Director, Office of Professional Responsibility v. Joseph R. Banister, Complaint No. 2003-02. A copy of pages 40 through 52 of the Banister Decision on Appeal appear as Attachment 6 to this Decision on Appeal. For the reasons discussed in Attachment 6, I find each of R-A's violations to have been "willful."

Conclusion

This Decision on Appeal 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 Representative of the Secretary of the Treasury)

April 10, 2009
Washington, D.C.