United States

Department of the Treasury

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Director, Office of Professional Responsibility

Complainant-Appellee ("C-A")

v. Complaint No. 2007-35

Edwin Davis Jr., C.P.A.

Respondent- Appellant ("R-A")

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## 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 General Counsel of the Treasury who was the 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 the 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 of Administrative Law Judge Michael A. Rosas (the "ALJ") on February 21, 2008 (the "Decision" .[1])

### Background

There is no dispute concerning whether the jurisdictional prerequisites have been met in this case. R-A is a C.P.A. who has been authorized to practice and has in fact practiced before the Internal Revenue Service. As such, he is subject to the standards of conduct and disciplinary rules established in Treasury Circular 230, and is subject to the disciplinary authority of the Secretary of the Treasury and the Director or acting Director of the Office of Professional Responsibility established under 31 U.S.C. §330(a)(1). This proceeding was commenced when, on July 13, 2007, C-A filed Complaint against R-A alleging that R-A had violated various provisions of Treasury Circular 230 which constituted disreputable conduct by a practitioner and which collectively called for his disbarment from practice before the Internal Revenue Service. Specifically, the Complaint charged that R-A had been guilty of: willfully failing to file (or willfully failing to timely file) his personal Federal income tax returns (Forms 1040) for the taxable years 2001 through 20005, inclusive (hereinafter, the "Category 1 Offenses"); willfully failing to pay (or willfully failing to timely pay) his personal income tax liabilities for the tax years 2001 through 2005, inclusive (hereinafter, the "Category 2 Offenses"); willfully failing to file (or willfully failing to timely file) quarterly employment tax returns (Forms 941) for each of the quarters comprising the 2001

[1] The ALJ's Decision appears as Attachment 1 to this Decision on Appeal.

through 2005 tax years (hereinafter, the "Category 3 Offenses")[2]; and willfully failing to pay (or willfully failing to timely pay) employment taxes for each of the quarters comprising the 2001 through 2005 tax years (hereinafter, the "Category 4 Offenses"). In his Decision, the ALJ found that: R-A had committed each offense; each offense constituted disreputable conduct as defined in relevant sections of Treasury Circular 230; and that the Offenses, in the aggregate, justified his disbarment from practice before the Internal Revenue Service.

On March 19, 2008, R-A timely filed his Appeal[3] of the ALJ's Decision. In his Appeal, R-A: (i) admitted that he had filed his personal income taxes late for each of the years 2001 through 2005, inclusive but claimed that he had filed all such returns by May 22, 2006;[4] (ii) tried to avoid a direct admission that he was personally responsible for the late filing of the employment tax returns (Forms 941) of the "S Corp" for the calendar quarters comprising the tax years 2001, 2002, 2003, 2004 and 2005, but stated that all such returns had been filed by May 22, 2006; (iii) stated that on two separate occasions in 2005 and 2006 when he alleged that he qualified for installment agreements to pay delinquent payroll and income taxes, the Internal Revenue Service failed to provide him with the documents needed to commence the Installment Agreements to which he was entitled;[5] (iv) stated that the ALJ's findings of fact were erroneous in that they confused R-A with the S Corp;[6] (v) R-A claimed the IRS failed to followed its own prescribed procedures and wrongfully denied R-A his right to obtain an Installment Agreement;[7] (vi) R-A claimed that "[T]here is no legal basis for the IRS to attribute to Respondent the failure of' the S Corp "to file Form 941 or to pay withholding taxes without a determination that Respondent is a 'responsible person' under Code Section 6672";[8] (vii) R-A claimed that the ALJ committed reversible error by denying R-A's request to exclude from evidence the S Corp.'s Forms 941 for each of the calendar

[2] During each of the quarters comprising the years 2001 through 2005, R-A acted as the sole corporate officer and sole full-time employee of Edwin Davis, Jr., PC, an S Corporation for Federal income tax purpose (the "s Corp".)

[3] A copy of R-A's Appeal appears as Attachment 2 to this Decision on Appeal

[4] C-A disputed R-A's claims with respect to R-A's alleged filing of his individual income tax returns (Forms 1040) for the years 2004 and 2005. The AU credited the testimony of one of C-A's witnesses, Revenue Officer Bernheimer, saying that R-A had submitted Forms 1120-S for 2004 and 2005 for the S Corp to Revenue Bernheimer around that date, but not R-A's Forms 1040 for 2004 and 2005. Mr. Bernheimer's version of events was confirmed by Mr. Bernheimer's contemporaneous notes of the events recorded in the IRS' Integrated Collection System ("ICS") and was accepted by the AU, who generally found Mr. Bernheimer's version of events more credible than R-A's. This is a mixed question of law and fact which I review under a "clearly erroneous" standard of review. I do not find the ALJ's findings on this point "clearly erroneous."

[5] I find these allegations relevant, if at all, only to the Category 2 and Category 4 Offenses. For the reasons stated below, I find that (i) C-A has failed to meet his burden of proof with respect to these Offenses and (ii) proof of these charges is unneeded to support the sanction sought by the C-A and imposed by the ALJ.

[6] While I agree that the ALJ confused R-A with the S Corp and that they are separate legal persons, for the reasons mentioned below. I find this fact relevant only to the Category 4 Offenses. As to the Category 3 Offenses, for the reasons stated below, I do not agree with R-A's argument.

[7] Again, if that fact were relevant, as a matter of law I would find it relevant only to the Category 2 and Category 4 Offenses. Again, as (i) I find for the reasons set forth below that C-A has failed to meet his burden of proof with respect to these Offenses, and (ii) proof of these Offenses is not required to support the sanction sought to be imposed by C-A, I will not consider these matters further.

[8] I will address this assertion below. Suffice it to say that find it without merit insofar as Category 3 Offenses are concerned. Insofar as its relevance to the Category 4 Offenses is concerned, as (i) I have for other reasons found that C-A has failed to meet his proof with respect to those Offenses, and (ii) I find the sanction sought is adequately justified by the charges where C-A has met the burden of proof, I find it unnecessary to discuss this allegation further.

quarters Comprising 2001, 2002, 2003, 2004 and 2005;[9] and (viii) R-A claimed that the ALJ erred by finding that the R-A had committed each of the Category 1, 2, 3 and 4 Offenses "willfully."[10]

The issues were joined on Appeal when C-A filed his Response to the Appeal on April 18, 2008.[11] My findings and conclusions with respect to the issues joined on Appeal appear below.

"Willfulness:" Generally. 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.[12] Of particular importance to all Offenses charged against R-A are four United States Supreme Court cases cited in Attachment 4 - Bishop,[13] Pomponio,[14] Cheek,[15] and Boyle.[16] The Bishop/Pomponio line of cases establishes that the term "willful" merely means a voluntary, intentional violation of a known legal duty.

In Cheek, the issue was whether the defendant, an airline pilot, 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 an objectively unreasonable interpretation of a substantive provision of the Internal Revenue Code and another based on his belief that the Federal income tax was unconstitutional. As to the former (the statutory claim), the Supreme Court, per Mr. Justice White, found that Cheek was entitled to the requested instruction. As to Cheek's constitutional claim, the Supreme Court found that he was not. The Supreme 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 in a criminal proceeding because every person is presumed to known the law. However, 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" failed to carry out 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 Federal 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 specific subjective intent). But Justice White adopted this heightened proof requirement only on issues relating to statutory construction, not on the constitutionality of the income tax. As to that matter, the Supreme Court found that Cheek was not entitled to the instruction requiring heightened proof on the part of the Government. As to the constitutional claim, the common law rule of presumed knowledge of the law prevailed.

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[9] For the reasons stated below, I disagree

[10] For the reasons stated below, I find that C-A has sustained his burden of proof that each of the Category 1 Offenses and Category 3 Offenses was committed "willfully." Also for the reasons stated below, I find that C-A has failed to sustain his burden of proof that the Category 2 and Category 4 Offenses were committed "willfully" or "voluntarily."

[11] C-A's Response to R-A's Appeal appears as Attachment 3 to this Decision on Appeal.

[12] Pages 40 through 52 of the Decision on Appeal in Banister appear as Attachment 4 to this Decision on Appeal.

[13] United States v. Bishop, 412 U.S 346 (1973).

[14] United States v. Pomponio, 429 U S 10 (1976).

[15] Cheek v. United States, 498 U S 192 (1991).

[16] United States v. Boyle, 469 US 241 (1985).

As to questions dealing with whether a taxpayer has a duty to file a return, and if so, when, and whether a taxpayer has an obligation to pay tax, and if so, when, I find those questions are properly governed by the common law rule presuming knowledge of the law. Indeed, the Supreme Court has already ruled on this question, albeit in a different context. In Bovle, the issue before the Supreme Court was whether an estate fiduciary could delegate the responsibility to file an estate's Federal income tax return and thereby avoid exposure to a failure to file (or failure to timely file) penalty. The Supreme Court held that the duty imposed on the estate fiduciary was personal and non-delegable, and distinguished the duty to file from other matters (for example, determining the correct amount of a tax liability) where it would be reasonable to rely on a tax advisor. I find these matters to be governed by the common law presumption of knowledge of the law. Even if they were not, and were instead governed by the higher proof requirement for matters of statutory interpretation established in Cheek, the record in this case clearly establishes that R-A knew he had not: (i) timely filed his personal Federal income tax returns for 2001, 2002, 2003, 2004 and 2005, and (ii) timely filed the Federal employment tax returns for the twenty calendar quarters comprising those years. Like the taxpayer in Cheek upon remand, it is one thing to prove that you are entitled to a jury instruction on a good faith but erroneous belief and another thing entirely to prove the existence of such a belief to the satisfaction of a jury. If that is a heavy burden for an airline pilot, it is indeed heavy lifting for a trained tax professional with many years of experience in tax practice doing the very tasks being considered. The ALJ found it so, and I find no basis for disturbing his findings and conclusions.

R-A tries to make much of the ALJ's failure to note that the R-A and the S Corp. are separate legal persons under the relevant provisions of the Federal tax laws and the regulations thereunder. While true, that distinction hardly has the consequences R-A suggests. In the case of a corporate income tax return, the return must be signed and filed by the corporation's president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act. See Section 6062 of the Internal Revenue Code. This filing obligation exists for every corporation, and must be met without regard to whether the corporation has income, and without regard to the amount of its gross income. Treas. Reg. §1.6012(a)(1). In the case of an S Corporation such as 5 Corp, that obligation is met through the filing of an annual Form 11205. See Treas. Reg. § 1.6012-2(h). In the case of employment tax returns of a corporate employer, the obligation must be met by the corporation acting through the corporation's president, vice president, or other principal officer. Section 6061(a) of the Internal Revenue Code and Treas. Reg. § 31.6061-1(b}.These provisions reflect the fact that when a "person" other than a natural person has a return filing obligation, that person acts through another person who is a natural person bearing a fiduciary obligation to the entity with the obligation to file a return. That obligation arises solely by reason of the fiduciary's relationship to the filing entity, not by his or her status as a "responsible person." The person(s) responsible for filing Form 941 on behalf of a corporate employer (the president, vice president or other principal officer) are now and during the years in issue were spelled out in the Instructions to Form 941 (see, e.g. page 7 of the Instructions to Form 941 for 2008), which indicate that Form 941 must be completed and signed by the corporation's president, vice president or other principal officer. As noted above, R-A, the president of S Corp, was the only officer of S Corp. The penalty imposed on "responsible persons" under Section 6672 is separate and distinct from the corporation's own employment tax obligations, although the Internal Revenue Service has a policy of not pursuing the Section 6672 penalty against any "responsible person" if the trust fund tax

liabilities have been paid by the corporate employer or another "responsible person.,,[17] During the years in issue, R-A was the sole officer and shareholder of the S Corp. and was therefore responsible for filing its Forms 941 for each of the 20 calendar quarters in issue.

Thus, the ALJ's admission of the Forms 941 into evidence was not error. The returns in issue were relevant and probative in determining whether R-A was guilty of the Category 3 Offenses - willfully failing to make a Federal tax return in violation of the revenue laws of the United States under §10.51 (d) of Treasury Circular 230 (Rev. 1999) or §10.51 (f) of Treasury Circular 230 (Rev. 7-2002).

Additional Requirements to Establish "Willfulness" in the Case of Category 2 and Category 4 Offenses

In the case of a failure to pay R-A's personal Federal income taxes (timely or at all), or a failure to pay S Corp.'s employment taxes, additional issues remain, and they relate to whether such failures were voluntary failures to pay either by R-A or by S Corp. In a prior unpublished Decision on Appeal, I have held that this is one of the required elements of C-A's burden of proof, analogizing these proceedings to criminal tax proceedings under Section 7202 rather than civil penalty proceedings under Section 6672,[18] in part because of the similarity of the language in Section 7202 to the language contained in the relevant section of Treasury Circular 230. I so hold again. I find that C-A has the burden of proof on each element of proof, albeit under a different standard of proof.[19]

A review of the evidence in this case reflects that R-A, while a C.P.A., was a man who, throughout the five years in issue, had earned an average of only $21,272.00 per year from the S Corp. and his accounting practice, had considered abandoning his practice to pursue a career as a screenwriter, had no meaningful accumulation of liquid assets (personally or in the S Corp),[20] had three minor children that relied on him for support (two by his former wife and one by his former girlfriend) and with respect to which he was in arrears in meeting child support obligations,[21] and generally seemed to be a person who was experiencing a personal and professional meltdown. In my judgment, those facts do not reflect circumstances that suggest, let alone prove, that his payment failures were "voluntary" and "willful." On this record, I do not find those failures to constitute "disreputable conduct." Treasury Circular 230 should not be construed in a manner that adds to the weapons in the IRS' arsenal of forced collection tools against practitioners, or that dooms practitioners to some equivalent of a Federal debtors' prison. I think that sustaining the

[17] For this reason, I find the fact that the Internal Revenue Service failed to follow its Section 6672 penalty procedures in its dealings with R-/\ irrelevant to this proceeding.

[18] For C-A to sustain its burden, it must show that R-A and the S Corp, had the ability to pay their respective obligations at the times relevant to the charges, See, e.g. "United States v, Evangelista, 12 F.3d 112 (2d Cir, 1997) (ability to pay relevant, but showing met on the facts of the case),

[19] In a criminal tax proceeding, the Government must establish each element of its required proof beyond a reasonable doubt. The standard of proof applied against the C-A in a Treasury Circular 230 proceeding differs depending on the sanction C-A seeks to impose, When, as here, the C-A seeks to impose a sanction of disbarment, the standard of proof is proof by clear and convincing evidence.

[20] Indeed, the record shows that the IRS' attempts to levy on his personal and S Corp, bank accounts or obtain monies owed from his clients had proved to no avail.

[21] While the IRS witnesses said that R-A had failed to submit to the IRS proof of his child support obligations, in this proceeding, that is an element of C-A's proof, not an element of the R-A's proof.

Category 2 and Category 4 Offenses on this record would risk those results, and I refuse to do so. I find that, on this record, C-A has not met his burden of proof on those charges.[22]

Sanction and Conclusion

On the basis of all the charges brought by the C-A and sustained by the AIJ in this proceeding, the ALJ disbarred R-A from practice before the Internal Revenue Service. In her testimony before the ALJ for the C-A, Ms. Ahn suggested that the Category 1 Offenses alone justified the sanction of disbarment. I agree and have so held in numerous Treasury Circular 230 proceedings. For the reasons set forth by the Supreme Court in United States v.Boyle, supra I find a pattern of unexcused willful failures to timely file Federal income tax and employment tax returns to constitute serious offenses that justify a finding of disreputable conduct and alone justify the imposition of the sanction of disbarment. Specifically, I find that these failures have imposed administrative burdens on the Internal Revenue Service that are unjustified and are a direct result of R-A's failures to meet basic obligations of citizenship. Practitioners should be part of the solution, not part of the problem. Accordingly, I AFFIRM the relevant findings and conclusions of the ALJ (those relating to the Category 1 and 3 Offenses) and disbar R-A from practice before the Internal Revenue Service. This Decision on Appeal constitutes FINAL AGENCY ACTION in this proceeding.

David F. P. O'Connor

Special Counsel to the Senior Counsel

Office of the Chief Counsel, IRS

(As Authorized Delegate of the Secretary of the Treasury)

March 10, 2009

Washington, D.C.

[22] I do not mean to suggest that there are no circumstances where a failure to pay could be proved to be "voluntary" and consequently "willful." I am only saying this case does not come close to meeting the standards I would impose for the C-A to sustain a "clear and convincing evidence" standard on these charges. If the readers or this Decision on Appeal interpret me to mean that I would require a high standard of proof of C-A on such charges, that is probably an accurate reflection of my views. I note that these charges were made because Mr. Bernheimer believed his supervisor would not approve an offer in compromise that would not totally "payout" within 3 years, requiring monthly payments of $800 as opposed to the $500 offered by R-A Whatever wisdom (or lack thereof) was reflected in that internal collection guideline (likely prompted by the statute of limitation on collection), it does not constitute evidence of R-A's ability to pay income or employment taxes at any of the times relevant to these charges. On this evidence, these charges do not belong in a Treasury Circular 230 disciplinary proceeding, where the C-A carries the burden of proving that failures to pay were voluntary.