

United States  
Department of the Treasury

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Director, Office of Professional Responsibility,  
Complainant-Appellant and Appellee

v.

Complaint No. 2008-12

Kevin Kilduff,  
Respondent-Appellant and Appellee

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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 entered in this proceeding against Kevin Kilduff by Administrative Law Judge Joel P. Biblowitz (the ALJ) on November 18, 2008.<sup>1</sup>

Procedural History

This proceeding was commenced on May 30, 2008, when Heather A. Southwell, an attorney acting as the authorized representative of the Director of the Office of Professional Responsibility (OPR), filed a Complaint against Respondent. The Complaint alleges that Respondent: (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 file Federal income tax returns as required by 26 U.S.C. §§ 6011, 6012, and 6072 for the year 2002, (iii) had willfully failed to timely file Federal income tax returns as required by 26 U.S.C. §§ 6011, 6012, and 6072 for the years 2000, 2001, 2003, 2004, and 2005, (iv) that with respect to tax year 2000 such willful failure constituted disreputable conduct within the meaning of 31 C.F.R. § 10.51 generally and a willful violation of 31 C.F. R. § 10.51(d) (Rev.

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<sup>1</sup> A copy of the ALJ's Decision appears as Attachment 1.

1994) more particularly, (v) that with respect to tax years 2001, 2002, and 2003, 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, and (vi) that with respect to tax years 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. 2005) more particularly. The Complaint recommends that Respondent should receive as a sanction for his conduct a forty-eight (48) month suspension from practice before the Internal Revenue Service and further requiring that his suspension not be lifted until Respondent has filed all of his tax returns and paid all outstanding Federal tax liabilities, or to have entered into an installment agreement or offer in compromise which has been accepted by the Service and with which the Respondent has remained in compliance. The Complaint also alleged as background facts that Respondent failed to timely file his 1998 and 1999 Federal income tax returns and that as of January 3, 2008, Respondent owed more than \$18,000 in personal income taxes.

Respondent filed an undated Answer to the Complaint which was received by counsel for OPR on July 3, 2008. In the answer Respondent admitted that he engaged in practice before the Internal Revenue Service as an attorney, admitted that he filed his 1998 and 1999 returns late (but alleged the late filing was due to reasonable cause), and admitted that he was required by 26 U.S.C. §§ 6011, 6012, and 6072 to file his individual income tax returns for the years 2000, 2001, 2002, 2003, 2004, and 2005 by the extended due dates. Respondent denied that he willfully failed to timely file the returns for the years 2000, 2001, 2003, 2004, and 2005. Respondent also denied that he willfully failed to file a Federal income tax return for year 2002. On October 1, 2008, a hearing was held in Boston, Massachusetts before the ALJ. On November 12, 2008, briefs were filed by both Complainant and Respondent.

On November 18, 2008, the ALJ held that “[t]he Respondent engaged in disreputable conduct within the meaning of Section 31 C.F.R 10.51 by failing to file a Federal tax return for the tax year 2002.” The ALJ imposed a sanction of a suspension from practice before the Internal Revenue Service twenty-four (24) months. The ALJ held that the late filing of returns for tax years 2000, 2001, 2003, 2004, and 2005 did not constitute disreputable conduct under Section 10.51 of Circular 230.

On December 17, 2008, both Complainant and Respondent appealed the decision of the ALJ. On February 5, 2009, Complainant filed a Response to Respondent’s Appeal.

### Findings of Fact

The Appellate Authority reviews the ALJ’s findings of fact under a clearly erroneous standard of review. Section 10.78 of Circular 230 (Rev. 4-2008).

Respondent is an attorney who has engaged in practice before the Internal Revenue Service. Respondent was previously employed as an attorney for the Internal Revenue Service for about five years beginning in 1993. After leaving the Internal Revenue Service he worked as an attorney with a law firm in Philadelphia and then later with a law firm in Boston. He is currently a partner with the law firm in Boston.

The following chart reflects the original due dates and the ALJ's findings regarding when Respondent's individual tax returns were due and when those returns were actually filed (if ever) for the 2000 through 2005 tax years.<sup>2</sup>

Tax Year	Original Return Due Date	Extended Return Due Date	Date IRS Received The Return
2000	April 15, 2001	October 15, 2001	April 10, 2003
2001	April 15, 2002	October 15, 2002	August 5, 2004
2002	April 15, 2003	October 15, 2003	No Return Filed
2003	April 15, 2004	August 15, 2004	June 30, 2006
2004	April 15, 2005	October 15, 2005	November 24, 2006
2005	April 15, 2006	October 15, 2006	November 24, 2006

As noted above, the Complaint alleges, as "background facts" that Respondent failed to file timely his Federal individual income tax returns for tax years 1998 and 1999. Respondent admits in his Answer to the Complaint that his 1998 and 1999 returns were filed late.

The ALJ specifically found that Respondent did not file a Federal tax return for the tax year 2002 and that Respondent filed his tax returns for tax years 2000, 2001, 2003, 2004, and 2005 late.

Respondent was aware of the requirement to timely file his tax returns.

The ALJ's findings of fact are well supported by the record and are not clearly erroneous.

Respondent testified at the hearing held on October 1, 2008, that he has an L.L.M. in tax, that he is a partner in the fifth largest law firm in Boston, that he is "one of the most highly regarded tax controversy attorneys in" Boston, and that his clients pay him "an exorbitant amount of money to represent them in connection

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<sup>2</sup> Pursuant to section 7503 of Title 26, if the due date for filing a return is a Saturday, Sunday, or a legal holiday, the return is considered timely if filed on the next succeeding day which is not a Saturday, Sunday, or legal holiday. For purposes of this discussion, the due dates used are listed without regard to section 7503. Any differences in due dates because of section 7503 have no bearing on the result herein.

with IRS matters.” He also stated that he has dealt with “hundreds and hundreds of agents during [his] career both as an IRS attorney and in private practice...”

Respondent was generally familiar with Circular 230. He also signed hundreds of Forms 2848, “Power of Attorney and Declaration of Representative.” The Form 2848 references Circular 230 and provides that by signing the Form, the practitioner acknowledges that the practitioner is familiar with the regulations contained in Circular 230.

### Analysis

Section 10.51(f) of Circular 230<sup>3</sup> provides that incompetence and disreputable conduct includes “[w]illfully failing to make a Federal tax return in violation of the revenue laws of the United States...” Pursuant to section 10.51 “a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service” for engaging in such misconduct. Section 10.52 of Treasury Circular 230 as in effect during the periods in issue provides that “[a] practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service” for “[w]illfully violating any of the regulations contained in this part.”

The ALJ found that the language of section 10.51(f) does not include late filing of returns. The ALJ focused on the initial language of “willfully failing to make a Federal tax return” and did not address the language “in violation of the revenue laws of the United States” which immediately follows. I.R.C. §§ 6011 and 6012 set forth the general requirements for filing returns and who must file an income tax return. I.R.C. § 6072 sets forth the time for filing income tax returns. I.R.C. § 6081 provides that the Secretary may grant a reasonable extension of the time for filing returns but no more than six months. Failing to file a return within the time requirements of I.R.C. §§ 6072 and 6081 is in violation of the revenue laws of the United States even if the return is ultimately filed. Accordingly, willfully failing to timely file a return is disreputable conduct within the express language of section 10.51(f). The Appellate Authority has held that repeated failure of a practitioner to file his or her Federal income tax returns in a timely manner constitutes a willful violation of sections 10.51(f) and 10.52. See Director, OPR v. Martin M. Chandler, C.P.A., Complaint No. 2006-23 (Decision on Appeal, May 14, 2008) (In which the Appellate Authority increased the length of suspension determined by the Administrative Law Judge). See also OPR v. Yoder, Complaint No. 2007-33 (in which another Administrative Law Judge found that willful failure to timely file a return was disreputable conduct within section 10.51(f)).

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<sup>3</sup> As in effect June 20, 2005. 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 meaningfully changed. 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).

Respondent filed his 2000, 2001, 2003, 2004, and 2005 returns late and failed to file his 2002 return. I find that these failures, if willful, are all disreputable conduct under section 10.51(f).

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). I question whether the criminal standard is the appropriate standard to apply in the context of a civil proceeding to determine whether disciplinary action should be taken for professional misconduct. Neither party has briefed the issue regarding the proper definition of willfulness under Treasury Circular 230. This is most likely because the Appellate Authority has previously adopted the standards defined in Cheek and Pomponio. Therefore, for the purposes of this case, I will apply the definition of willfulness as described in Cheek and Pomponio. I invite the parties in future cases to brief what the appropriate definition for willfulness should be under Treasury Circular 230.

As described in Cheek and Pomponio, willful means the voluntary, intentional violation of a known duty. It does not require any showing of motive. Since 1993, Respondent has worked full time either as a tax attorney for the Internal Revenue Service or as a tax attorney in private practice. He has an L.L.M. in tax and considers himself one of the most highly regarded tax controversy attorneys in Boston. He was aware of the requirement to file returns, and the requirement to file returns timely. For each of the tax years at issue, Respondent filed extensions of time in which to file his individual income tax returns. This further establishes that he knew about the time deadlines for filing returns. Respondent's failure to file the 2002 return and failure to timely file the returns for the years 2000, 2001, 2003, 2004, and 2005 was a violation of a known duty. I find that Respondent willfully violated section 10.51.

Respondent also argues that OPR's complaint should be dismissed because of actions taken by a Revenue Officer for the IRS. Respondent alleges that the Revenue Officer referred his failure to timely file his tax returns to OPR because the Revenue Officer was unhappy with Respondent's zealous representation of a client. Respondent alleges that the Revenue Officer improperly accessed Respondent's tax records and improperly made the referral because of a personal vendetta.

The ALJ found that there is no evidence indicating the Revenue Officer either improperly accessed Respondent's tax records or made the referral because of a personal vendetta. I concur that other than Respondent's accusations there is no evidence supporting Respondent's argument. I also concur in the ALJ's finding that these allegations, even if true, are not a defense to this proceeding. At issue is whether or not Respondent willfully failed to timely file his tax returns.

Respondent also argues that he had reasonable cause for his failure to timely file his tax returns and failure to file his 2002 individual tax return because he was taking care of his ill parents during this period. While it is certainly admirable that he would assist with the care of his ailing parents, most people have time consuming obligations such as caring for ill relatives or caring for young children and yet are able to meet their tax filing obligations. In this instance Respondent was working full time as an attorney for a major law firm engaged in tax practice. In fact, he became a partner in the fifth largest law firm in Boston during this time. I find that, given the fact that Respondent worked full time during the relevant period as an attorney with a major law firm engaged in a tax controversy practice, Respondent's reasonable cause defense is without merit.

#### Appropriate Sanction

Complainant requests a 48 month suspension from practice before the Internal Revenue Service. Respondent asserts that a private reprimand is the appropriate sanction. In recommending that Respondent be suspended for 48 months, OPR took into consideration as aggravating factors the length of noncompliance with the filing requirements, the fact that he was a tax attorney with a large firm, and the fact that he previously worked as an attorney for the Internal Revenue Service. OPR also considered as a mitigating factor that he took care of his seriously ill parents during this period. I do not consider that his taking care of his parents qualifies as a mitigating factor. Throughout the period of time that Respondent failed to timely file returns and in the case of tax year 2002 failed to file a return, the Respondent worked full time as a tax attorney representing hundreds of people before the Internal Revenue Service.

I believe the record supports disbarment of Respondent from practice before the Internal Revenue Service. OPR has proposed a 48 month suspension from practice before the Internal Revenue Service, which is a lesser sanction. I will defer to OPR and impose the sanction requested in this case.

## **Conclusion**

For the reasons stated, I hereby determine that the Respondent 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 at a minimum Respondent is to have filed all Federal tax returns and paid all outstanding Federal tax liabilities for which he is responsible, or to have entered into an installment agreement or offer in compromise which has been accepted by the Internal Revenue Service and with which the practitioner has remained in compliance. 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)**

**January 20, 2010  
Lanham, MD**