

United States  
Department of the Treasury

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Director, Office of Professional Responsibility,  
Complainant-Appellee

v.

Complaint No. 2009-31

Edgar H. Gee, Jr.,  
Respondent-Appellant

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Decision on Appeal

Authority

Under the authority of General Counsel Order No. 9 (January 19, 2001) and a delegation order dated March 2, 2011, I have been delegated 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 (IRS), 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 Initial Decision and Order (Initial Decision) entered into this proceeding by Chief Administrative Law Judge Susan L. Biro (the ALJ) on March 28, 2011.

Procedural History

This proceeding was commenced on December 9, 2009, when the Complainant-Appellee Director of the Office of Professional Responsibility (OPR) filed a Complaint against Respondent-Appellant Edgar H. Gee, Jr. ("Mr. Gee"). The Complaint alleges that Mr. Gee has engaged in practice before the IRS, as defined by §10.2 of Circular 230, as a certified public accountant, and, further, that he willfully failed to timely pay his federal income taxes as required by 26 U.S.C. §§ 6011, 6012, and 6072 [the failure to pay citation should have included §6151(a)] for tax years 1997 through 2005. The Complaint states that for each of the above years that income taxes were due on or

before April 15<sup>th</sup> of the following year. The violations, as set out in the Initial Decision at p. 16, n. 8, are described in more detail below in tabular form:

Tax Year	Adjusted Gross Income	Taxable Income	Income Tax Due	Tax Paid	Account Balance as of 11/30/09 (includes interest and penalties)
1997	\$99,776	\$80,158	\$28,026	\$714 12/8/08 - Credit transferred in from 1040 2007 12	\$0 (Balance due of \$37,180.21 written off 7/27/09)
1998	\$59,094	\$39,900	\$14,961	\$6,689 4/15/09 - Credit transferred in from 1040 2007 12	\$29,393
1999	\$76,070	\$55,848	\$18,618 + \$601 add'l tax assessed by examination on 11/18/01	\$689 10/2/01 - Advance payment of tax owed	\$42,038
2000	\$84,849	\$71,336	\$22,943	\$600 12/3/01 - Tax relief credit	\$48,783
2001	\$111,371	\$94,432	\$33,399	\$0	\$64,546
2002	\$83,638	\$66,788	\$24,601	\$400 12/1/03 - Tax relief credit	\$42,051
2003	\$80,798	\$62,148	\$20,703	\$0	\$35,517
2004	\$103,364	\$79,112	\$27,232	\$0	\$44,652
2005	\$113,123	\$91,789	\$29,717	\$10,000 2/1/07 - Payment	\$32,778
Totals	\$812,083	\$641,511	\$220,801	\$19,093	\$339,758

As indicated in the above table and as stipulated by the parties, Mr. Gee did not pay any amount of taxes for any of the above years by April 15<sup>th</sup> of the following year, and had paid only a very small percentage of the taxes owed at the time of the institution of this proceeding. The Complaint states that with respect to each of the years in question Mr. Gee's failure to timely pay his federal income taxes was willful and constituted disreputable conduct within the meaning of §10.51 of Circular 230 for which Mr. Gee may be censured, suspended, or disbarred from practice before the IRS. The Complaint requests that Mr. Gee be disbarred from practice before the IRS pursuant to §§10.50 and 10.70 of Circular 230, reinstatement thereafter being at the sole discretion

of OPR and, at a minimum, requiring that Mr. Gee have filed all federal tax returns and paid all outstanding tax liabilities, or to have entered into an installment agreement or offer in compromise which has been accepted by the IRS and with which Mr. Gee has remained in compliance.

Mr. Gee filed a response admitting that he had not timely paid his taxes but denying that his failure to pay was willful. Prehearing memoranda were submitted, a hearing was held on July 13, 2010, and Mr. Gee submitted a post-hearing brief. The Initial Decision found that Mr. Gee engaged in disreputable conduct for each of the years in question by evading or willfully evading the payment of tax as provided for by §10.51 of Circular 230 as in effect at the time. See Initial Decision at p. 30. The ALJ found that the appropriate sanction was disbarment.

Mr. Gee timely appealed the Initial Decision taking the position that his failure to pay was not willful or evasive and that the sanction of disbarment was excessive, and Mr. Gee and OPR have briefed the issues.

### 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. The Initial Decision at p. 29 states that Mr. Gee failed to timely file his income tax returns, apparently based on IRS transcripts that reflect when the IRS processed the returns rather than when they were filed. However, the transcripts reflect, and the parties agree, that this is in error and that Mr. Gee did timely file his tax returns each year. With this one exception, the ALJ's extensive findings of fact are well supported by the record and are not clearly erroneous. Since Mr. Gee was not charged with a failure to timely file and the record (see Initial Decision at pp. 26-30) provides abundant support for Mr. Gee engaging in other affirmative acts that constitute evasion, this finding of fact is not material to the decision in this case.

### Analysis

26 U.S.C. § 6151(a) provides the general rule that when a return of tax is required, the person required to make the return shall pay the tax to the IRS at the time fixed for filing, determined without regard to any extension of time for filing the return. No exceptions to the general rule apply here. 26 U.S.C. §6072(a) provides the general rule that income tax returns of calendar year taxpayers shall be filed on or before April 15<sup>th</sup> of the following calendar year. No exceptions to the general rule apply here. It is undisputed that for the years 1997-2005 Mr. Gee did not pay any tax as shown on his returns by April 15<sup>th</sup> of the following calendar year.

For the years in question §§10.51(d) and (f) of Circular 230 provided, using slightly different phrasing for 1997-2001 than for 2002-2005, that disreputable conduct included willfully evading, attempting to evade, or participating in any way in evading any federal

tax or the payment thereof, or concealing assets of himself or another to evade the payment of federal taxes. See Initial Decision at p. 30.

The ALJ set forth an appropriate legal standard as to the meaning of acting “willfully” as applied to the failure to pay tax, that is, to have a legal duty to pay tax, to know that one has such legal duty, and to voluntarily and intentionally violate that legal duty (Initial Decision at p. 16).<sup>1</sup> The ALJ correctly applied that legal standard to the facts.<sup>2</sup>

The ALJ set forth as the legal standard for “evade” or “evading,” within the meaning of §10.51 of Circular 230, that Mr. Gee must have engaged in “an affirmative attempt, act, or practice to avoid paying taxes lawfully due” (Initial Decision at p. 26) citing as support cases containing such a requirement for evasion in criminal cases (Initial Decision at p. 14-15). I am unaware of any agency decisions that have directly interpreted the meaning of “evade” or “evading” under §10.51 since decisions in Circular 230 disciplinary proceedings have been made public. The criminal tax evasion statute under 26 U.S.C. §7201 uses the term “evade” as does the civil assessable penalty statute, 26 U.S.C. §6672, and the civil statute addressing the nondischargeability of tax debts under 11 U.S.C. §523(a)(1)(C) and the case law sets out different standards under the criminal and civil statutes.

I believe that requiring affirmative acts to establish evasion sets too high a standard in the context of civil disciplinary proceedings under Circular 230. For Circular 230 purposes a pattern of culpable omissions may be sufficient to establish an effort to circumvent the payment of tax sufficient to establish evasion. For example, in civil bankruptcy cases involving the dischargeability of tax debts a pattern of failing to file returns combined with failing to paying taxes over several years, without an affirmative act, may be sufficient to constitute tax evasion.<sup>3</sup> See *United States v. Toti*, 24 F. 3d 806, 808-09 (6<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 987; *United States v. Fretz*, 244 F.3d 1323, 1329-30 (11<sup>th</sup> Cir. 2001); *In re Bruner*, 55 F. 3d 195, 200 (5<sup>th</sup> Cir. 1995); *In re Fegeley*, 118 F.3d 979, 984 (3d Cir. 1997); see generally *In re Tudisco*, 183 F.3d 133, 136-37 (2d Cir. 1999).

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<sup>1</sup> My predecessors have applied this standard in defining “willful” since *OPR v. Banister*, Complaint No. 2003-02 (Decision on Appeal, June 25, 2004) (see p. 40). It was taken from several leading criminal tax cases. In response to an invitation by my immediate predecessor, OPR has revisited the issue and suggested that a more appropriate willfulness standard in a civil disciplinary proceeding would be whether the failure to pay taxes was “knowingly done.” See Initial Decision at 7-8 and 11-13. Generally, incorporation of a civil standard to a civil disciplinary proceeding such as this one is more appropriate than is incorporation of a criminal standard (for example, attorney discipline cases subsequent to *In re Ruffalo*, 390 U.S. 544 (1968), have applied a civil standard to the due process accorded attorney disciplinary proceedings. See, e.g., *State v. Caenen*, 681 P.2d 639, 644-45 (Kan. 1984); *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437-38 (Tex. 1998)). However, since I do not foresee any circumstances under which the standard proposed by OPR would yield a different result in a Circular 230 case, I do not see any reason to revisit the standard set out in *Banister*.

<sup>2</sup> This included applying to these facts the correct standard for financial incapacity that would negate a finding of willfulness (Initial Decision at pp. 17-26).

<sup>3</sup> I have cited a pattern of failure to file *and* pay as establishing a culpable omission for illustrative purposes only; Mr. Gee did timely file his income tax returns.

However, that is of no moment here as the ALJ correctly found and set forth several affirmative acts undertaken by Mr. Gee that constitute evasion.<sup>4</sup> These include Mr. Gee's failure to disclose information on the Collection Information Wage Statement for Wage Earners and Self-Employed Individuals (CIS) as to his interest in four corporate entities, his active disposal of assets while failing to pay tax, his routine seeking of extensions under the circumstances, his failure to file quarterly estimated tax returns or pay quarterly estimated taxes, and his lack of forthrightness with the IRS Appeals Office (Initial Decision at pp. 27-30). The Initial Decision provides abundant support for a finding of clear and convincing evidence that Mr. Gee engaged in willfully evading the payment of federal tax as provided in §10.51(d) of Circular 230 for 1997-2001 and §10.51(f) of Circular 230 for 2002-2005.

### Appropriate Sanction

The ALJ determined that the appropriate sanction was disbarment of Mr. Gee from practice before the IRS. In doing so the ALJ appropriately considered the relevant aggravating and mitigating facts and circumstances present in the case (Initial Decision at pp. 33-39).<sup>5</sup> I agree with the ALJ - the record reflects that Mr. Gee is a "tax scofflaw" (Initial Decision at p. 38) and that the appropriate sanction for Mr. Gee's disreputable conduct, within the meaning of §§ 10.50 and 10.51 of Circular 230, is disbarment.

I have considered all of the arguments made by OPR and Mr. Gee, 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 Edgar H. Gee, Jr. is disbarred from practice before the IRS. This constitutes FINAL AGENCY ACTION in this proceeding.

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Bernard H. Weberman  
Appellate Authority  
Office of Chief Counsel  
Internal Revenue Service  
(As Authorized Delegate of the  
Secretary of the Treasury)  
August 8, 2011  
Lanham, MD

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<sup>4</sup> The erroneous finding of fact as to Mr. Gee's failure to timely file his tax returns does not affect the finding of evasion.

<sup>5</sup> The erroneous finding of fact as to Mr. Gee's failure to timely file his tax returns does not affect the appropriate sanction.