

United States  
Department of the Treasury

Director, Office of Professional Responsibility, Complainant-Appellee	)	
	)	
v.	)	Complaint No. 2004-11
	)	
(b)(3)/26 USC 6103, Respondent-Appellant	)	
	)	
	)	
	)	

Initial Decision on Appeal

Under the authority of General Counsel Order No. 9 (January 19, 2001), and the authority vested in him as Assistant General Counsel of the Treasury who was the Chief Counsel for the Internal Revenue Service, Donald L. Korb on May 15, 2006 delegated to the undersigned authority to decide disciplinary appeals to the Secretary of the Treasury filed in this matter under Part 10 Title 31, Code of Federal Regulations (Rev. 7-2002) (“Practice Before the Internal Revenue Service”) (sometimes known and hereafter referred to as “Treasury Circular 230”). This is such an appeal, timely filed by (b)(3)/26 USC 6103, an individual who, during all years relevant, was (i) licensed by the State of “A”, his state of residence, to practice accountancy as a CPA and law as an attorney, (iii) authorized to practice before and in fact practiced before the Internal Revenue Service.

1. Background

On March 1, 2004, Cono N. Namorato, then the Director of the Office of Professional Responsibility (“OPR”), wrote (b)(3)/26 USC 6103 (“Respondent-Appellant”) to advise him that OPR had received information indicating that Respondent-Appellant may have been in violation of Subparts B and C of Treasury Circular 230 as in effect prior to July 26, 2002. Mr. Namorato’s letter went on to advise that the pertinent provisions Respondent-Appellant may have violated included Sections 10.22 (diligence as to accuracy), 10.33 (tax shelter opinions), 10.34 (standards for advising with respect to tax return positions and for preparing or signing returns.), (b)(3)/26 USC 6103 (disreputable conduct) and 10.51 (j) (again disreputable conduct). Further particulars concerning the allegations were set forth with considerable specificity in Mr. Namorato’s letter.

On April 5, 2004, Respondent-Appellant sent a letter to Mr. Namorato responding, again with considerable specificity, to the allegations contained in Mr.

Namorato's letter, denying that he had violated any of the provisions of Treasury Circular 230 he was alleged to have violated.

On June 18, 2004, the Director of OPR, the Complainant-Appellee, filed his Complaint in this matter.

On July 15, 2004, Respondent-appellant filed his Answer in this matter.

After the issues were joined through the filing of the Complaint and Reply, a series of motions and other filings were filed by the parties, including a Motion for Summary Judgment by Respondent-Appellant (which was denied) and a request for discovery filed by the Respondent-Appellant (also denied after Complainant-Appellee filed a Motion for Reconsideration of the Administrative Law judge's initial decision on the discovery motion). To the extent relevant to the issues properly contested through Appeal in this matter, these issues are addressed below.

On July 20, 2005, a hearing in this matter was held in City #1, "A" before Administrative Law Judge T. Todd Hodgdon ("the ALJ"), an Administrative Law judge of the United States Mines Safety and Health Review Commission (the "MS&HRC"), sitting by designation under an inter-agency agreement between the MS&HRC and the Department of the Treasury. While the Respondent-Appellant and his wife were physically present at the hearing, he chose not to participate, claiming variously that he chose not to do so because (i) he was not represented by an attorney<sup>1</sup> and (2) because he suffered from a profound hearing loss.<sup>2</sup> Thereafter, after having been accorded time to review the hearing record, the parties each filed their proposed findings of fact and conclusions of law with the ALJ.

On March 2, 2006, the ALJ issued his Decision in this matter, dismissing two of the Counts in the Complaint (Counts 6 and 13), affirming the remaining Counts in the Complaint (Counts 1-5, 7-12 and 14) and disbaring Respondent-Appellant from practice before the Internal Revenue Service.<sup>3</sup> In his Opposition to Respondent-Appellant's Appeal, Complainant-Appellee does not challenge the ALJ's dismissal of Counts 6 and 13. Accordingly, this Initial Decision on Appeal is confined to the 12

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<sup>1</sup> After this matter was commenced but prior to the hearing, Respondent-Appellant voluntarily resigned from the practice of law in the State of "A". However, the fact did not prevent Respondent-Appellant from appearing *pro se*. Respondent-Appellant also surrendered his license to practice accountancy as a CPA during this period.

<sup>2</sup> Respondent-Appellant's hearing loss and the adequacy of the actions taken by the ALJ and Complainant-Appellee to accommodate Respondent-Appellant's hearing deficiencies are discussed below. For now it suffices to note that his hearing loss does not explain Respondent-Appellant's failure to present direct testimony in his own support.

<sup>3</sup> A copy of the ALJ's Decision appears as Attachment A to this Initial Decision on Appeal and, to the extent relevant to the issues properly considered on Appeal, is incorporated as if fully set forth herein. Likewise, to the extent relevant to the issues properly considered on Appeal, also incorporated as if fully set forth herein are Attachment B, the Decision on Appeal in Director, Office of Professional Responsibility v. (b)(3)/26 USC 6103 (a proceeding made public by mutual agreement of the parties), and Attachment C, the ALJ's January 24, 2005 Order Granting Motion for Reconsideration Order Denying Discovery in this matter.

Counts affirmed by the ALJ that form the basis of the ALJ's determination to disbar Respondent-Appellant from practice before the Internal Revenue Service,<sup>4</sup> and to certain other issues raised by Appellant-Respondent properly considered on Appeal.<sup>5</sup>

These 12 Counts fall into three general categories of offenses.

Counts 1-4 relate to (b)(3)/26 USC 6103, Complainant-Appellee charged and the ALJ found that Respondent-Appellant's actions were in violation of Sections 10.22(a), 10.22(b), 10.51(b) (b)(3)/26 USC 6103 of Treasury Circular 230 (Rev. 1994), the version of Treasury Circular 230 in effect on the date of the alleged conduct.

Counts 7-12 relate to Respondent-Appellant's actions in (b)(3)/26 USC 6103. As to these actions, Complainant-Appellee

<sup>4</sup> And to the related issue of whether the conduct of Appellant-Respondent has been proven to be of a nature justifying disbarment in the manner required by Section 10.52 of Treasury Circular 230 (Rev. 1994).

<sup>5</sup> Other issues properly raised on Appeal in this matter include: (i) whether the ALJ committed reversible error by failing to examine "evidence of record" provided by Appellant-Respondent; (ii) whether the ALJ committed reversible error by disbaring Appellant-Respondent in light of Appellant-Respondent's offer to resign voluntarily and irrevocably from practice before the Internal Revenue Service; (iii) whether Appellant-Respondent was denied due process of the law; (iv) whether the ALJ committed reversible error in finding that Appellee-Complainant failed to meet his burden of proof by clear and convincing evidence with respect to each alleged violation of Treasury Circular 230, as required by Section 10.76 of Treasury Circular 230 (Rev. 7-2002), when the sanction sought was Appellant-Respondent's disbarment; (v) whether the ALJ committed reversible error by finding that Appellant-Respondent's (b)(3)/26 USC 6103 (b)(3)/26 USC 6103; (vi) whether the ALJ committed reversible error by finding that Appellant-Respondent violated Section 10.33 of Treasury Circular 230 (Rev. 1994); (vii) whether the ALJ committed reversible error by finding that Appellant-Respondent (b)(3)/26 USC 6103 (b)(3)/26 USC 6103; (viii) whether the ALJ committed reversible error by finding that Appellant-Respondent's (b)(3)/26 USC 6103 (b)(3)/26 USC 6103; (ix) whether the ALJ committed reversible error by finding that Appellant-Respondent's (b)(3)/26 USC 6103 (b)(3)/26 USC 6103

constituted an admission of wrongdoing. Issues raised by Appellant-Respondent on Appeal that are not appropriate issues to consider on Appeal in this matter include (a) Respondent's request that the Treasury Inspector General for Tax Administration ("TIGTA") authorize a full investigation into OPR, (b) Appellant-Respondent's request for a moratorium on Treasury Circular 230 disciplinary proceedings by OPR pending completion of an independent investigation, (c) Appellant-Respondent's request that a moratorium on Treasury Circular 230 proceedings until such time as TIGTA has completed its own investigation and considered the concerns of the professional tax community, and (d) Appellant-Respondent's contention that the ALJ "failed to acknowledge" that the "IRS Commissioner's Circular 230 initiative" constituted corruption. While I consider each of these allegations to be without merit, their consideration is beyond the scope of my authority as the Appellate Authority in these proceedings. The focus of this matter is Appellant-Respondent's conduct, whether the ALJ was correct in his determinations that Appellant-Respondent violated the various provisions of Treasury Circular 230 he was found to have violated, and whether the ALJ's proposed sanction of disbarment should be affirmed given the requirements of Sections 10.52 (a) and 10.52 9 (b) of Treasury Circular 230.

charged and the ALJ found that Respondent-Appellant's actions were in violation of Sections 10.22(a), 10.22(b), 10.22(c), 10.33 10.34, and either 10.51 or 10.51(j) of Treasury Circular 230 (Rev. 1994), the version of Treasury Circular 230 in effect on the date of the alleged conduct.

Counts 5 and 14 relate to Respondent-Appellant's (b)(3)/26 USC 6103

(b)(3)/26 USC 6103, which Complainant-Appellee charged and the ALJ found were actions in violation of Sections 10.51 and (b)(3)/26 USC 6103 of Treasury Circular 230 (Rev. 2002), the version of Treasury Circular 230 in effect on the date of the alleged conduct.

2 (b)(3)/26 USC 6103

A summary of Respondent-Appellant's (b)(3)/26 USC 6103 appears in the testimony of Revenue Agent Robert C. Hissam. Hearing Transcript at pp. 58-67 (:Tr. 58-67"). In brief summary, the (b)(3)/26 USC 6103 involved the following elements or steps:

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

<sup>6</sup> I use the term "made" rather than "act as" because there is an admission in the record, at least with respect to Respondent-Appellant's (b)(3)/26 USC 6103

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

Complainant-Appellant charges that Respondent-Appellant's (b)(3)/26 USC 6103

(b)(3)/26 USC 6103, one of the Federal common law doctrines that serve as bedrocks of our Federal Income tax. (b)(3)/26 USC 6103

. There is a single exception to that rule, (b)(3)/26 USC 6103. In community property states, unless spouses take actions to negate the presumption that arises under state law (for example, through the execution of a "three-pronged separate property agreement"), each spouse is deemed to act as an agent of the marital estate when performing personal services and half of the income arising from the performance of those services is allocated to each spouse. See Poe v. Seaborn, 282 U.S. 101 (1930):

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<sup>7</sup> For example, Respondent-Appellant (b)(3)/26 USC 6103

Graham v. Commissioner, 93 F.2d 174 (9<sup>th</sup> Cir.1932). “A” is not a community property state.

(b)(3)/26 USC 6103  
[REDACTED] are described in the excerpt from the Final Judgment of Permanent Injunction issued against Respondent-Appellant by the United States District Court for the Middle District of “A” on March 24, 2003, in United States v. [REDACTED] (b)(3)/26 USC 6103, Case No. 3-02-1072, appearing at pages 13-15 of the ALJ’s Decision (Attachment A).<sup>9</sup> (b)(3)/26 USC 6103

[REDACTED] attached to the ALJ’s Decision (Attachment A). (b)(3)/26 USC 6103  
(b)(3)/26 USC 6103, Complainant-Appellee has relied on another bedrock Federal common law principle. (b)(3)/26 USC 6103.<sup>10</sup> Together with yet another related but distinct bedrock Federal common law doctrine (b)(3)/26 USC 6103

[REDACTED] . In contrast, (b)(3)/26 USC 6103  
[REDACTED]

(b)(3)/26 USC 6103  
[REDACTED] In contrast, (b)(3)/26 USC 6103  
[REDACTED] . The two related but distinct Doctrines have a common origin. See Gregory v. Helvering, 293 U.S. 465 (1935). In a subsequent decision involving a sale/leaseback transaction, the Supreme Court made clear that the two doctrines were distinct, but that the elements of proof required for one might also suffice for the other. Frank Lyon Co. v. United States, 435 U.S. 560 (1978). See also TIFD III-E, Inc. v. United States, 459 F.3d 220 (2d Cir. 2006). Complainant-Appellee has alleged and the ALJ found that, (b)(3)/26 USC 6103

[REDACTED]

<sup>8</sup> (b)(3)/26 USC 6103  
[REDACTED]

Respondent-Appellant is correct in noting that the Final Judgment in issue in that injunction action was a Consent Judgment and that the Judgment, while prohibiting future actions on his part, specifically stated that it was not an admission of past misconduct.

<sup>10</sup> Sometimes (and in my judgment more accurately) referred to as the (b)(3)/26 USC 6103

(b)(3)/26 USC 6103

. Courts have applied this principle even when the transferee (and purported “owner” of the property) has physical possession of tangible property when the evidence showed that the transferor retained dominion and control over the property. For example, following the Supreme Court’s decision in Thor Power Tool Co. v. Commissioner, 439 U.S. 522 (1979), taxpayers holding “excess inventory” tried to claim tax losses with respect to that inventory by “selling” the inventory to a counter-party. Examining the totality of the rights and obligations in those arrangements, the courts found that the counter-party was, in substance, not a purchaser/owner, but rather functioned as a storage agent for the purported seller. Rexnord v. United States, 940 F.2d 1094 (7<sup>th</sup> Cir. 1991), citing PACCAR, Inc. v. Commissioner, 86 T.C. 754, aff’d 849 F.3d 393 (9<sup>th</sup> Cir. 1988); Volvo Cars of North America v. United States, 92-2 US. Tax Cas. (CCH) Para. 50,130, 99 A.F.T.R.2d (RIA) 376 (M.D. N.C. 1997). There, the taxpayers sought to circumvent a controlling precedent of the United States Supreme Court. (b)(3)/26 USC 6103

My limited functions as the Appellate Authority are described in Section 10.76 of Circular 230. The Appellate Authority generally cannot reverse the decision of the ALJ unless the Appellate Authority finds that the decision of the ALJ is clearly erroneous in light of the evidence in the record and the applicable law. An exception to this general rule applies in the case of matters that are exclusively matters of law, where the Appellate Authority reviews such matters *de novo*. In the event that the Appellate Authority determined that there are unresolved issues raised by the record, the Appellate Authority is authorized, but not required, to remand the case to the ALJ to elicit additional testimony or evidence. I interpret the term “evidence” to include the consideration of other legal authorities on mixed issues of fact and law.

Were I the ALJ in this matter, I would have asked the parties to address three issues.

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103



(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

As discussed below, this third issues was thoroughly considered by the ALJ, at least insofar as the (b)(3)/26 USC 6103 is concerned.

### 3. The Import of Sections 1060 and 197 of the Internal Revenue Code of 1986<sup>11</sup>

Section 1060 of the Internal Revenue Code and the regulations thereunder establish ordering rules for allocating the aggregate purchase price in taxable asset acquisitions of entire business among the assets sold and purchased.<sup>12</sup> Section 1060 (and its corollary, Section 338, which applies to taxable corporate stock acquisitions that are treated as “deemed asset acquisitions”) did not create the concept that (b)(3)/26 USC 6103

Nor do they address the question of (b)(3)/26 USC 6103

Section 197 establishes a ratable 15-year cost recovery regime that permits a taxpayer to recover his/her/its cost basis in so-called “Section 197 intangibles” (including but not limited to goodwill, going concern value and workforce in place, other than self-developed intangibles). Again, Section 197 did not create a (b)(3)/26 USC 6103

Rather, Section 197 was Congress’ attempt to answer two vexing questions that had resulted in a huge volume of litigation in the Federal courts: (i) Was the asset in question a wasting asset (a requirement under other Code provisions if the asset’s cost was to be “recovered” before the asset was disposed of or the business terminated), and (ii) the period of time over which the asset wasted and lost its commercial usefulness. Section 197 ended these controversies with regard to “Section 197 intangibles,” (b)(3)/26 USC 6103. But Section 197 did not (b)(3)/26 USC 6103

Neither Section 1060 nor Section 197 is relevant to the issues raised in this matter.

### 4. The Application of (b)(3)/26 USC 6103

The ALJ’s analysis of the application of (b)(3)/26 USC 6103 (b)(3)/26 USC 6103 appears at pages 11-13 of the ALJ’s Decision

<sup>11</sup> All references to the Internal Revenue Code refer to the Internal Revenue Code of 1986, as amended and in effect during the taxable years in issue.

<sup>12</sup> Section 338 and the regulations thereunder establish similar rules with respect to so-called deemed assets acquisitions.

<sup>13</sup> Indeed, (b)(3)/26 USC 6103

. See page 11 of the ALJ’s Decision (Attachment A).



(Attachment A).

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

C.J. Mathews v. Commissioner, 61 T.C. 12, rev'd 520 F.2d 323 (5<sup>th</sup> Cir. 1975), where on the facts present in that case the Tax Court found that: (i) the transferor had not maintained substantially the same dominion and control over the asset after its purported transfer;<sup>14</sup> (ii) the leaseback of the asset was in writing and provided for the payment of reasonable rent;<sup>15</sup> (iii) the leaseback (as distinguished from the initial transfer of the asset) must have a bona fide business purpose;<sup>16</sup> (iv) the transferor must not retain a disqualifying equity interest in the property (see Section 162(a)(3)). The

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

are described at page 12 of the ALJ's Decision

(Attachment A). For the reasons stated therein, the ALJ found (b)(3)/26 USC 6103

(b)(3)/26 USC 6103

Under my standards of review, I find no basis to reverse the ALJ. There is ample evidence in the record that supports the ALJ's determination that the Complainant-Appellee met his burden of proof on these matters by clear and convincing evidence.

In addition, the ALJ noted one of the glaring omissions in Respondent-Appellant's argument: No attempt was made to address the decision of the Fifth Circuit Court of Appeals in C.J. Mathews v. Commissioner, 520 F.2d 523 (5<sup>th</sup> Cir. 1975), which reversed the Tax Court's decision and applied the economic substance doctrine, finding that "before the trust's creation, Taxpayer had operated his business on and with necessary property – all under his complete control. The same was true afterward –

<sup>14</sup> See discussion of the excess inventory cases, *supra*.

<sup>15</sup> See (b)(3)/26 USC 6103, *supra*.

<sup>16</sup> The Tax Court limited this inquiry to the leaseback because the transfer of the asset to the trust was a donative transfer, in the Tax Court's mind negating any need to find business purpose for the transfer.

(b)(3)/26 USC 6103

respectively fully disagree.

(b)(3)/26 USC 6103

. Moreover, I note that under (b)(3)/26 USC 6103

except he hoped some of his income had been siphoned off to his children.” Id. At 325.<sup>17</sup> See page 13 of the ALJ’s Decision (Attachment A).

(b)(3)/26 USC 6103

The same argument was more eloquently advanced by Judge Goffe in his concurring opinion in May v. Commissioner, 76 T.C. 7 (1981). Judge Goffe’s concurring opinion also contains a lengthy analysis of prior Federal tax cases involving gift/leaseback transactions. However, the majority refused to join in Judge Goffe’s concurrence, instead reaffirming the Tax Court’s opinion in C.J. Mathews v. Commissioner, supra. May makes much of whether the trust acting as the counter-party in the transaction is controlled by the transferor or members of his/her immediate family or is under the control of parties exhibiting independent management, judgment and direction.

(b)(3)/26 USC 6103

### 5. Applying the Treasury Circular 230 Standards

In order to disbar Respondent-Appellant from practice before the Internal Revenue Service, Complainant-Appellee must meet three burdens. The first is proving that his allegations of violations under Treasury Circular 230 (Rev. 1994) have been established by clear and convincing evidence. Section 10.76 of Treasury Circular 230 (1994). Second, that clear and convincing evidence must sustain a finding that that Complainant-Appellee had met each element of proof required to sustain a finding that Respondent-Appellant had violated the specific provisions of Treasury Circular 230 charged. Third, in order to disbar or suspend a practitioner from practice before the Internal Revenue Service, Complainant-Appellee also must prove, again by clear and convincing evidence, that the violation is either willful (in the case of any violation of Treasury Circular 230 (Rev. 1994) or, only in the case of violations of Sections 10.33 and 10.34 of Treasury Circular 230 (Rev. 1994), the result of either willful, reckless or grossly incompetent conduct. Sections 10.52 (a) and 10.52 (b) of Treasury Circular 230 (Rev. 1994).<sup>18</sup>

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<sup>17</sup> After the Fifth Circuit’s opinion in C.J. Mathews, the Fifth Circuit was divided into the Fifth and 11<sup>th</sup> circuits and opinions of the former Fifth Circuit were adopted as controlling precedents in the 11<sup>th</sup> Circuit.

<sup>18</sup> Section 10.52 of Treasury Circular 230 (Rev. 7-2002) contains a similar provision, but extends the requirements to censures as well as disbarments and suspensions.

The Charges Pertaining to

(b)(3)/26 USC 6103

Counts 1, 2, 3 and 4 relate to Respondent-Appellant's conduct (b)(3)/26 USC 6103  
(b)(3)/26 USC 6103

. In those Counts, Respondent-Appellant is charged with having violated Sections 10.22(a), 10.22(b), 10.51(b) Same of Treasury Circular 230 (Rev. 1994). In his Decision, the ALJ affirmed the Complainant-Appellant's conclusion on these charges.

Section 10.22(a) required attorneys, CPAs, enrolled agents and enrolled actuaries to exercise due diligence in preparing or assisting in the preparation of, approving and filing returns, documents, affidavits and other papers relating to Internal Revenue Service matters. There is no dispute that (b)(3)/26 USC 6103

. The ALJ found that there was clear and convincing evidence in the record indicating that Respondent-Appellant did not. Under my standard of review, I find that the ALJ's determination in this regard is not clearly erroneous.<sup>19</sup> As noted above, Complainant-Appellee must also establish and the ALJ must find that Respondent-Appellant acted willfully within the meaning of Section 10.52(a) of Treasury Circular 230 when he failed to exercise due diligence. I will discuss the issue of willfulness later in this Initial Decision on Appeal as it related to all the charges where it is relevant. For now, it suffices to note that, at pages 17 and 18 of his Decision (Attachment A), the ALJ found that Respondent-Appellant's conduct was willful. There is ample evidence in the record to support that Complainant-Appellant has proved by clear and convincing evidence that Respondent-Appellant willfully violated Section 10.22(a). I AFFIRM

Section 10.22(b) required attorneys, CPAs, enrolled agents and enrolled actuaries to exercise due diligence in determining the correctness of oral or written representations made by him to the Department of the Treasury. My comments respecting the Section 10.22(a) charge are equally applicable here. For the reasons expressed above, I AFFIRM the ALJ's finding that Complainant-Appellee has proved, by clear and convincing evidence, that Respondent-Appellant violated Section 10.22(b) and did so willfully.

Section 10.51(b) made it disreputable conduct for attorneys, CPAs, enrolled agents or enrolled actuaries to give false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, knowing such statements to be false or misleading.

(b)(3)/26 USC 6103

By analogy to Section 10.51(j), I conclude that the term "other information" includes a knowing misstatement of either fact or law, and consequently (b)(3)/26 USC 6103

. The ALJ concluded that Respondent-

<sup>19</sup> Indeed, were I the ALJ in this matter, I would have found the evidence in this matter to have been not only clear and convincing but overwhelming. (b)(3)/26 USC 6103

Appellant furnished information [REDACTED] (b)(3)/26 USC 6103 [REDACTED], and appropriately noted as one of the bases for his finding that Respondent-Appellant was an experienced attorney who specialized in tax planning. See page 8 of the ALJ's Decision (Attachment A). In concluding that Respondent-Appellant's conduct was "knowing," the ALJ stated that there was clear and convincing evidence that Respondent-Appellant "knew, or should have known" [REDACTED] (b)(3)/26 USC 6103 [REDACTED]. *Id.* "Knew, or should have known" is not the required element of proof for a violation of Section 10.51(b) of Treasury Circular 230 (Rev. 1994). Rather, the required proof is that Respondent "knew" that [REDACTED] (b)(3)/26 USC 6103 [REDACTED]. If my review of the ALJ's overall decision left me with any doubt whether the ALJ had found Respondent-Appellant's conduct to be "knowing" and was merely stating that he "should have known" that his conduct violated Section 10.51(b) of Circular 230, I would be required to vacate and remand the ALJ's decision on this point for consideration by the ALJ under the correct legal standard. However, given the ALJ's determination that all Respondent-Appellant's conduct was "willful,"<sup>20</sup> I have no doubt that the ALJ found that Respondent-Appellant "knew" his conduct was in violation of Section 10.51(b) of Treasury Circular 230.

Section 10.51(j) of Circular 230 provided that attorneys, CPAs, enrolled agents and enrolled actuaries could be disbarred or suspended from practice before the Internal Revenue Service for giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or a pattern of providing incompetent opinions on questions arising under the Federal tax laws. For purposes of Section 10.51(j), I find that the term "opinion" is not confined to formal legal opinions, but extends to all written and oral advice on material Federal tax matters. As noted above, false opinions include those that reflect or result from a knowing misstatement of fact or law. "Reckless conduct," for purposes for Section 10.51(j), was defined as "a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances." Section 10.51(j) also provided that the term "gross incompetence" includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to a client. As stated above, the ALJ concluded that all of Respondent-Appellant's conduct was "willful." I find that such a finding is also dispositive of the issue of whether Respondent-Appellant's violations of Section 10.51(j) were "knowing." For reasons described below (in my comments on what constitutes "willful" of "knowing" conduct under Circular 230 (Rev. 1994), I AFFIRM the ALJ's findings with respect to Section 10.51(j). Since the ALJ concluded that Respondent-Appellant's conduct was "knowing," there was no need for the ALJ to consider whether the same conduct was also "reckless" or "grossly incompetent."

*The Charges Pertaining to* [REDACTED] (b)(3)/26 USC 6103 [REDACTED]

Counts 7, 8, 9, 10, 11 and 12 allege that Respondent-Appellant violated Sections 10.22(a), 10.22(b), 10.22(c), 10.33, 10.34 and 10.51(j) of Treasury Circular 230 (Rev.

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<sup>20</sup> See pages 18 and 19 of the ALJ's Decision

1994) by

(b)(3)/26 USC 6103

For the reason stated above in connection with the charges made with respect to Respondent-Appellant's conduct

(b)(3)/26 USC 6103

. I AFFIRM the ALJ's findings with respect to Respondent-Appellant's violations of Sections 10.22(a) and 10.22(b) in connection with his advice to his clients.

As I find the same factors dispositive of whether Respondent-Appellant failed to exercise due diligence in determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the Internal Revenue Service, I likewise AFFIRM the ALJ's finding with regard to Respondent-Appellant's alleged violations of Section 10.22(c) of Treasury Circular 230 (Rev. 1994).

With regard to the ALJ's finding that Respondent-Appellant's conduct violated Section 10.33 of Treasury Circular 230, I REVERSE the ALJ's determination. I do so for two reasons.

First, I find that

(b)(3)/26 USC 6103

Section 10.33(c)(2) of Treasury Circular 230 defines a "tax shelter" as an "investment" which has as a significant and intended feature for Federal income or excise tax purposes "either of the following attributes: (i) Deductions in excess of income from the investment being available in any tax year to reduce income from other sources in that taxable year; or (ii) Credits in excess of income from the investment being available in any year to offset taxes on income from other sources in that year."

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

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(b)(3)/26 USC 6103

This definition of a "tax shelter" is far narrower than the definition of "tax shelter" contained in many Code provisions, including those intended to apply to a wider range of potentially abusive tax avoidance



Second, Section 10.33(c)(3) defines a “tax shelter opinion” as an opinion directed to a person other than the client who engaged the practitioner. That is, Section 10.33 is only addressed to third-party opinions provided to one party but intended to be relied upon by another. (b)(3)/26 USC 6103

Section 10.34 of Treasury Circular 230 (Rev. 1994) made it a violation of Treasury Circular 230 for a practitioner to “advise a client to take a position on a [Federal tax] return, or prepare the portion of a [Federal tax] return on which a position is taken unless – [either] (i) [t]he practitioner determines that the position satisfies the realistic possibility standard; or (ii) [t]he position is not frivolous and the practitioner advises the client of any opportunity to avoid the accuracy-related penalty in [S]ection 6662 of the Internal Revenue Code of 1986 by adequately disclosing the position and of the requirements for adequate disclosure.” Section 10.34(a)(1) of Treasury Circular 230 (Rev. 1994). Section 10.34 went on to provide standards of conduct for practitioners in advising clients on potential penalty exposure (including the requirements for adequate disclosure) (see Section 10.34(a)(2) and to provide the following definitions of “realistic possibility” and “frivolous:”

“A position is considered to have a realistic possibility of being sustained on its merits if a reasonable and well-informed analysis by a person knowledgeable in the tax law would lead such a person to conclude that the position has approximately a one in three, or greater, likelihood of being sustained on its merits...” Section 10.34(a)(4)(i) of Treasury Circular 230 (Rev. 1994).

“A position is frivolous is it is patently improper.” Section 10.34(a)(4)(ii) of Treasury Circular 230 (Rev. 1994).

(b)(3)/26 USC 6103

Under my standards of review, find no basis for reversing the ALJ on this point, of in his determination that Respondent-Appellant’s conduct was “willful” within the meaning of Section 10.52(a) of Treasury Circular 230. I therefore AFFIRM the ALJ’s findings on these matters.

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transactions (“PATATs”). The fact that a (b)(3)/26 USC 6103

Indeed, had I been the ALJ, I too would have found clear and convincing evidence that Respondent-Appellant’s (b)(3)/26 USC 6103



*The Charges Pertaining to*

(b)(3)/26 USC 6103

In dealing with Counts 5 and 6 of the Complaint, which respectively charge that Respondent-Appellant violated Sections 10.51 and (b)(3)/26 USC 6103 of Treasury Circular 230 (Rev. 1994), the ALJ dismissed Count 6, noting that Section (b)(3)/26 USC 6103 required a showing that Respondent-Appellant (b)(3)/26 USC 6103. Noting that Complainant-Appellee had not even charged that Respondent-Appellant (b)(3)/26 USC 6103, the ALJ dismissed Count 6. However, he agreed that Section 10.51's "includes, but is not limited to" language with respect to "disreputable conduct" covered (b)(3)/26 USC 6103 of the Internal Revenue Code of 1986, as amended and in effect at the time of the proscribed conduct. This left the ALJ in a position to find that (b)(3)/26 USC 6103. I concur with this part of the ALJ's analysis.

However, I do not agree that Complainant-Appellee had yet proved by clear and convincing evidence that Respondent-Appellant (b)(3)/26 USC 6103. I agree that the standard to be used for comparison is (b)(3)/26 USC 6103. I find that Complainant-Appellee has not yet met his burden of proof on one element of his burden of proof on that matter. The cases under (b)(3)/26 USC 6103 suggest that Complainant-Appellee can meet his burden in this regard either by showing that Respondent-Appellant (b)(3)/26 USC 6103

See United States v. Poll, 521 F.2d 329, 333 (9<sup>th</sup> Cir. 1975), citing United States v. Bishop, 412 U.S. 346, 360-361 (1973). There were some indications in materials submitted by Respondent-Appellant in support of his Motion for Summary Judgment that Respondent-Appellant (b)(3)/26 USC 6103

The ALJ correctly indicated that those indications were not "evidence" he could consider in these proceedings since Respondent-Appellant chose not to present those matters in evidence by testifying. If Respondent-Appellant's (b)(3)/26 USC 6103 were a matter that would have been appropriately raised only by affirmative defense, I would have affirmed the ALJ's findings on this charge. But since I find this is an element of Complainant-Appellant's proof, I VACATE AND REMAND this charge to the ALJ so that he can determine whether he requires Complainant-Appellee to introduce additional evidence on Respondent-Appellant's (b)(3)/26 USC 6103, or whether he is prepared to reach a finding on that point on the basis of evidence already in the record.<sup>24</sup>

<sup>24</sup> Of course, either the Complainant-Appellee is free to withdraw this charge, and the ALJ is free not to consider it and have the case considered solely on the basis of the 10 Counts where I have affirmed the findings of the ALJ.

(b)(3)/26 USC 6103

I find that the ALJ was correct in finding that (b)(3)/26 USC 6103

and that Respondent's conduct was "willful" within the meaning of Section 10.52(a) of the same Circular. I AFFIRM the ALJ's determination on this charge.

"Willful"<sup>25</sup>

Treasury Circular 230 (Rev. 1994) contains no definition of the word "willful."<sup>26</sup> In a Decision on Appeal in another case, I noted my belief that, absent a definition of the term in Treasury Circular 230 (Rev. 1994), I found it appropriate to look to cases interpreting criminal provisions of the Internal Revenue Code of 1986 for guidance.<sup>27</sup> In his Decision, the ALJ noted that, in United States v. Pomponio, the Supreme Court determined that "willfulness" simply meant "a voluntary, intentional violation of a known legal duty." See page 18 of the ALJ's Decision (Attachment A). The other cases examined in the Decision on Appeal in (b)(3)/26 USC 6103 also suggests that (i) an honest but mistaken belief in the law, even if that belief is unreasonable, is not a "willful" violation of the law, (ii) that is appropriate to examine how unreasonable a purported belief is in view of a person's background and experience in making a determination of whether a person's belief is truly "honest," and (iii) that in determining whether a belief is "honest," it is important to distinguish between (a) a belief as to what the law is, and (b) a belief in what the law should be. Only the former qualifies as an "honestly held belief." Applying these standards to Respondent-Appellant's conduct on the 10 Counts where I have AFFIRMED the ALJ, I find ample evidence to support the ALJ's finding that Complainant-Appellee met his burden of proof by clear and convincing evidence that each of these violations of Treasury Circular 230 (Rev. 1994) were willful.

## 6. Other Matters on Appeal

*"The Purported Exclusion of "Evidence of Record."* This claim is apparently a of the fact that the ALJ's appropriate determination that evidence could only be introduced through appropriate witness testimony, rather than as Exhibits submitted in support of Respondent-Appellant's purported Motion for Summary Judgment, a document the ALJ found was neither an accurate reflection of the law or supported by credible claims that the issues presented by the Motion could be considered on the basis of uncontested facts on every material issue. I find this claim to be without merit.

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<sup>25</sup> And "Known"

<sup>26</sup> Nor does Treasury Circular 230 define the words "know" or "known."

<sup>27</sup> My lengthy consideration of these precedents and their relevance to Treasury Circular 230 Proceedings appears at pages 40 through 59 and 65 through 66 of the Decision on Appeal in Director, Office of Professional Responsibility v. (b)(3)/26 USC 6103, Complaint No. 2002-11 (Attachment B).

*Respondent-Appellant's Claim That He Should Have Been Allowed to Voluntarily Resign From Practice Before the Internal Revenue Service.* This claim is without merit. Respondent-Appellant has for many years been authorized to practice, and has in fact practiced, before the Internal Revenue Service. While practicing before the Internal Revenue Service, he engaged in all the conduct which became the subject of the charges against him. That said, the Director, Office of Professional Responsibility, was wholly within his rights when he commenced these proceedings by filing his Complaint, and when he continued his prosecution of the matter. The Internal Revenue Service has a valid interest not only in sanctioning the conduct of this practitioner, but in making other practitioners aware that, if they engage in similar conduct, they too will face sanction.

*Respondent-Appellant's Due Process Claims.* Respondent-Appellant has made a number of Due Process claims, all without merit. Each is discussed below.

Respondent's hearing Deficiencies – Neither Complainant-Appellee nor the ALJ contest that Respondent-Appellant suffers from a significant hearing deficiency. Both took steps to accommodate that deficiency. The Complainant-Appellee allowed Respondent-Appellant's wife to assist him in all phases of these proceedings, including the hearing in City #1, "A". As noted at page 19 of the ALJ's Decision, a number of efforts were undertaken at the hearing in an attempt to assist Respondent-Appellant with the problems caused by his hearing deficiencies. For example, Respondent-Appellant "reads lips" and has some remaining hearing capacity. The ALJ moved his table closer to the witness stand, repositioned counsel so that he could read counsel's lips, tried an amplified audio system and allowed his wife, who is not hearing impaired, to sit next to him. Respondent-Appellant's complaint is that these efforts did not go far enough, and that other acoustic devices may have better addressed his hearing deficiencies. My "cold" reading of the hearing transcript leads me to believe that Respondent-Appellant could understand at least some of what occurred at the hearing. Further, Complainant-Appellee had shared all of his evidence with Respondent-Appellant prior to the hearing, as well as having shared with Respondent-Appellant the details of the charges against him. Further, Respondent-Appellant has provided no explanation as to why he could not himself provide the additional audio equipment needed to address his hearing deficiency. In view of these facts, I do not find that these facts constitute a denial of due process.

Denial of Discovery – For these reasons stated in the ALJ's Order Granting Motion for Reconsideration Order Denying Discovery (Attachment C), this claim is without merit.

Providing Counsel – Respondent-Appellee, like all United States citizens, has no Constitutional right to have the Government pay his attorney's fees in any civil matter. Neither is Respondent-Appellant accorded the right to have his attorney's fees paid by the Government by any provision of Treasury Circular 230 (Revs. 1994 or 2002-7.) This claim is without merit.

Ex Parte Communications – The limited contacts that occurred were to cover procedural matters relating to all Treasury Circular 230 cases and involved an ALJ other than the ALJ how handled the case. This claim is without merit.

ALJ's Lack of Tax Expertise – Respondent-Appellant complains that he has been prejudiced by what he claims is a lack of tax expertise in the ALJ. I note at the outset that I have no idea of the nature and extent of the ALJ's tax expertise. The Department of the Treasury has arranged for Administrative Law judges from other Executive Branch Departments and Agencies, such as the ALJ in these proceedings, to assure that the persons discharging the important functions discharged by the ALJs in Treasury Circular 230 are, in fact and perception independent of the charging Agency, the Internal Revenue Service. Among, the functions of the Secretary's Delegate acting as the Appellate Authority in these proceedings is to assure that someone with significant tax experience reviews the Decisions of the ALJs.<sup>28</sup> When the Circular 230 process as a whole is examined, Respondent-Appellant has no credible claim that his conduct has not been examined by someone with significant relevant tax experience. This claim is without merit.

*Respondent-Appellant's Allegations Concerning the ALJ's References to Respondent-Appellant's* (b)(3)/26 USC 6103

Respondent-Appellant claims that the ALJ's repeated references to his failures to testify and let a Federal court examine (b)(3)/26 USC 6103 was "an admission of wrongdoing" by Respondent-Appellant. The opportunities to join the issue on the merits to which the ALJ referred, and Respondent-Appellant's explanations of his actions are summarized below.

(b)(3)/26 USC 6103

– Here, Respondent-Appellant said that he "fell on his sword" because he has received advice from an unnamed "A" lawyer that an (b)(3)/26 USC 6103 Respondent-

<sup>28</sup> In my case, I have over 37 years of experience as a tax lawyer, with over 29 of those years having been spent in private practice and over 8 years spent in Federal Government Service as either an Assistant to the Commissioner of Internal Revenue (November 1977 through January 1981) or as a Special Counsel in the immediate Office of Chief Counsel, Internal Revenue Service (October 2002 to Date). While in private practice, my tax work was evenly divided between tax planning and tax controversy work (including tax litigation). While in private practice, I was a Member of the American Bar Association's Tax Section, and of that Section's Administrative Practice and Standards of Tax Practice Committees, served as the Chair of its Administrative Practice Committee and Co-Chair of its Pro Se Taxpayer and Civil Tax Penalties Task Forces, and later served as the Council Director responsible for the Section's Private Clients Group and Procedure Group. While I was their Council Director, the Private Clients Group was composed of the Estate and Gift Tax Committee, the Committee on the Income of Estates and Trusts, and the Committee on Divorce Taxation, while the Procedure Group was composed of the Administrative Practice Committee, the Court Procedure Committee, the Civil & Criminal Tax penalties Committee, the Committee on the Standards of Tax Practice and the Civil Tax Penalties task Force. I believe that experience, together with a reputations for integrity and independence, were the reasons I was selected to act as the Appellate Authority in these proceedings.

Appellant did not name or provide an affidavit from any lawyer to that effect. Any decision [REDACTED] (b)(3)/26 USC 6103 [REDACTED]

[REDACTED] (b)(3)/26 USC 6103 [REDACTED]

[REDACTED] There is [REDACTED] (b)(3)/26 USC 6103 [REDACTED], but it never came into evidence because Respondent-Appellant failed to testify.

The [REDACTED] (b)(3)/26 USC 6103 [REDACTED] – Here, Respondent-Appellant’s claim is that he failed to testify because the matter would have been difficult and costly to pursue, particularly given the withdrawal of his attorney due to a conflict of interest. An affidavit confirming the reason for the withdrawal of Mark Westlake, Respondent-Appellant’s attorney in this matter, was attached to Respondent-Appellant’s motion for Summary Judgment. When Respondent-Appellant chose not to testify, that Affidavit was not admitted into evidence. It should be noted, however, that Mr. Westlake’s Affidavit is [REDACTED] (b)(3)/26 USC 6103 [REDACTED]

[REDACTED] leaving the interesting question of whether Westlake would have been willing to file pleadings asserting [REDACTED] (b)(3)/26 USC 6103 [REDACTED] under Federal Rule of Civil Procedure 11 had the [REDACTED] (b)(3)/26 USC 6103 [REDACTED] proceeded to a trial on the merits.

I do not read the ALJ’s comments as an indication that he viewed Respondent-Appellant’s actions (or inactions) as admissions. Rather, I take the ALJ’s comments as an indication that these facts, together with all the other facts he considered, caused the ALJ to form an overall impression Respondent-Appellant’s credibility. The ALJ as the Trier of fact was fully justified in doing so. This claim is without merit.

## 7. Conclusion

For the reasons set forth above, I:  
AFFIRM the ALJ's findings with regard to Counts 1, 2, 3, 4, 7, 8, 9, 10, 12 and 14;

REVERSE the ALJ's findings with respect to Count 11 (the Section 10.33 charge); and

VACATE AND REMAND the ALJ's findings with regard to Count 13 (the Section 10.51 Charge).

I also VACATE AND REMAND to the ALJ the question of the appropriate sanction to impose against Respondent-Appellant in light of the charges ultimately sustained, an issue I will again review following after the ALJ issues a Decision on remand.

This Initial Decision on Appeal DOES NOT constitute FINAL AGENCY ACTION in these proceedings.

David F. P. O'Connor

David F. P. O'Connor

Special Counsel to the Senior  
Counsel

Office of Chief Counsel

Internal Revenue Service

(As Authorized Delegate of Henry  
Paulson, Secretary of the Treasury)

October 5, 2007