United States

Department of the Treasury

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

v. **Complaint No. 2006-33**

(b)(3)/26 USC 6103, C.P.A.,
Respondent- Appellant ("R-A")

Decision on Appeal

Authority

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 of the Internal Revenue Service, through a series of Delegation Orders (most recently, an Order dated July 16, 2008) Donald L. Korb 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 hereafter referred to as "Treasury Circular 230"). This is such an Appeal from a Decision entered in this proceeding by Administrative Law Judge Michael A. Rosas (the "ALJ")[1] on December 20, 2007.[2]

Background

This proceeding was commenced on January 5, 2007 when Stephen A. Whitlock, then the Acting Director, Office of Professional Responsibility, filed a Complaint against R-A alleging that (i) R.A. had engaged in practice before the Internal Revenue Service, (ii) R.A. was subject to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility, (iii) (b)(3)/26 USC 6103 **of Treasury Circular 230 (Rev. 72002), and (v) such conduct was conduct for which R-A could be censured, suspended or disbarred from practice before the Internal Revenue Service.**

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[1] The ALJ is an Administrative Law Judge of the National Labor Relations Board ("NLRB") and acted as the ALJ in this proceeding under an inter-agency agreement between the Department of the Treasury and the NLRB.

[2] A copy of the ALJ's Decision appears as Attachment 1 and is incorporated in this Decision on Appeal as if fully set forth herein.

R-A filed his Answer (in the form of an "Answer to Opposition to Motion to Dismiss") on March 7, 2007. In his answer, R-A did not contest that he had practiced before the Internal Revenue Service [(i) above], nor did he contest that he was subject to the disciplinary authority of the Secretary of the Treasury or the Office of Professional Responsibility [(ii) above].[3] With regard to (iii) above, R-A did not contest (b)(3)/26 USC 6103 [redacted].

In his Answer and/or later in the proceeding, R-A offered several explanations for why he had (b)(3)/26 USC 6103 [redacted] **Next, R-A indicated that, beginning in 2002 and continuing until her death in late 2003, R-A was caring and/or praying for his gravely ill mother and his aged father. The prayers for his mother continued following her death under the Jewish tradition of coddish [sic] (a mourner's prayer vigil), as did the care he provided for his aged father. R-A also stated that he had for some years suffered from visual impairments that prevented him from practicing full time as a C.P.A., and which had prevented him from acting as a C.P.A. without the assistance of his wife and, once they reached an age where they too could be of help, of his children and "per diem workers" (independent contractors) who had worked with him.**

On October 30, 2007, a hearing was held in this proceeding before the ALJ in New York, New York, at which R-A appeared pro se and C-A was represented by Heather Southwell, Esquire. At the hearing, C-A presented one witness, Elizabeth Ahn, and submitted exhibits that were accepted into evidence. R-A also testified and submitted exhibits that were accepted into

[3] Evidence in the Administrative Record confirms that R-A was both authorized to practice before the Internal Revenue Service as a CPA licensed by the State of New York and that he had in fact practiced before the Internal Revenue Service.

evidence. However, R-A was unwilling to submit certain other evidence to be made part of the permanent administrative record (pairs of eye glasses and contact lenses and a family photo) and offered no other evidence to corroborate his own testimony on these points.[4]

Following the hearing, on December 20, 2007. the ALJ issued his Decision in this proceeding, suspending R~A from practice before the Internal Revenue Service for a period of twenty-four (24) months.[5] On January 14, 2008, R-A timely filed his Appeal from the Decision of the ALJ.[6] On January 15, 2008. R-A filed an Amended Appeal from the Decision of the ALJ, amending in certain respects the third paragraph of Section 7 of his original Appeal.[7] On February 11, 2008, C-A timely filed his Reply to R-A's Appeal.[8]

Role and Functions of the Appellate Authority

Before turning to the particular issues raised by R-A in his Appeal, let me briefly describe the role and functions of the Appellate Authority in a Treasury Circular 230 disciplinary proceeding.

The Appellate Authority reviews the entire Administrative Record in a proceeding, and I have done so in this proceeding.[9] One reason the Appellate Authority does so is to determine whether the jurisdictional prerequisites establishing the Director, Office of Professional Responsibility's jurisdiction over a practitioner have been established. Here, the Administrative Record reflects that, as a C.P.A. licensed by the State of New York, R-A is authorized to

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[4]. R-A claimed that C-A had introduced as "evidence" correspondence R-A had submitted to C-A in the course of the C-A's consideration of the case., [sic] apparently with the belief that anything R-A had made self-serving statements in his correspondence with C-A that C-A had not specifically rebuffed should be deemed admitted for the truth of the matter. I do not read the Administrative Record as supporting such a conclusion. I view C-A's action in admitting R-A's correspondence to C-A as merely admissions that the correspondence as only an admission that the Exhibits were accurate and true copies of the correspondence sent to OPR, not as an admission of the truth of the statements contained in the correspondence.

[5] The Decision of the ALJ is confusing in its discussion of the appropriate sanction to be imposed on R-A, mentioning both a twenty-four (24) month suspension and disbarment. On balance, and in light of the Order contained in the Decision, I construe the ALJ's Decision as intending to impose a twenty-four (24) month suspension from practice as the sanction.

[6] A copy of R-A's Appeal appears as Attachment 2 and is incorporated in this Decision on Appeal as if fully set forth herein.

[7] Given that R-A filed his Amended Appeal within the time period prescribed for filing an Appeal under § 10.77 of Treasury Circular 230 (Rev.6-2005), I will treat R-A's Amended Appeal as part of his original Appeal. A copy of R-A's Amended Appeal appears as Attachment 3 and is incorporated in this Decision on Appeal as if fully set forth herein. Both in his Appeal and in his Amended Appeal, R-A makes reference to other physical disabilities (including [redacted] that prevented him from normal functioning at certain times. There is no evidence to this effect in the Administrative Record and R-A did not subject himself to cross-examination on this claim during his Hearing testimony, or to specify which periods these maladies affected his abilities [redacted].

[8] A copy of C-A's Reply to R-A's Appeal appears as Attachment 4 and is incorporated in this Decision on Appeal as if fully set forth herein.

[9] The ALJ's Certification of Record appears as Attachment 5 and is incorporated in this Decision on Appeal as if fully set forth herein

practice before the Internal Revenue Service,[10] and that R-A has in fact practiced before the Internal Revenue Service.[11] I therefore find that these jurisdictional prerequisites have been met.

In addition, the Appellate Authority examines the facts in the Administrative Record and the law to determine whether the ALJ is correct that Complainant has met each of his burdens of proof by the requisite evidentiary standard of proof. Given the sanction initially sought by C-A and imposed by the ALJ in his Decision, the requisite evidentiary standard that C-A must meet in this proceeding is proof by clear and convincing evidence. § 10.76 of Treasury Circular 230 (Rev. 6-2005).

Complainant's burdens of proof exist with respect to each element of proof on each specific charge that remains in issue in a proceeding at the time of an Appeal, as well as certain other evidentiary burdens imposed on the Complainant based on the sanction Complainant sought to impose. Given the specific charges alleged and the sanction initially sought to be imposed by C-A in this proceeding, C-A must prove by clear and convincing evidence that R-A's violations were "willful." §§ (b)(3)/26 USC 6103 and 10.52(a)(1) of Treasury Circular 230 (Rev. 6-2005). As Appellate Authority, under the standards of review discussed below, I have reviewed the Administrative Record and the Decision of the ALJ to determine whether C-A has met each of these burdens by clear and convincing evidence.

The Appellate Authority's standards of review differ depending on whether the issue being reviewed involves (i) a purely factual question, (ii) a mixed question of fact and law, or (iii) a purely legal question. The Appellate Authority reviews the Administrative Law Judge's findings of fact and conclusions of law on issues described in either category (i) or category (ii) above under a "clearly erroneous" standard, whereas issues described in category (iii) are reviewed by the Appellate Authority *de novo*. § 10.78 of Treasury Circular 230 (Rev. 6-2005). As the Appellate Authority, I apply these standards to issues raised in an Appeal and to other issues I deem appropriate in view of my review of the Administrative Record.

Finally, the Appellate Authority reviews the sanction proposed by the ALJ to determine its appropriateness in light of the charges proved and the other "aggravating" or "mitigating" factors found present. The Appellate Authority performs this function *de novo* and with the full authority of the Secretary of the Treasury and the Internal Revenue Service (as the charging agency). The Appellate Authority may increase, decrease, or affirm the sanction imposed by the Administrative Law Judge.

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[10] R-A did not contest this fact in his Answer, and the Administrative Record contains a copy of his license information from the New York State Office of Professions.

[11] R-A did not contest this fact in his Answer, and the Administrative Record contains an official record from the IRS Centralized Authorization file indicating that he has represented taxpayers before the Internal Revenue Service.

Issues Raised By R-A on Appeal

The ALJ's findings of fact and conclusions of law with respect to the charges made by C-A and sustained against R·A are explained clearly and concisely in the ALJ's Decision and will only be repeated here when necessary to give context to the issues raised by R-A on Appeal.

Section # 1. In Section # 1 of his Amended Appeal, R-A made two distinct claims.

First, R-A claimed that he [redacted (b)(3)/26 USC 6103] **This issue is discussed at pp. _ thru _, infra. I find this claim to involve a mixed question of law and fact and consequently is reviewable under a "clearly erroneous" standard of review. For the reasons set forth at pp. _ thru _, infra, I find this claim to be without merit.**

Second, R-A contends that the ALJ erred by [redacted (b)(3)/26 USC 6103] **of Treasury Circular 230 (Rev. 7-2002). I also find this claim to be without merit. I find this claim to involve solely a question of law, and I review it *de novo*. Both § 10.51(d) of Treasury Circular 230 (Rev. 1994) and § 10.51(f) of Treasury Circular 230 (Rev. 7-2002) state that disreputable conduct includes a willful failure "to make a Federal tax return in violation of the revenue laws of the United States ...." In United States v., Boyle, 469 U.S. 241, 249-251 (1985), the United States Supreme Court stated, in explaining the importance of the timely filing of Federal tax returns:**

> **"Deadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results. The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards. Any less rigid standard would risk encouraging a lax attitude toward filing dates. Prompt payment of taxes is imperative to the Government, which should not have to assume the burden of ad hoc determinations."**

I find, therefore, that [redacted (b)(3)/26 USC 6103] **As noted above, the issue of whether R-A's violations were "willful" is discussed at pp. _ thru _, infra. I find R-A's** [redacted (b)(3)/26 USC 6103] **to have been "willful."**

Section # 2. In Section 2 of his Amended Appeal, R-A claimed that he was not given a fair "trial"[12] or accorded the right to present a defense in a full and proper manner.

R-A specifically alleged that the ALJ "made light of' his mother's illness and his feelings for her. I have reviewed the entire Administrative Record, including each page of the Hearing Transcript ("HT") and I do not view the ALJ's conduct during the Hearing to have constituted error, let alone reversible error, on this point. Having accepted as fact that R-A had responsibilities for his mother both before her death and thereafter given his obligation to pray for her under his Jewish faith, the ALJ did prohibit R-A from testifying in Hebrew to explain in further detail his Jewish faith and the obligations it imposed on him, or from introducing religious texts written in Hebrew to the same end. But I see no evidence that he did so out of disrespect either for R-A's Jewish faith or for his mother. Rather, I interpret the ALJ's actions as indicating that he viewed that testimony as irrelevant given his acceptance of R-A's assertions concerning his faith and his religious obligations to a mother for whom he cared deeply.

To the extent the ALJ indicated impatience with R-A in connection with his expressions of faith, he manifested it only when R-A continually sought to testify in Hebrew, or introduce documents written in Hebrew into the Hearing Record, and in his unwillingness to review pairs of glasses and contacts lens offered as evidence of his visual impairment (because he would not leave the glasses and contact lens to form a part of the evidentiary record) and a picture of his family, some of the members of which R-A alleged prepared tax returns for his clients, alone or under his supervision (again because R-A would not leave the picture with the ALJ to allow it to be admitted into evidence and become a part of the Administrative Record). Nor did R-A submit sworn affidavits or even signed correspondence from his doctors indicating the nature and extent of his visual impairment, or the period(s) of time to which they related. Rather, given the C-A's line of argument, the ALJ repeatedly asked R-A to explain how his religious obligations and duties to his mother caused his [redacted] **(b)(3)/26 USC 6103** **, particularly given that he seemed to have filed numerous Federal individual and Federal business income tax returns for his clients during the years in issue, alone or with the assistance of "per diem workers" or certain of his family members who had assisted him with his clients' returns.[13] Given the opportunity to respond to that**

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[12] The proceeding before the AU at which witnesses testified and evidence was introduced was a "hearing," not a "trial."

[13] At the Hearing, Ms. Ahn testified that: for the tax year 2002, business records of the Internal Revenue Service reflected that 302 Federal individual income tax returns and 61 Federal business income tax returns were filed bearing R-A's name and Social Security Number as Preparer; for the tax year 2003, business records of the Internal Revenue Service showed that 375 Federal individual income tax returns and 74 Federal business income tax returns were filed bearing R-A's name and Social Security Number as Preparer; and for the tax year 2004, the business records of the Internal Revenue Service showed that 464 Federal individual income tax returns and 94

focused inquiry, R-A offered no explanation other than an explanation of how he prepared returns for his clients with their assistance given his limited vision. (HT, pp. 138-139.) But R-A did not indicate why, if he had enlisted the assistance of others (including family members or "per diem workers") in preparing his clients' returns, he had not followed the same procedure (b)(3)/26 USC 6103 . R-A wanted to show the ALJ some proof supporting his position, but indicated that he did not want to offer that proof into evidence. The ALJ appropriately indicated that he did not want to review anything that R-A was unwilling to submit into evidence. (HT, pp.129-130.) Further, R-A did not offer into evidence at the Hearing any proof of the other health concerns he first raised on Appeal. For these reasons, I find this claim to be without merit.

Section # 3. In Section 3, R-A alleged that, because the ALJ failed to give him "proper chance to defend" himself, the ALJ made material errors in his statements and opinions on the case and in his Decision, ignored relevant facts, appeared not to have considered the evidence and to have read his brief, had misstated material facts and had failed to comment upon or address other material facts at all. As I have stated above, I find R-A's claim that he was denied the opportunity to defend himself without merit. R-A was given the opportunity to defend himself, but failed to do so. The ALJ obviously was of the view that R-A lacked credibility on several relevant points, and from that concluded that his testimony generally lacked credibility. Given my review of the entire Administrative Record, I find that was a perfectly permissible inference for the ALJ to draw, and certainly not an inference I would deem inappropriate under a "clearly erroneous" standard of review.

First, I agree with the ALJ that R-A was not under a different and higher duty to (b)(3)/26 USC 6103

Federal business income lax returns were filed bearing R-A's name and Social Security number as Preparer. R-A testified that his name and Social Security Number were imprinted by the company that provided his software, and that the returns in question (or many of them) were prepared not by R-A but by either per diem workers or by his wife and children. (b)(3)/26 USC 6103 , leading me to conclude that the vast majority of the returns in issue were prepared either by R-A or by members of his family operating at his direction. HT, pp. 25-26. R-A offered no explanation of why these same techniques could not have been (b)(3)/26 USC 6103 .

With regard to R-A's alleged vision and other health problems, I note that R-A presented no notes or testimony from his physicians, or from members of his family or his "per diem" workers, attesting to his conditions during the relevant periods or on their effects on his ability to (b)(3)/26 USC 6103 . As mentioned above, if members of R-A's family or his "per diem workers" were as involved in the preparation of his clients' returns as he claims (a claim that the AU found to lack credibility), R-A offered no explanation of why the same individuals could not have been enlisted to help (b)(3)/26 USC 6103 , nor did he explain his failure to have them supply testimony to support his claims. Further, I note that R-A offered no testimony or evidence at the Hearing concerning health problems other than his vision problems, and even as to those claims was unwilling to leave as evidence for the record the various eye glasses and contact lenses he had submitted to the ALJ. I therefore find these claims to be without merit. With regard to R-A's vision problems, I note that certain of his assertions related to periods that either preceded or followed the periods here in issue.

R-A's allegations otherwise lack specificity, and are consequently deemed to be without merit.

Section # 4. R-A alleged: "The Judge erred in allowing the OPR to sending regulations after the case was over." As I find this allegation unintelligible, I find it without merit.

Section # 5. R-A alleges that OPR was not formed until 2003, did not issue regulations until 2005, and that the ALJ committed err by allowing OPR to retroactively apply of Treasury Circular 230 (b)(3)/26 USC 6103 . Contrary to R-A's assertions, OPR was "in business" long before 2003, under the name Office of the Director of Practice, either as a part of the Internal Revenue Service or as a part of the Department of the Treasury. Further, regulations have been issued that governed conduct by practitioners for many years, for example: Treasury Circular 230 (Rev. 1994); Treasury Circular 230 (Rev. 7-2002); Treasury Circular 230 (Rev. 6-2005); and Treasury Circular 230 (Rev. 9-2007). While each of these Revisions of Treasury

Circular 230 are generally effective as of the day of their enactment to any proceeding which has not been concluded on the date of their enactment, each Revision contains a a "savings clause" assuring that a practitioner's conduct would be judged under the provisions of Treasury Circular in effect on the date the practitioner's conduct occurred. See, e.g., § 10.91 of Treasury Circular 230 (Rev. 6-2005). This claim is without merit.

Section # 6.[14] Section 6 of R-A's Amended Appeal sets forth a compendium of allegations respecting alleged errors and omissions by the ALJ. Each of these allegations is set forth below, together with my response to each.

First, R-A alleges that the ALJ erred in finding that his absence of willfulness, or alternatively mitigating circumstances, existed only (b)(3)/26 USC 6103 [redacted] **. The AlJ found that R-A lacked credibility on this matter, one of a lengthy list of excuses that R-A asserted in a series of letters filed with the Office of Professional Responsibility.[15] These claims are**

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[14] R-A's Amended Appeal contains two Section 6s, one on page 2 preceding and one on page 3 following the version of Section 7 beginning on page 2 and continuing on page 3. Likewise, in addition to the Section 7 beginning on page 2 and continuing on page 3, R-A has also added another Section 7 beginning on page 3 and continuing on page 4, as well as a new Section, following the repeated Section 7 which R-A referred to as Section 8. For purposes of this Decision on Appeal, I have renumbered the Sections following the original Section 7 as Sections 8, 9 and 10.

[15]The first in this series of letters was a letter dated February 1, 2006, appears as Exhibit A-3 to the Hearing Record. In that letter, the only mitigating or extenuating circumstances mentioned by R-A related to his Mother's suffering of a stroke in March, 2003, her subsequent death in late 2004, and his obligation to say a mourner's prayer several times each day for his mother after her death. He also expressed in that letter that he was an only son, very close to his mother and thoroughly devastated by her loss. The next in the series of letters was a letter dated July, 10 2006 [sic], which appears as Exhibit A-6 in which R-A set forth the following additional mitigating and extenuating circumstances: care for his aged father; care for his wife and 10+ children; obligations of his devout Jewish faith (17.3% of his time each week plus three weeks each year in which he was prohibited from working each year); severe vision problems that he had sought to address through (b)(6) [redacted] R-A also stated in this letter as a factor in mitigation that each of (b)(3)/26 USC 6103 [redacted]. As noted above, R-A submitted no evidence in support in support [sic] of any of these claims at the Hearing or elsewhere in the Administrative Record.

unsupported by evidence contained in the Administrative Record and consequently are without merit.

Section # 7. R-A again challenges the ALJ's findings and conclusions that his (b)(3)/26 USC 6103, both as a matter of law and on the facts given the "mitigating factors" and "acts of G-d" described above. As a matter of law, R-A again states that the ALJ added the concept of (b)(3)/26 USC 6103 to the literal language of Treasury Circular 230. For the reasons discussed above, I find this claim without merit. As a matter of fact, many of the "mitigating facts" and "Acts of G-d" R-A alludes to were simply not submitted properly into evidence by R-A, notwithstanding the ALJ's repeated attempts to assist R-A in doing so. Under the standard of review I must apply to such matters (the "clearly erroneous standard") when the issue involves issues involving facts or facts and law, I find no basis for this claim by R-A. Indeed, even if I were to have found the ALJ's actions to have involved error under a lesser standard (which I do not), I would have considered it harmless error because R-A never explained why, even if he personally, (b)(3)/26 USC 6103 who, by his own testimony, assisted in the preparation of his clients' returns. I find these claims to be without merit.

Section # 8. R-A again makes a claim that the fact that the ALJ erred by adding (b)(3)/26 USC 6103 of Treasury Circular 230. Again, and for the reasons mentioned above, I find this claim to be without merit.

"Willfulness"

Treasury Circular 230 does not contain a regulatory definition of "willful." However, Treasury Circular 230 in many respects proscribes and sanctions conduct that is also sanctioned under the criminal tax provisions of the Internal Revenue Code. See. e.g., Sections 7201 through 7212 of the Internal Revenue Code of 1986, as amended and in effect during the years here in issue. See specifically (b)(3)/26 USC 6103. In the absence of a regulatory definition of "willfulness," I have adopted the case precedents of the criminal tax provisions of the Internal Revenue Code to interpret the term "willful" for Treasury Circular 230 purposes.

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. (b)(3)/26 USC 6103, Complaint No. 2003-2, a proceeding made public by mutual agreement of the parties.[16] Of particular relevance to this proceeding are cfour [sic] United States Supreme

[16] Pages 40 through 52 of the Decision on Appeal in [redacted] appear as Attachment 6 to this Decision on Appeal and is incorporated asif [sic] fully set forth herein

(b)(3)/26 USC 6103

Court cases cited in Attachment 6 -Bishop,[17] Pomponio,[18] Cheek,[19] and Boyle.[20] As explained i n [sic] greater detail in Attachment 6, the Bishop/Pomponio line of cases establish that the term "willful" 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 to the jury 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 based on an objectively unreasonable interpretation of a substantive provision of the Internal Revenue Code and the other based on his belief that the income tax was unconstitutional. As to nthe [sic] former statutory claim, the Supreme Court, per Mr. Justice White, held that the taxpayer was entitled to the requested instruction. As to the latter Constitutional claim, the Supreme Court found that he was not. The 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 to a criminal prosecution based on the notion that the law is definite and knowable, and the common law presumed that every person knew the law. Mr. Justice White noted:

> **"Willfulness, as construed by our prior decisions in criminal 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 violated 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 relating to the meaning of the substantive provisions of the Internal Revenue Code, in enacting a "willfulness" standard, Congress intended to depart law rule [sic] presuming knowledge of the law (a rule of presumed general intent) and instead require the Government to prove specific knowledge of the law on the part of the defendant (a rule requiring the Government to prove specific subjective intent). This was the basis for the Court's holding that Cheek was entitled to the requested instruction with regard to his statutory claim, but not with respect to his Constitutional claim.

(b)(3)/26 USC 6103 , and whether those questions are questions falling under the general common law rule of presumed general intent or under a rule requiring the Government to prove specific subjective intent on the part of the defendant, , [sic] I find that the Supreme Court has also answered that question, albeit in a different context. In Boyle, the issue was whether an estate fiduciary could avoid a penalty for

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[17] United States v. Bishop, 412 U.S. 346 (1973).
[18] Unites States v. Pomponio, 429 U.S. 10 (1976).
[19] Cheek v. United States, 498 U.S. 192 (1991).
[20] United States v. Boyle, 469 U.S. 241 (1985).

failing to file a fiduciary income tax return by proving that he had engaged a tax advisor to prepare and file the return for him. The Supreme Court upheld the penalty against the fiduciary, finding that the obligation to file a tax return imposed a non-delegable duty on the fiduciary (or, by analogy, any taxpayer). The Court distinguished between situations where it was reasonable fro [sic] a taxpayer to rely on an advisor, where a layman should not be presumed to know the answer to the question (such as whether a tax liability existed) and the question of whether and when a taxpayer had a duty to file a tax return (questions the Court viewed as questions reasonably within the knowledge of a taxpayer and consequently non-delegable. I therefore find the question of (b)(3)/26 USC 6103 to fall under the presumptive common law general intent rule. However, I note that even had I found that C-A needed to prove specific subjective intent on the part of R-A, the Administrative Record is replete with evidence supporting that conclusion, including (b)(3)/26 USC 6103

Sanction

The ALJ imposed as a sanction against R-A a twenty-four (24) month, or two (2) year suspension from practice before the Internal Revenue Service. This is the same sanction that OPR sought to impose. In case [sic] that involve (b)(3)/26 USC 6103, I typically impose a suspension from practice before the Internal Revenue Service of twelve (12) months, or one (1) year for each offense. I view R-A's conduct as involving three (3) separate offenses, each (b)(3)/26 USC 6103. R-A argued that each of his offenses constituted a "victimless crime" (my term, not his) because (b)(3)/26 USC 6103 But that hardly makes his offenses "victimless." As the Supreme Court noted in Boyle with respect to the importance of (b)(3)/26 USC 6103:

> **"Deadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results. The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards. Any less rigid standard would risk encouraging a law [sic] attitude toward filing dates. Prompt payment of taxes is imperative to the Government, which should not have to assume the burden of ad hoc determinations." 469 U.S. at 249-51.**

That statement was true in 1985, and is even truer today. (b)(3)/26 USC 6103 require the Internal Revenue Service to needlessly expend resources that could be better spent securing returns and collecting taxes due from other taxpayers. These "lost opportunity costs" needlessly burden the Internal Revenue Service and compliant taxpayers. (b)(3)/26 USC 6103 and C-A reduced R-A's suspension in part for that reason. I am satisfied that the

twenty-four (24) month, or two (2) year suspension (b)(3)/26 USC 6103 is an appropriate penalty for the charges made and proved.

Conclusion

For the reasons stated, I hereby AFFIRM the ALJ's findings of fact and conclusions of law with respect to each of the three charges made against R-A, and likewise AFFIRM R-A's twenty-four (24) month, or two (2) year, suspension from practice before the Internal Revenue Service, commencing from the date of this Decision on Appeal, which constitutes FINAL AGENCY ACTION in this proceeding.

/s/
David F.P. O'Connor
Special Counsel to the Senior Counsel
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of Henry M. Paulson,
Secretary of the Treasury)

October 17, 2008 [by hand]
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the Decision on Appeal in Complaint No. 2006-33 was sent this day by Certified Mail/Return Receipt Requested and by First Class United States Mail to the addresses listed below:

Honorable Michael A. Rosas
Administrative Law Judge
National Labor Relations Board, Division of Judges
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(b)(3)/26 USC 6103, CPA
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Secretary of the Treasury)

October 17, 2008 [by hand]
Washington, D.C.