United States
Department of Treasury

Director, Office of Professional Responsibility,
Complainant-Appellee

v. **Complaint No.; 2007-08**

(b)(3)/26 USC 6103, Esq.
Respondent-Appellant

Decision on Appeal

Authority

Under the Authority of General Counsel Order No. 9 (January 19, 2001) and the authority vested in him as the 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 January 15, 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 on Motion for Summary Judgment entered in this proceeding by Administrative Law Judge Michael A. Rosas (the "ALJ")[1] on September 11, 2007,[2] disbarring Respondent-Appellant from practice before the Internal Revenue Service.

This proceeding commenced on February 26, 2007, when Complainant-Appellee filed a Complaint against Respondent-Appellant charging that he had (b)(3)/26 USC 6103 **. The Director, Office of Professional Responsibility found that, cumulatively,**

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[1] The ALJ served as the ALJ in these proceedings under an inter-agency agreement between the Department of the Treasury and the National Labor Relations Board.

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

[3] A copy of the Complaint in this proceeding appears as Attachment 2 and is made a part of this Decision on Appeal as if fully set forth herein. (b)(3)/26 USC 6103

Respondent-Appellant's conduct justified disbarment from practice before the Internal Revenue Service, and sought that sanction against Respondent-Appellant.

On March 31, 2007, Respondent-Appellant filed his Answer to the Complaint.[4] In his Answer, Respondent-Appellant admitted that: he was an attorney who was not only authorized to practice before the Internal Revenue Service, but who had in fact practiced before the Internal Revenue Service; that he was subject to the discipline of the Secretary of the Treasury and the Director, Office of Professional Responsibility; (b)(3)/26 USC 6103 **. However, in his Answer, Respondent-Appellant did not admit that** (b)(3)/26 USC 6103 **." In his Answer, he claimed** (b)(3)/26 USC 6103 **Respondent-Appellant made no other statements in his Answer that could be construed as a basis for concluding that** (b)(3)/26 USC 6103 **.**

On July 13, 2007, Complainant-Appellee filed his Motion for Summary Judgment, requesting that the ALJ disbar Respondent-Appellant from practice before the Internal Revenue Service based on Respondent-Appellant's (b)(3)/26 USC 6103 **I will address the issue of "willfulness" more fully below. For now, it suffices to say that Complainant-Appellee did not address the one possible basis for a lack of "willfulness" raised in Respondent-Appellant's Answer** (b)(3)/26 USC 6103 **but did mention another possible factor, raised for the first time in a letter dated December 15, 2006, namely the fact that Respondent-Appellant claimed to have been**

[4] A copy of Respondent-Appellant's Answer appears as Attachment 3 and is made a part of this Decision on Appeal as if fully set forth herein.

[5] By letter dated February 8, 2007, Respondent-Appellant stated to Cono R. Namorato, then Director of the Office of Professional Liability, (b)(3)/26 USC 6103 A copy of that letter appears as Attachment 4 and is made a part of this Decision on Appeal as if fully set forth herein.

which ha[ve] had a serious impact on his ability to practice law and to fulfill his obligations, both personal and professional."[6]

Respondent-Appellant filed his Response to Complainant-Appellant's Motion for Summary Judgment on August 4, 2007. In his Response, Respondent-Appellant noted his belief that the "willfulness" of his conduct was contested and that it was not the type of issue that could appropriately be decided through a motion for summary judgment, or for that matter by any forum short of a United States District Court given the implications that a disbarment might have on his continued ability to practice law in the State of A. Respondent-Appellant did not state the basis for his belief that his conduct was not "willful," nor did he identify specific material facts in dispute that would be relevant to that determination, and that would make resolution of this proceeding through a motion for summary judgment inappropriate.

As noted above, the ALJ issued his Decision on Motion for Summary Judgment on September 11, 2007. In his decision, the ALJ found that there were no genuine issues of material fact in dispute, that the matter was appropriately handled on a motion for summary judgment, that the Complainant-Appellant has met his burdens of proof, and that the sanction sought by Complainant-Appellee was appropriate given the charges proved.

On October 10, 2007, Respondent-Appellant timely filed his Appeal of the ALJ's Decision pursuant to § 10.77 of Treasury Circular 230, and on November 7, 2007, Complainant-Appellee timely filed his Response to that Appeal.

Role and Functions of the Appellate Authority

Before turning to the particular issues raised by Respondent5-Appellant on Appeal, and certain other matters I deem worthy of discussion based on my review of the administrative record in this proceeding, let me briefly discuss my role and functions as the Appellate Authority in a Treasury Circular 230 proceeding.

I review the entire administrative record in the proceeding. I do so first to determine whether the jurisdictional prerequisites establishing the Director, Office of Professional Responsibility's jurisdiction over a practitioner have been established. In this proceeding, Respondent-Appellant has admitted that he is a lawyer (and hence authorized to practice before the Internal Revenue Service) and that he has in fact practiced before the Internal Revenue Service. These two jurisdictional prerequisites are also supported by other evidence contained in the administrative record. As a matter of law, therefore, I find that the Director, Office of Professional Responsibility has jurisdiction over Respondent-Appellant, a fact admitted in Respondent-Appellant's Answer.

[6] It is unclear from Complainant-Appellant's Motion whether this factor was offered as a defense to "willfulness," as a factor in "mitigation," or both

I also examine the facts in the administrative record and the law to determine whether the Complainant has met each element of each of his burdens of proof by the requisite evidentiary standard. Given the sanction that Complainant-Appellant sought and still seeks to impose against Respondent-Appellant, the requisite standard of proof is clear and convincing evidence.[7]

The Complainant-Appellee's burdens of proof exist with respect to each element of each specific charge that remains in issue at the time of an Appeal, as well as with respect certain other evidentiary burdens imposed on the Complainant based on the sanction sought to be imposed against the Respondent. In this proceeding, Complainant-Appellee contends, and Respondent-Appellant agrees, that Complainant-Appellee has met his burdens of proof by clear and convincing evidence on each element of proof on each charge save one: whether Complainant-Appellee has proved by clear and convincing evidence that Respondent-Appellant's conduct with respect to each charge was "willful." Complainant-Appellee contends that he has met his burden of proof with regard to "willfulness," whereas Respondent-Appellant contends that Complainant-Appellee has not met his burdens in that respect and that such matters do not involve issues that can be appropriately resolved through summary judgment. I will address these issues below in the section of this Decision on Appeal dealing with "willfulness."[8]

The Appellate Authority's standard of review of the Administrative Law Judge's actions differs depending on whether the Appellate Authority is reviewing a purely factual issue or an issue involving a mixed question of fact and law (in either instance, the Appellate Authority reviews such actions under a "clearly erroneous" standard) or involves a purely legal issue (where the Appellate Authority reviews the issue *de novo*). Under either standard, I affirm the ALJ's findings and conclusions with respect to all the charges against Respondent-Appellant in this proceeding. For the reasons described below in the portion of this Decision on Appeal dealing with "willfulness," I also affirm the ALJ's determinations that each of Respondent-Appellant's violations was "willful."

Finally, the Appellate Authority reviews the sanction sought by the Complainant and the sanction imposed by the Administrative Law Judge in light of the charges proved and in light of other "aggravating" and "mitigating" circumstances. The Appellate Authority does so *de novo* with the full authority of the Secretary of the Treasury of the Internal Revenue Service (the charging agency). In so doing, the Appellate Authority can affirm the sanction imposed by the ALJ, decrease the sanction, or, when possible, increase the sanction imposed in light of

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[7] See § 10.76(a) of Treasury Circular 230.

[8] The issue of "willfulness" must be addressed both under the substantive charges leveled against Respondent-Appellant under §§10.51 and (b)(3)/26 USC 6103 of Treasury Circular 230, and, because of the sanction sought to be imposed, under § 10.52(a) of Treasury Circular 230, which I view as "sanction specific" and as therefore having been applicable to all violations of Treasury Circular 230 where the sanction sought was among those specified in §10.52(a) during the period in issue.

the charges proved and in light of other "aggravating" or "mitigating" factors found present. For the reasons described below in the "Sanction" section of this Decision on Appeal, I affirm the sanction imposed by the ALJ disbarring Respondent-Appellant from practice before the Internal Revenue Service.

"Willfulness"

Treasury Circular 230 does not contain a regulatory definition of the words "willful" or "willfulness." 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 generally §§ 7201 – 7212 of the Internal Revenue Code of 1986 as amended and in effect during the years here in issue. See specifically [redacted (b)(3)/26 USC 6103] **. In the absence of a regulatory definition of "willfulness," I have adopted the case precedents under the criminal provisions of the Internal Revenue Code as the first step [and in some instances (including in this proceeding) the only step] in interpreting the term "willful" for Treasury Circular 230 purposes.[9]**

I have had many occasions to interpret the term "willful" in Treasury Circular 230 proceedings. I first addressed the issue in the Decision on Appeal in Director, Office of Professional Responsibility v. [redacted (b)(3)/26 USC 6103] **, Complaint No. 2003-02, a proceeding made public by mutual agreement of the parties.[10] Of particular importance to this proceeding are four decisions of the United States Supreme Court referred to in Attachment 5 – Bishop,[11] Pomponio,[12] Cheek,[13] and Boyle.[14]**

As explained in greater detail in Attachment 5, the Bishop/Pomponio line of cases establish that the term "willful" merely means a voluntary, intentional violation of a known legal duty.

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[9] If the Complainant meets those most stringent proof requirements, my analysis ends there. If, however, the Complainant fails to meet those proof requirements because they evolved in proceedings raising Constitutional or proof standards developed in criminal tax cases involving juries where similar Constitutional or proof issues are not presented given the nature of Treasury Circular 230 proceedings (for example, because Treasury Circular 230 proceedings combine the role of the initial fact finder and initial applier of the law in one person, the Administrative Law Judge, or because the law may require more of a practitioner than of a layman), I may inquire further before reaching a conclusion. Here, since I believe Complainant-Appellee has met his burdens of proof under the more stringent standards developed under the criminal tax provisions of the Internal Revenue Code of 1986, as amended and in effect during the years in issue, I have no need to inquire further.

[10] Pages 15-16 and 40-52 of the Decision on Appeal in [redacted] appear as Attachment 5 to this Decision on Appeal and are incorporated as if fully set forth herein. (b)(3)/26 USC 6103

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

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

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

[14] United States v. Boyle, 469 U.S. 241 (1985).

In Cheek, the issue was whether the taxpayer, an airline pilot, was entitled to a jury instruction that it was a valid defense to a willful failure to file charge if the taxpayer established that his beliefs that he was not required to file were honestly held (subjectively) even if the reasons for his beliefs were not reasonable (objectively). The taxpayer had two purported reasons for believing that he was not required to file a tax return, one based on an objectively unreasonable interpretation of a substantive provision of the Internal Revenue Code and the other on his purported belief that the Federal Income Tax was unconstitutional. As to the former statutory claim, the Supreme Court found that the taxpayer was entitled to the requested instruction. As to the latter constitutional claim, the Supreme Court found that he was not. In reaching these conclusions, the Supreme Court reasoned 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. In his opinion for the Court, Mr. Justice White noted:

> **"Willfulness, as construed by our prior decisions in criminal tax cases, requires that the government 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 elements of proof, Mr. Justice White found that, with respect to matters of statutory construction under our tax laws, when Congress imposed a "willfulness" requirement under the criminal tax provisions of the Internal Revenue Code, it intended to depart from the common law rule presuming knowledge of the law (a rule of presumed general intent) and to substitute a rule requiring 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). However, the Supreme Court did not adopt this heightened proof requirement with respect to Cheek's constitutional claim, where the common law rule continued to apply. As to his constitutional claim, the Supreme Court found that he was not entitled to his requested instruction.

(b)(3)/26 USC 6103

, and whether this issue falls into the first category imposing a heightened proof requirement on the Government or falls into the second category and continues to be governed by the common law rule of presumed general intent, I find that the Supreme Court has also answered this question, albeit in a different context. In Boyle, the issue before the Supreme Court was whether a person with a duty to file a tax return (in Boyle, an estate fiduciary) could delegate that responsibility to a tax advisor assisting the person with the obligation to file and thereby escape exposure to penalty if there was a failure to timely file the return. The Supreme Court found that the duty to file the return was personal and non-delegable. In so holding, the Supreme Court distinguished the obligation to timely file a return (where it was reasonable to impose a duty on a layman to know that a

return had to be filed and when) from other types of tax issues (such as determining whether a tax liability existed) where it was reasonable for a layman to rely on an attorney's or accountant's advice. For the reasons described in the ALJ's Decision on Motion for Summary Judgment, the administrative record is replete with evidence that establishes that Respondent-Appellant was (b)(3)/26 USC 6103 **But even if the administrative record was not clear on these points, I would find as a matter of law that** (b)(3)/26 USC 6103 **is an issue that falls into the second category from Cheek and continues to be governed by the common law rule of presumed general intent. I therefore find that Complainant-Appellee has met his burdens of proof with respect to the second element of proof required under Cheek and its predecessors.**

Therefore, there remains only the third element of proof for Complainant-Appellant to establish willfulness under Cheek: Were Respondent-Appellant's violations voluntary and intentional? Here, Respondent-Appellant has offered only two reasons why they may not have been: (b)(3)/26 USC 6103 **and** (b)(3)/26 USC 6103 **. For the reasons that follow, I find that neither of these factors forms a basis for finding that any of Respondent-Appellant's violations was either involuntary or unintentional.**

(b)(3)/26 USC 6103

. Respondent-Appellant has practice tax law for 38 years. It leaves one to wonder what he did before Congress greatly expand the "net" of third party information reporting in the 1980s. This claim is without merit.

I also find Respondent-Appellant's (b)(3)/26 USC 6103 **to be without merit. I too suffer from** (b)(3)/26 USC 6103 **and am all too familiar with the** (b)(3)/26 USC 6103 **. I am also familiar enough with** (b)(3)/26 USC 6103

[redacted] (b)(3)/26 USC 6103 **But I know enough about the** (b)(3)/26 USC 6103 [redacted] **I agree with the ALJ that Respondent-Appellant's** [redacted] **simply cannot explain violations that continued for such a long period of time, and which he was only able to overcome when facing disbarment. This claim is without merit.**

Accordingly, I find that Complainant-Appellee has met the third element of his proof with respect to the 'willfulness" of each of Respondent-Appellant's violations.

I also find that Respondent-Appellant has not placed in issue a material contested fact that makes resolution of Respondent-Appellant's "willfulness" a matter inappropriate for resolution through summary judgment.

Issues Raised on Appeal

Respondent-Appellant raised four issues on Appeal:

1. **Did the ALJ err in rendering his decision on the Motion for Summary Judgment without first according the Respondent-Appellant an opportunity to be heard through oral argument?**

2. **Did the ALJ err in combining his decision on Complainant-Appellee's Motion for Summary Judgment with the Complainant-Appellant's recommendation for disbarment, without first affording the Respondent-Appellant the opportunity to be heard, as to any mitigating factors, which violates his Due Process Rights under the United States Constitution?**

3. **Did the ALJ err in ordering the most severe degree of punishment available without considering the applicability of censure which is appropriate for first-time offenders such as Respondent-Appellant?**

4. **Did the ALJ err in failing to consider the impact on Respondent-Appellant's right to practice law in the State of Pennsylvania due to his disbarment before the Internal Revenue Service, which results in disparate treatment among similarly situated offenders?**

With regard to the first grounds of appeal, my answer is no. Oral argument on a Motion for Summary Judgment is not a matter of right. Oral argument is only required when matters of fact or law are unclear to a judge following a careful review of the parties' papers and the totality of the administrative record. Here, there is no such uncertainty and the standards

for review on Motion for Summary Judgment have been met. This claim is without merit.

Respondent-Appellant's second claim is likewise without merit. There is no legal requirement, under the United States Constitution or otherwise, that requires a bifurcation of a disciplinary proceeding under Treasury Circular 230, into separate liability and penalty proceedings. Indeed, Treasury Circular 230 clearly contemplates a unitary proceeding conducted by the ALJ and reviewed by the Appellate Authority. Further, Respondent-Appellant's claims regarding factors he considered to be in mitigation were fully considered by the Office of Professional Responsibility, the ALJ and by me. At each level, they were found to be without merit.

As to Respondent-Appellant's third claim, for the reasons specified in the section of this Decision on Appeal dealing with the Sanction imposed, my answer is no. This claim is without merit.

With regard to Respondent-Appellant's fourth claim, my answer is no. Rather, I find that Respondent-Appellant is the one who failed to consider the consequences of his conduct. It is he, not the ALJ through his choice of sanction, who bears the responsibility for whatever consequence may follow from (b)(3)/26 USC 6103 **. Further, that consequence will flow from actions taken by the State of Pennsylvania, not from the actions of the ALJ or me acting as the Appellate Authority in this proceeding. Finally, Respondent-Appellant's claim of disparate treatment is without merit. The fact that Complainant-Appellee for whatever reason has not been able to impose sanctions for** (b)(3)/26 USC 6103 **against all practitioners guilty of that conduct does not provide a basis of unfair treatment. In the last three months, I have acted as the Appellate Authority in three disciplinary proceedings involving practitioners charged with** (b)(3)/26 USC 6103 **. All three involved practitioners who had** (b)(3)/26 USC 6103 **. All involved** (b)(3)/26 USC 6103 **for each violation charged. All involved practitioners who expressed little or no contrition for the actions. All involved practitioners placing added burdens on the Internal Revenue Service, both in their initial conduct and in the burdens they placed on all parties involved in their disciplinary proceedings, which were pursued doggedly despite their absence of merit. One of the three, involving** (b)(3)/26 USC 6103 **, C.P.A. (Complaint No. 2006-23) involved a practitioner who** (b)(3)/26 USC 6103 **. I suspended** Same **from practice before the Internal Revenue Service for thirty-six (36) months. Another, involving** (b)(3)/26 USC 6103 **, C.P.A. (Complaint No. 2007-10) involved a practitioner who had** (b)(3)/26 USC 6103 **. I suspended** Same **from practice before the Internal Revenue Service for a period of forty-eight (48) months. Following his disbarment, Respondent-Appellant will be able to**

re-apply for admission to practice after 5 years, assuming he fully complies with [redacted]. Thus I hardly consider my actions in this proceeding to be "disproportionate" to the actions I have taken in other proceedings against "similarly situated offenders."

Sanction

In United States v. Boyle, supra, in addressing the importance of the [redacted], the Supreme Court stated:

> **"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." 469 U.S. at 249-251.**

That statement was true in 1985 and is even truer today. The time and energy the Internal Revenue Service expends securing tax returns from taxpayers who have not met this basic obligation of citizenship is substantial. Expending this time on [redacted] represents a "lost opportunity cost" not only for the Internal Revenue Service and the Federal Government as a whole, but for compliant taxpayers who are asked to shoulder the load for the non-compliant.[15] I view this as a very serious offense for a tax practitioner.

For the reasons stated elsewhere in this Decision on Appeal (specifically, as a part of the discussion on whether Respondent-Appellant's conduct was "willful," I find none of the factors offered by Respondent-Appellant to be mitigating factors given the repetitiveness and long standing nature of his violations, and find the repetitiveness [redacted] to be an aggravating factor.

For each of these reasons, I AFFIRM the sanction imposed by the ALJ and this day DISBAR Respondent-Appellant from practice before the Internal Revenue Service.

Conclusion

For the reasons set forth above, I hereby: AFFIRM the ALJ's findings of fact and conclusions of law with respect to the five (5) charges relating to Respondent-

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[15] To encourage all citizens to meet this basic obligation of citizenship, Congress has made [redacted] As noted above, while the burdens of proof are different (proof beyond a reasonable doubt in a criminal proceeding and proof by clear and convincing evidence in this proceeding), the elements of proof are the same.

Appellant's [redacted] (b)(3)/26 USC 6103 [redacted] **and 10.52(a) of Treasury Circular 230; find that** [redacted] (b)(3)/26 USC 6103 [redacted] **and 10.52(a) of Treasury Circular 230; and impose the sanction described above. This Decision on Appeal constitutes FINAL AGENCY ACTION in this proceeding.**

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

July __, 2008
Washington, D.C. 2008