United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellee

v. **Complaint No. 2007-28**

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

Decision On Appeal

Authority

Under the Authority of General Counsel Order No. 9 (January 19, 2001) and the authority vested in her as Acting General Counsel of the Treasury who was the Acting Chief Counsel of the Internal Revenue Service, through a delegation order dated June 26, 2009, Clarissa C. Potter delegated to the undersigned the authority to decide disciplinary appeals to the Secretary of the Treasury filed under Subpart D of Part 10 of Title 31, Code of Federal Regulation 31 C.F.R. Part 10, *Practice Before the Internal Revenue Service* (reprinted in and hereinafter referred to as Treasury Department Circular No. 230). This is such an Appeal from a Decision entered in this proceeding against (b)(3)/26 USC 6103 by Administrative Law Judge Arthur J. Amchen (the ALJ) on August 29, 2008.[1]

Background

This proceeding was commenced on May 22, 2007, when Attorney 1, an attorney acting as the authorized representative of Michael R. Chesman, then the Director of the Office of Professional Responsibility, filed a complaint against Respondent-Appellant. The complaint alleges that Respondent-Appellant: (i) has engaged in practice before the Internal Revenue Service, as defined by 31 C.F.R. § 10.2(d) as an enrolled agent, (b)(3)/26 USC 6103

[1] A copy of the ALJ's Decision Granting Complaint's Motion For Summary Judgment appears as Attachment 1.

(b)(3)/26 USC 6103 The complaint recommends that Respondent-Appellant should receive as a sanction for her conduct a forty-eight (48) month suspension from practice before the Internal Revenue Service and further requiring that her suspension not be lifted until Respondent-Appellant (b)(3)/26 USC 6103

ALJ's Decision and Complainant-Appellee's Motion to Dismiss Appellant's Appeal

On August 29, 2008, Administrative Law Judge Arthur J. Amchan granted Complainant-Appellee's Motion for Summary judgment and suspended Respondent-Appellant from practice before the Internal Revenue Service for thirty-six (36) months. By letter dated September 4, 2008, the Office of Professional Responsibility notified Respondent-Appellant that any appeal must be postmarked no later than September 29, 2008.

By letter dated September 15, 2008, Respondent-Appellant requested copies of decisions referenced in the Decision of the Administrative Law Judge and required an extension of time to file an appeal from September 29, 2008 to a date no sooner than thirty (30) days from when the requested decisions were mailed. The requested decisions were mailed on September 26, 2008. By memorandum dated October 8, 2008, the Appellate Authority granted Respondent-Appellant an extension to November 10, 2008, to file an appeal.

Respondent-Appellant's attorney indicates in the Opposition to Motion to Dismiss Appeal of (b)(3)/26 USC 6103 to Order Granting Motion For Summary Judgment that he called the attorney for Complainant-Appellee on November 12, 2008 and informed her that he intended to file the appeal late. On November 14, 2008, Respondent-Appellant's attorney sent a letter to the Office of Professional Responsibility indicating that he would be filing the appeal late. While Respondent-Appellant's attorney notified Complainant-Appellee that he would be filing the appeal late, he did not request an additional extension of time past the November 10, 2008 due date. No additional extension of time was granted.

On November 19, 2008, Respondent-Appellant served an appeal by FedEx express overnight. On December 4, 2008, Complainant-Appellee served a Motion to Dismiss Appellant's Appeal. By letter dated December 15, 2008, Respondent-Appellant's counsel requested an extension of time to file an

Opposition to Motion to Dismiss Appeal of (b)(3)/26 USC 6103 to Order Granting Motion for Summary Judgment indicating that the Opposition would be filed that day or the following day. An Opposition to Motion to Dismiss Appeal of (b)(3)/26 USC 6103 to Order Granting Motion for Summary Judgment was submitted by letter dated December 21, 2008. By letter dated December 22, 2008, Complainant-Appellee submitted a Response to Respondent-Appellant's Appeal since no decision had been issued in response to Complainant-Appellee's Motion to Dismiss the Appeal. By letter dated January 21, 2009, Respondent-Appellant submitted a document captioned Reply of (b)(3)/26 USC 6103 to Complainant's Opposition to (b)(3)/26 USC 6103 Appeal. There is no provision in Circular 230 for filing such Reply, nor did Respondent-Appellant request leave to file such Reply.

Respondent-Appellant argues that the letter dated September 15, 2008, sent to the Office of Professional Responsibility, constituted a Notice of Appeal which met the requirements of Circular 230 for filing a timely appeal. The September 15, 2008 letter was titled as a "Request for extension of time to appeal of Order granting summary judgment." Pursuant to 31 C.F.R. § 10.77(a) (Effective September 26, 2007) "[t]he appeal much include a brief that states exceptions to the decision of the Administrative Law Judge and supporting reasons for such exceptions." Furthermore, 31 C.F.R. § 10.77(b) states that "[t]he appeal and brief must be filed, in duplicate, with the Director of the Office of Professional Responsibility within 30 days of the date that the decision of the Administrative Law Judge is served on the parties." The September 15, 2008 letter was not an appeal, and no brief was attached to that letter, as required by 31 C.F.R. § 10.77(a). The letter, as its title indicates, was a request for an extension of time to file and appeal and a request for certain unpublished decisions. Therefore, Respondent-Appellant's September 15th letter does not meet the requirements of Circular 230 for timely filing an appeal.

Respondent-Appellant also argues alternatively that the untimely filing of the appeal was excusable. Respondent-Appellant requested an additional 30 days to file an appeal calculated from the date Respondent-Appellant was mailed copies of requested unpublished decision. The requested decisions were mailed on September 26, 2008. Therefore, based upon the request for an extension Respondent-Appellant's appeal would have been due on October 27, 2008[2]. An extension was granted to file the appeal to November 10, 2008, two weeks beyond the 30 days requested by Respondent-Appellant.

Respondent-Appellant's attorney indicates that he was attending a Continuing Legal Education program from November 9-14, 2008, and that he intended to complete the Appeal during the evenings and mail it by the due date of November 10, 2008. Respondent-Appellant's attorney contends that he became ill late during the evening of November 9, 2008, which prevented him from timely filing the appeal. Respondent-Appellant's attorney attached his attendance

[2] October 26, 2008 was a Sunday. Regardless, Respondent-Appellant was granted a longer extension to November 10, 2008.

record for the program as an exhibit to the December 21, 2008 opposition ot the motion to dismiss. The attendance record demonstrates that Respondent-Appellant's attorney attended three (3) sessions on Sunday, November 9, 2008, one (1) session, on November 10, 2008, one (1) session on November 11, 2008, and one (1) session on November 14, 2008. Respondent-Appellant has not established that the untimely filing of the appeal was excusable. Respondent-Appellant was granted an extension of time substantially in excess of the time requested. The Appeal in this case was inexcusably untimely, and therefore the Appeal is dismissed.

Merits of the Action Taken by the Office of Professional Responsibility

The Director of the Office of Professional Responsibility filed a Complaint on May 22, 2007, seeking to suspend Respondent-Appellant (b)(3)/26 USC 6103, an enrolled agent, from practice before the IRS for a period of 48 months. The complaint alleges that the Respondent-Appellant (b)(3)/26 USC 6103

In her answer to the Complaint, Respondent-Appellant asserts that (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

(b)(3)/26 USC 6103

[3] Pursuant to section 7503 of Title 26, if the due date for filing a return is a Saturday, Sunday, or a legal holiday, the return is considered timely if filed on the next succeeding day which is not a Saturday, Sunday, or legal holiday. (b)(3)/26 USC 6103

Section 10.51(f) of Treasury Circular 230[4] provides that incompetence and disreputable conduct includes "[w]illfully failing to make a Federal tax return in violation of the revenue laws of the United States . . . ." Pursuant to section 10.51 "a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service" for engaging in such misconduct. Section 10.52 of Treasury Circular 230 as in effect during the periods in issue provides that "[a] practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service" for "[w]illfully violating any of the regulations contained in this part." The Appellate Authority has held that (b)(3)/26 USC 6103 . See Director, OPR v. (b)(3)/26 USC 6103 , C.P.A., Complaint No. 2006-23 (Decision on Appeal, May 14, 2008) (In which the Appellate Authority increased the length of suspension determined by the Administrative Law Judge). In the instant case the parties are in agreement that (b)(3)/26 USC 6103

Willfullness is not defined in Treasury Circular 230. The Appellate Authority previously has applied the definition of willfulness used in criminal cases, in particular Cheek v. United States, 498 U.S. 192 (1991) and United States v. Pompino, 429 U.S. 10 (1976). I question whether the criminal standard is the appropriate standard to apply in the context of a civil proceeding to determine whether disciplinary action should be taken for professional misconduct. For example, the California Supreme Court has determine that the term "willful" under the Rules of Professional Conduct of the State Bar of California means "simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." Richards A. Phillips v. the State Bar of California, 782 P.2d 587, 591 (1989), (quoting Durbin v. State Bar, 590 P.2d 876 (1979)). Neither party has briefed the issue regarding the proper definition of willfulness under Treasury Circular 230. This is most likely because the Appellate Authority has previously adopted the standards defined in Cheek and Pomponio. Therefore, for the purposes of this case, I will apply the definition of willfulness as described in Cheek and Pomponio. I invite the parties in future cases to brief what the appropriate definition for willfulness should be under Treasury Circular 230.

As described in Cheek and Pomponio, willful means the voluntary, intentional violation of a known duty. It does not require any showing of motive. Respondent-Appellant contends that she was not willful because (b)(3)/26 USC 6103 . I question whether she lacked such knowledge of her responsibilities under Circular 230. Regardless, the legal duty Respondent-Appellant violated was not

[4] As in effect July 26, 2002. While the specific provision dealing with (b)(3)/26 USC 6103 For simplicity, I will refer to this as section 10.51(f).

the consequences of [redacted] As an enrolled agent, Respondent-Appellant [redacted].

Respondent-Appellant also argues that [redacted] In support of this assertion, she submitted [redacted] Respondent-Appellant was given the opportunity to provide her testimony and [redacted] by means of a telephone conference call. The Administrative law Judge also indicated that [redacted]. During such call, counsel for Complainant-Appellee would have had the opportunity to question [redacted]. The parties did not have a conference call with the ALJ to discuss [redacted]. Also, I note that [redacted]. The Administrative Law Judge indicated that "he would not credit an unsupported opinion." I concur that the opinion of [redacted] is unsupported. It is conclusory and of no value to consideration of this disciplinary action.

[redacted] Respondent-Appellant worked full time preparing returns for her clients and representing them before the Internal Revenue Service. By her own admission, no client was harmed by [redacted]. I concur in the finding of the Administrative Law Judge that Respondent-Appellant's [redacted]

Appropriate Sanction

Respondent-Appellant cites to two cases regarding disciplinary actions considered against members of the New York State Bar, In The Matter of Kenneth Everett, Esq., 243 A.D. 2d 75 (1998) and In the Matter of Howard Hornstein, 232 A.D. 2d 134 (1997). In both of these cases, attorneys [redacted] were given a public censure. In both instances the Court found that public censure was the appropriate disciplinary action because of

mitigating circumstances. Both opinions are very sparse on details regarding the types of law in which the attorneys engaged. Specifically, here is no mention that the attorneys were engaged in the practice of tax law. Here, Respondent-Appellant has passed the enrolled agents examination and is engaged full time in a tax practice including tax return preparation and representing taxpayers before the Internal Revenue Service. In addition, as discussed above, she has not established any applicable mitigating circumstances. The two cited cases are distinguishable from Respondent-Appellant's situation and are not helpful in determining the appropriate sanction.

Respondent-Appellant also cites two opinions of the United States Tax Court in which the taxpayers were found not liable for the (b)(3)/26 USC 6103 addition to tax asserted by the Commission, Shaffer v. Commissioner, T.C. Memo. 1994-618, and Meyer v. Commissioner, T.C. Memo. 2003-12. In both of these cases, the Tax Court found that there was reasonable cause for (b)(3)/26 USC 6103 because the taxpayers were severely incapacitated to the point they were unable to work. In contrast, Respondent-Appellant has continuously engaged in a tax practice, which includes preparing and filing returns for her clients.

The Administrative Law Judge reduced the requested suspension from 48 months to 36 months because of Respondent-Appellant's assertion of [redacted] (b)(3)/26 USC 6103, even though as the Administrative Law Judge found "there is nothing for the record that would lead me to conclude that [redacted] (b)(3)/26 USC 6103." Since I have found that the case should be dismissed because the Appeal was untimely, I do not have the authority to change the suspension determined by the Administrative Law Judge. I find the [redacted] (b)(3)/26 USC 6103 to be a very serious offense. If this case were not being dismissed, I would give serious consideration to imposing the 48 month suspension requested by the Director of the Office of Professional Responsibility.

I have considered all arguments made, and, to the extent not mentioned herein, I find them to be irrelevant or without merit.

Conclusion

Since the Appeal of the decision of the Administrative Law Judge was not timely filed, the administrative Law Judge's decision suspending Respondent-Appellant became FINAL AGENCY ACTION on November 10, 2008. Respondent-Appellant is suspended for 36 months from November 10, 2008, and the conditions imposed by the Administrative Law Judge for reinstatement are in effect.

Ronald D. Pinsky
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
(As authorized delegate of
Timothy F. Geithner,
Secretary of the Treasury)

December 9, 2009
Lanham, MD