United States

Department of the Treasury

Director, Office of Professional Responsibility

Complainant-Appellee ("C-A")

v.

Complaint No. 2007-35

(b)(3)/26 USC 6103

C.P.A.

Respondent- Appellant ("R-A")

Decision On Appeal

Authority

Under the authority of Treasury 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 February 9, 2009, Clarissa Potter 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 hereinafter referred to as "Treasury Circular 230"). This is such an Appeal from a Decision of Administrative Law Judge Michael A. Rosas (the "ALJ") on February 21, 2008 (the "Decision". 1)

Background

There is no dispute concerning whether the jurisdictional prerequisites have been met in this case. R-A is a C.P.A. who has been authorized to practice and has in fact practiced before the Internal Revenue Service. As such, he is subject to the standards of conduct and disciplinary rules established in Treasury Circular 230, and is subject to the disciplinary authority of the Secretary of the Treasury and the Director or acting Director of the Office of Professional Responsibility established under 31 U.S.C. §330(a)(1). This proceeding was commenced when, on July 13, 2007, C-A filed Complaint against R-A alleging that R-A had violated various provisions of Treasury Circular 230 which constituted disreputable conduct by a practitioner and which collectively called for his disbarment from practice before the Internal Revenue Service. Specifically, the Complaint charged that R-A had been guilty of:

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(hereinafter, the "Category 1 Offenses");

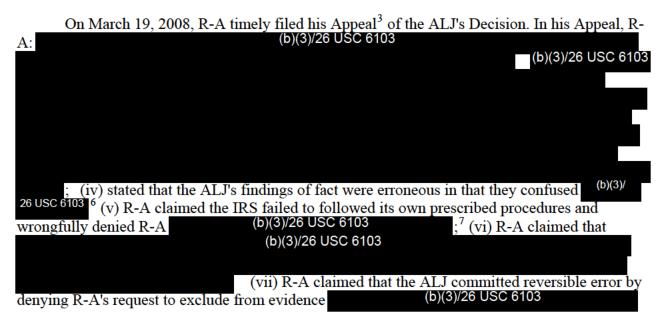
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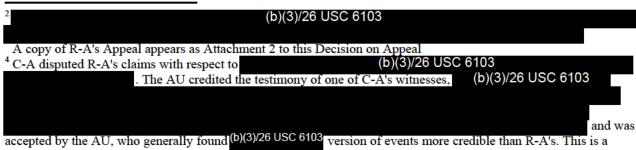
(hereinafter, the "Category 2 Offenses");

(b)(3)/26 USC 6103

¹ The ALJ's Decision appears as Attachment 1 to this Decision on Appeal.

(hereinafter, the "Category 3 Offenses")²; and (b)(3)/26 USC 6103 (hereinafter, the "Category 4 Offenses"). In his Decision, the ALJ found that: R-A had committed each offense; each offense constituted disreputable conduct as defined in relevant sections of Treasury Circular 230; and that the Offenses, in the aggregate, justified his disbarment from practice before the Internal Revenue Service.





mixed question of law and fact which I review under a "clearly erroneous" standard of review. I do not find the ALJ's findings on this point "clearly erroneous."

5 I find these allegations relevant, if at all, only to the Category 2 and Category 4 Offenses. For the reasons stated

below, I find that (i) C-A has failed to meet his burden of proof with respect to these Offenses and (ii) proof of these charges is unneeded to support the sanction sought by the C-A and imposed by the ALJ.

⁶ While I agree that the ALJ confused (b)(3)/26 USC 6103 , for the reasons mentioned below. I find this fact relevant only to the Category 4 Offenses. As to the Category 3 Offenses, for the reasons stated below, I do not agree with R-A's argument.

⁷ Again, if that fact were relevant, as a matter of law I would find it relevant only to the Category 2 and Category 4 Offenses. Again, as (i) I find for the reasons set forth below that C-A has failed to meet his burden of proof with respect to these Offenses, and (ii) proof of these Offenses is not required to support the sanction sought to be imposed by C-A, I will not consider these matters further.

⁸ I will address this assertion below. Suffice it to say that find it without merit insofar as Category 3 Offenses are concerned. Insofar as its relevance to the Category 4 Offenses is concerned, as (i) I have for other reasons found that C-A has failed to meet his proof with respect to those Offenses, and (ii) I find the sanction sought is adequately justified by the charges where C-A has met the burden of proof, I find it unnecessary to discuss this allegation further.

;9 and (viii) R-A claimed that the ALJ erred

by finding that the R-A had committed each of the Category 1, 2, 3 and 4 Offenses "willfully." 10

The issues were joined on Appeal when C-A filed his Response to the Appeal on April 18, 2008. 11 My findings and conclusions with respect to the issues joined on Appeal appear below.

"Willfulness:" Generally. 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 <u>Director, Office of Professional Responsibility v.</u> (b)(3)/26 USC 6103, Complaint No. 2003-02, a proceeding made public by mutual agreement of the parties. Of particular importance to all Offenses charged against R-A are four United States Supreme Court cases cited in Attachment 4 - <u>Bishop, 13 Pomponio, 14 Cheek, 15 and Boyle. 16 The Bishop/Pomponio</u> line of cases establishes that the term "willful" merely means a voluntary, intentional violation of a known legal duty.

In <u>Cheek</u>, the issue was whether the defendant, an airline pilot, was entitled to an instruction 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 an objectively unreasonable interpretation of a substantive provision of the Internal Revenue Code and another based on his belief that the Federal income tax was unconstitutional. As to the former (the statutory claim), the Supreme Court, per Mr. Justice White, found that Cheek was entitled to the requested instruction. As to Cheek's constitutional claim, the Supreme Court found that he was not. The Supreme 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 in a criminal proceeding because every person is presumed to known the law. However, Mr. Justice White noted: "Willfulness, as construed by our prior decisions in criminal tax 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" failed to carry out 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 of statutory construction under the Federal tax laws, when Congress imposed a "willfulness" standard, it intended to depart from the common law rule presuming knowledge of the law (a rule of presumed general intent) to a rule requiring the Government to prove specific knowledge of the law on the part of the defendant (a rule requiring specific subjective intent). But Justice White adopted this heightened proof requirement only on issues relating to statutory construction, not on the constitutionality of the income tax. As to that matter, the Supreme Court found that Cheek was not entitled to the instruction requiring heightened proof on the part of the Government. As to the constitutional claim, the common law rule of presumed knowledge of the law prevailed.

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⁹ For the reasons stated below, I disagree

¹⁰ For the reasons stated below, I find that C-A has sustained his burden of proof that each of the Category 1 Offenses and Category 3 Offenses was committed "willfully." Also for the reasons stated below, I find that C-A has failed to sustain his burden of proof that the Category 2 and Category 4 Offenses were committed "willfully" or "voluntarily." ¹¹ C-A's Response to R-A's Appeal appears as Attachment 3 to this Decision on Appeal.

¹² Pages 40 through 52 of the Decision on Appeal in appear as Attachment 4 to this Decision on Appeal.

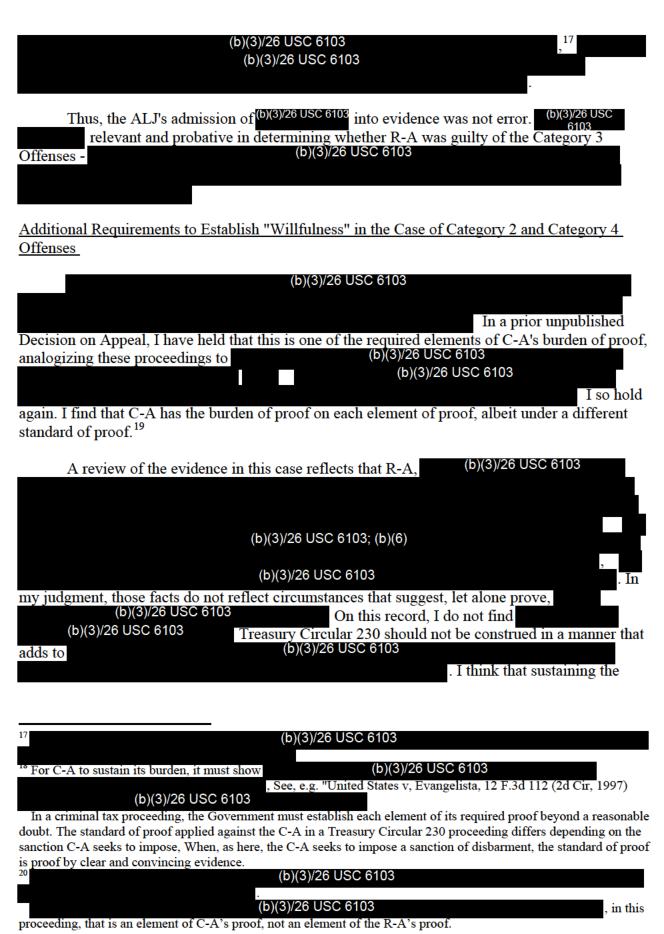
¹³ United States v. Bishop, 412 U.S 346 (1973).

¹⁴ United States v. Pomponio, 429 U S 10 (1976).

¹⁵ Cheek v. United States, 498 U S 192 (1991).

United States v. Boyle, 469 US 241 (1985).

As to questions dealing with whether	(b)(3)/26 USC 6103
	, I find those questions are
properly governed by the common law rule pr	resuming knowledge of the law. Indeed, the Supreme
	it in a different context. In Bovle, the issue before the
Supreme Court was whether an estate fiduciar	ry could delegate the responsibility to file an estate's
Federal income tax return and thereby avoid e	exposure to a failure to file (or failure to timely file)
penalty. The Supreme Court held that the duty	y imposed on the estate fiduciary was personal and
non-delegable, and distinguished the duty to f	ale from other matters (for example, determining the
correct amount of a tax liability) where it wou	ald be reasonable to rely on a tax advisor. I find these
matters to be governed by the common law pr	resumption of knowledge of the law. Even if they
were not, and were instead governed by the h	igher proof requirement for matters of statutory
interpretation established in Cheek,	(b)(3)/26 USC 6103
	Cheek upon remand, it is one thing to prove that you
	th but erroneous belief and another thing entirely to
	sfaction of a jury. If that is a heavy burden for an
airline pilot,	(b)(3)/26 USC 6103
	. The ALJ found it so, and I find no basis for
disturbing his findings and conclusions.	
R-A tries to make much of the ALJ's f	Failure to note that (b)(3)/26 USC 6103
R-A tries to make much of the ALJ's i	andre to note that
While true, that distinction hardly	has the consequences R-A suggests. In the case of a
_	be signed and filed by the corporation's president,
•	officer or any other officer duly authorized so to act
	de. This filing obligation exists for every corporation
and must be met without regard to whether th	e corporation has income, and without regard to the
amount of its gross income. Treas. Reg. §1.60	012(a)(1). In the case of an S Corporation (b)(3)/26
, that obligation is met through the filing	of an annual Form 11205. See Treas. Reg. § 1.6012-
2(h). In the case of employment tax returns of	f a corporate employer, the obligation must be met by
the corporation acting through the corporation	n's president, vice president, or other principal officer
Section 6061(a) of the Internal Revenue Code	e and Treas. Reg. § 31.6061-1(b). (b)(3)/26 USC 6103
	0103



Category 2 and Category 4 Offenses on this record would risk those results, and I refuse to do so. I find that, on this record, C-A has not met his burden of proof on those charges.²²

Sanction and Conclusion

On the basis of all the charges brought by the C-A and sustained by the AIJ in this proceeding, the ALJ disbarred R-A from practice before the Internal Revenue Service. In her testimony before the ALJ for the C-A, Ms. Ahn suggested that the Category 1 Offenses alone justified the sanction of disbarment. I agree and have so held in numerous Treasury Circular 230 proceedings. For the reasons set forth by the Supreme Court in United States v.Boyle, supra I find (b)(3)/26 USC 6103

Practitioners should be part of the solution, not part of the problem. Accordingly, I AFFIRM the relevant findings and conclusions of the ALJ (those relating to the Category 1 and 3 Offenses) and disbar R-A from practice before the Internal Revenue Service. This Decision on Appeal constitutes FINAL AGENCY ACTION in this proceeding.

David F. P. O'Connor

Special Counsel to the Senior Counsel

Office of the Chief Counsel, IRS

(As Authorized Delegate of the Secretary of the Treasury)

March 10, 2009

Washington, D.C.

I am only saying this case does not come close to meeting the standards I would impose for the C-A to sustain a "clear and convincing evidence" standard on these charges. If the readers or this Decision on Appeal interpret me to mean that I would require a high standard of proof of C-A on such charges, that is probably an accurate reflection of my views. I note that these charges were made because (b)(3)/26 USC 6103

Whatever wisdom (or lack thereof) was reflected in that (b)(3)/26 USC 6103

. On this evidence, these

charges do not belong in a Treasury Circular 230 disciplinary proceeding, where the C-A carries the burden of proving (b)(3)/26 USC 6103