

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: (b)(3)/26 USC 6103

(hereinafter, the "Category 1 Offenses");

(b)(3)/26 USC 6103

(hereinafter, the "Category 2 Offenses");

(b)(3)/26 USC 6103

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

(b)(3)/26 USC 6103 ;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 Director, Office of Professional Responsibility v. (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 - Bishop,¹³ Pomponio,¹⁴ Cheek,¹⁵ and Boyle.¹⁶ The Bishop/Pomponio line of cases establishes that the term "willful" merely 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 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 know 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.

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 (b)(3)/26 USC 6103 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).

¹⁶ United States v. Boyle, 469 U.S. 241 (1985).

(b)(3)/26 USC 6103

As to questions dealing with whether

(b)(3)/26 USC 6103

, I find those questions are properly governed by the common law rule presuming knowledge of the law. Indeed, the Supreme Court has already ruled on this question, albeit in a different context. In Boyle, the issue before the Supreme Court was whether an estate fiduciary could delegate the responsibility to file an estate's Federal income tax return and thereby avoid exposure to a failure to file (or failure to timely file) penalty. The Supreme Court held that the duty imposed on the estate fiduciary was personal and non-delegable, and distinguished the duty to file from other matters (for example, determining the correct amount of a tax liability) where it would be reasonable to rely on a tax advisor. I find these matters to be governed by the common law presumption of knowledge of the law. Even if they were not, and were instead governed by the higher proof requirement for matters of statutory interpretation established in Cheek,

(b)(3)/26 USC 6103

Like the taxpayer in Cheek upon remand, it is one thing to prove that you are entitled to a jury instruction on a good faith but erroneous belief and another thing entirely to prove the existence of such a belief to the satisfaction 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 failure to note that

(b)(3)/26 USC 6103

. While true, that distinction hardly has the consequences R-A suggests. In the case of a corporate income tax return, the return must be signed and filed by the corporation's president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act. See Section 6062 of the Internal Revenue Code. This filing obligation exists for every corporation, and must be met without regard to whether the corporation has income, and without regard to the amount of its gross income. Treas. Reg. §1.6012(a)(1). In the case of an S Corporation

(b)(3)/26 USC 6103

, 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 a corporate employer, the obligation must be met by the corporation acting through the corporation's president, vice president, or other principal officer. Section 6061(a) of the Internal Revenue Code and Treas. Reg. § 31.6061-1(b).

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103
(b)(3)/26 USC 6103

17

Thus, the ALJ's admission of (b)(3)/26 USC 6103 into evidence was not error. (b)(3)/26 USC 6103
relevant and probative in determining whether R-A was guilty of the Category 3
Offenses - (b)(3)/26 USC 6103

Additional Requirements to Establish "Willfulness" in the Case of Category 2 and Category 4 Offenses

(b)(3)/26 USC 6103

In a prior unpublished Decision on Appeal, I have held that this is one of the required elements of C-A's burden of proof, analogizing these proceedings to (b)(3)/26 USC 6103 (b)(3)/26 USC 6103 I so hold again. I find that C-A has the burden of proof on each element of proof, albeit under a different standard of proof.¹⁹

A review of the evidence in this case reflects that R-A, (b)(3)/26 USC 6103

(b)(3)/26 USC 6103; (b)(6)

(b)(3)/26 USC 6103

In my judgment, those facts do not reflect circumstances that suggest, let alone prove, (b)(3)/26 USC 6103 On this record, I do not find (b)(3)/26 USC 6103 Treasury Circular 230 should not be construed in a manner that adds to (b)(3)/26 USC 6103. I think that sustaining the

¹⁷ (b)(3)/26 USC 6103

¹⁸ For C-A to sustain its burden, it must show (b)(3)/26 USC 6103. See, e.g., "United States v. Evangelista, 12 F.3d 112 (2d Cir, 1997) (b)(3)/26 USC 6103

In a criminal tax proceeding, the Government must establish each element of its required proof beyond a reasonable doubt. The standard of proof applied against the C-A in a Treasury Circular 230 proceeding differs depending on the sanction C-A seeks to impose. When, as here, the C-A seeks to impose a sanction of disbarment, the standard of proof is proof by clear and convincing evidence.

²⁰ (b)(3)/26 USC 6103 (b)(3)/26 USC 6103, in this proceeding, that is an element of C-A's proof, not an element of the R-A's proof.

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.

²² I do not mean to suggest that there are no circumstances where (b)(3)/26 USC 6103 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