United States

Department of the Treasury

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

v. **Complaint No. 2007-38**

(b)(3)/26 USC 6103
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 Assistant General Counsel of the Treasury who was 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 and Order of Administrative Law Judge Michael A. Rosas (the "ALJ") dated June 5, 2008 (the "Decision").[1]

Background

[1] The Decision appears as Attachment 1 to this Decision on Appeal. In addition to the Decision which appears as Attachment 1, I have attached to this Decision on Appeal R-A's Appeal (Attachment 2) and C-A's Response (Attachment 3). All three of these Attachments are deemed a part of this Decision on Appeal as if fully set forth herein.

This proceeding was initiated when, on September 12, 2007, C-A filed a Complaint against R-A alleging that (1) R-A has practiced before the Internal Revenue Service as an attorney, (2) R-A is subject to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility, (3) R-A had (b)(3)/26 USC 6103 [redacted] (b)(3)/26 USC 6103 [redacted][4] **and (4) such conduct justified imposing a sanction of disbarment against R-A.**

Under § 10.64(c) of Treasury Circular 230 (Rev. 2005), every allegation contained in a Complaint that is not denied by Answer is deemed admitted and will be considered proved. An Answer must be filed with the Administrative Law Judge within the time specified in the Complaint (here, within 30 days of service of the Complaint) unless, on request or application of the Respondent, the time is extended by the Administrative Law Judge. § 10.64(a) of Treasury Circular 230 (Rev. 2005). A failure to file an Answer within the time prescribed (or within the time for Answer as extended by the Administrative Law Judge) constitutes an admission of the allegations of the Complaint and a waiver of hearing, and the Administrative Law Judge may make a decision by default without a hearing or further procedures. § 10.64(d) of Treasury Circular 230 (Rev. 2005).

The ALJ's Decision and Order sets forth the procedural history of this proceeding. R-A requested and received from the ALJ several extensions of the time within which he was required to file his Answer. When R-A failed to file an Answer within those extended time frames and failed to submit what C-A and the ALJ felt was sufficient evidence of his medical condition to support yet another requested extension, on May 12, 2008, C-A filed a Motion for Decision by

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[2] [redacted].

[3] (b)(3)/26 USC 6103 [redacted].

[4] Points (1) and (2) above are jurisdictional prerequisites to this proceeding and are nott contested.

Defaullt. At the time C-A filed her Motion, R-A had still not filed his Answer .[5] On June 5, 2008, the ALJ entered his Decision and Order.

Of the issues raised by R-A in his belated Answer and in his Appeal, I find only a few that even merit discussion. They are the following.

I disagree with R-A's assertion (in his Answer) that the sanction was asserted "without due regard for fact and law." As the ALJ noted in his Decision and Order, R-A waived his rights to challenge the allegations contained in the Complaint by failing to file his Answer in a timely manner. Moreover, in his untimely Answer, R-A admitted each of the allegations contained in the Complaint. Further, though not specifically argued by R-A, I find that each of R-A's acts were [redacted] **of Treasury Circular 230 (Rev. 2002).**

I first considered the issue "willfulness" in Treasury Circular 230 disciplinary proceedings in a case made public by mutual agreement of the parties, Director, Office of Professional Responsibility v. [redacted] **, Complaint No. 2003-02.[6] Of particular importance to the charges brought against R-A in this proceeding are four United States Supreme Court cases discussed in Attachment 4 – Bishop,[7] Pomponio,[8] Cheek,[9] and Boyle.[10] The Bishop/Pomponio line of cases established that, for purposes of interpreting the criminal tax provisions of the Internal Revenue Code, the term "willful" merely means a voluntary, intentional violation of a known legal duty. The Supreme Court's later decision in Cheek dealt with the question of whether the taxpayer (in Cheek, an airline pilot) was entitled to a jury**

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[5] R-A attempted to submit an untimely Answer on May 21, 2008. In that document, R-A admitted each of the allegations contained in C-A's Complaint, but argued that (i) [redacted] (ii) [redacted], (iii) "under all the circumstances," the requested sanctions were "disproportionate, inequitably burdensome, vindictive, unjust and unfair and asserted without due regard for fact and law." The ALJ concluded that R-A had forfeited his right to challenge the allegations contained in the Complaint. Indeed, the untimely Answer admitted each of the allegations contained in the Complaint. For the reasons hereinafter set forth, I find R-A's other arguments not only untimely but without merit.

[6] A copy of pages 40 through 52 of the Decision on Appeal in [redacted] appears as Attachment 4 to this Decision on Appeal, and is incorporated in this Decision on Appeal as if fully set forth herein.

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

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

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

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

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instruction to the effect that an honestly held belief (determined subjectively) was entitled to be so treated and as a defense to the charge even if the taxpayer's belief was unreasonable (objectively). Cheek had two bases for believing that he did not have to file a tax return. One of the reasons was based on an unreasonable interpretation of a technical provision of the Internal Revenue Code. The other was a belief that the income tax was unconstitutional. The Supreme Court held that Cheek was entitled to the jury instruction with respect to objectively unreasonable belief respecting statutory construction but not with respect to his belief that the income tax was unconstitutional. Speaking for the Court, Mr. Justice White distinguished between Cheek's belief as to the constitutionality of the income tax (which the Court found to be governed by a rule deeply rooted in the American legal system that ignorance of the law or a mistake of law is no excuse because every person is presumed to know the law – a rule of presumed general intent) and his belief concerning a matter of technical statutory interpretation (as to which the Court found a Congressional intent to require the Government to prove in criminal tax prosecutions that the law imposed a duty on the defendant, that the defendant knew of that duty, and that he voluntarily and intentionally failed to carry it out – a rule requiring the Government to present proof of a defendant's subjective intent). I find the question of [redacted] **to be the type of issue governed by the common law rule. Indeed, the Supreme Court has already dealt with this issue, albeit in a different context. In Boyle, the Supreme Court addressed this issue in the context of whether an estate fiduciary, with the obligation to file the estate's return, could avoid a civil penalty for his failure to timely do so because he had relied on a tax advisor to make the filing. Finding that the duty was non-delegable, the fiduciary was not relieved of the penalty. In so holding, the Court distinguished, as it later did in Cheek, between issues that were beyond the abilities and experience of taxpayers generally (where reliance upon a tax advisor was justified), and those that were not, finding that issues concerning the duty to file a Federal tax return and when returns must be filed to fall in the latter category.**

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Moreover, both because of his failure to file a timely Answer (and hence admitting that his conduct was "willful"), and because in

his tardy Answer, he specifically admitted all the facts needed to sustain the charges.

Accordingly, as a matter of law, there was nothing that R-A could contest with respect to the charges themselves. As a matter of law, I find that [redacted (b)(3)/26 USC 6103] [redacted]

I also find that R-A has failed to submit any evidence in mitigation of these serious charges. R-A has not even claimed, yet alone proved, that the medical condition of which he complained even existed in the time period relevant to these charges. The very limited documentary proof submitted by R-A which the ALJ found inadequate to show that there was a need to further delay this proceeding [redacted (b)(6)] [1] **The point is that none of this evidence pertains to the periods of time relevant to the five charges themselves.**

With regard to whether this evidence should have been accepted as a basis for further delays in this proceeding, I note my belief that C-A and the ALJ went out of their way to accommodate R-A and showed R-A far more patience than I would have shown him, particularly given the meritless nature of R-A's case on the merits.

<u>Sanction</u>

Contrary to R-A's assertions, I do not view [redacted (b)(3)/26 USC 6103] **that do not justify the sanction of disbarment. I have considered** [redacted (b)(3)/26 USC 6103] **on many occasions and have always imposed a sanction of disbarment. I have**

[11] [redacted (b)(6)] refused to submit any further evidence concerning either [redacted (b)(6)]. The proceedings were also delayed for several months while R-A sought replacement counsel for the attorney who originally represented him. The record is silent on why R-A terminated his relationship with his prior counsel or what the reasons were for his failure to secure new counsel despite the ALJ's repeated urgings.

done so because I find [redacted] (b)(3)/26 USC 6103 [redacted]

[redacted]**.**

As the Supreme Court said in Boyle, supra:

> **"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 unnecessary ad hoc determinations."**

469 U.S. at 249. In short, with a tax agency starved for resources, it is imperative that practitioners and a part of the solution, not a part of the problem. [redacted] (b)(3)/26 USC 6103 **.**

Accordingly, I AFFIRM the Decision and Order of the ALJ and DISBAR R-A from practice before the Internal Revenue Service

Conclusion

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 Chief Counsel
Internal Revenue Service
(As Authorized Representative of the Secretary of the Treasury)

March 16, 2009; Washington, D.C.