

United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellant and Appellee

v.

Complaint No. 2008-12

(b)(3)/26 USC 6103 ;

Respondent-Appellant and Appellee

Decision on Appeal

Authority

Under the Authority of General Counsel Order No. 9 (January 19, 2001) and the authority vested in her as Acting Assistant 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 Regulations 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 Joel P. Biblowitz (the ALJ) on November 18, 2008.¹

Procedural History

This proceeding was commenced on May 30, 2008, when Heather A. Southwell, an attorney acting as the authorized representative of the Director of the Office of Professional Responsibility (OPR), filed a Complaint against Respondent. The Complaint alleges that Respondent: (i) has engaged in practice before the Internal Revenue Service, as defined by 31 C.F.R. § 10.2(d) as an attorney, (ii) (b)(3)/26 USC 6103

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

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

¹ A copy of the ALJ's Decision appears as Attachment 1.

(b)(3)/26 USC 6103

, (v)

(b)(3)/26 USC 6103

, and (vi)

(b)(3)/26 USC 6103

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

. The Complaint also alleged as background facts that Respondent (b)(3)/26 USC 6103

Respondent filed an undated Answer to the Complaint which was received by counsel for OPR on July 3, 2008. In the answer Respondent admitted that he engaged in practice before the Internal Revenue Service as an attorney, admitted that he (b)(3)/26 USC 6103

, and admitted that

(b)(3)/26 USC 6103

. Respondent denied that he

(b)(3)/26 USC 6103

. Respondent also denied that he

(b)(3)/26 USC 6103

. On October 1, 2008, a hearing was held in Boston, Massachusetts before the ALJ. On November 12, 2008, briefs were filed by both Complainant and Respondent.

On November 18, 2008, the ALJ held that (b)(3)/26 USC 6103

The ALJ imposed a sanction of a suspension from practice before the Internal Revenue Service twenty-four (24) months. The ALJ held that (b)(3)/26 USC 6103

On December 17, 2008, both Complainant and Respondent appealed the decision of the ALJ. On February 5, 2009, Complainant filed a Response to Respondent's Appeal.

Findings of Fact

The Appellate Authority reviews the ALJ's findings of fact under a clearly erroneous standard of review. Section 10.78 of Circular 230 (Rev. 4-2008).

Respondent is an attorney who has engaged in practice before the Internal Revenue Service. Respondent was previously employed as an attorney for the Internal Revenue Service for about five years beginning in 1993. After leaving the Internal Revenue Service he worked as an attorney with a law firm in Philadelphia and then later with a law firm in Boston. He is currently a partner with the law firm in Boston.

The following chart reflects the (b)(3)/26 USC 6103 and the ALJ's findings regarding (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	(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	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103

As noted above, the Complaint alleges, as "background facts" that Respondent (b)(3)/26 USC 6103

. Respondent admits in his Answer to the Complaint that (b)(3)/26 USC 6103.

The ALJ specifically found that Respondent (b)(3)/26 USC 6103

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

The ALJ's findings of fact are well supported by the record and are not clearly erroneous.

Respondent testified at the hearing held on October 1, 2008, that he has an L.L.M. in tax, that he is a partner in the fifth largest law firm in Boston, that he is "one of the most highly regarded tax controversy attorneys in" Boston, and that his clients pay him "an exorbitant amount of money to represent them in connection

² 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

with IRS matters.” He also stated that he has dealt with “hundreds and hundreds of agents during [his] career both as an IRS attorney and in private practice...”

Respondent was generally familiar with Circular 230. He also signed hundreds of Forms 2848, “Power of Attorney and Declaration of Representative.” The Form 2848 references Circular 230 and provides that by signing the Form, the practitioner acknowledges that the practitioner is familiar with the regulations contained in Circular 230.

Analysis

Section 10.51(f) of Circular 230³ 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 (b)(3)/26 USC 6103 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 ALJ found that (b)(3)/26 USC 6103
(b)(3)/26 USC 6103. The ALJ (b)(3)/26 USC 6103
(b)(3)/26 USC 6103. I.R.C. §§ 6011 and 6012 set forth the general requirements for filing returns and who must file an income tax return. I.R.C. § 6072 sets forth the time for filing income tax returns. I.R.C. § 6081 provides that the Secretary may grant a reasonable extension of the time for filing returns but no more than six months. (b)(3)/26 USC 6103

(b)(3)/26 USC 6103. Accordingly, (b)(3)/26 USC 6103
(b)(3)/26 USC 6103. The Appellate Authority has held that (b)(3)/26 USC 6103
(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). See also OPR v. (b)(3)/26 USC 6103, Complaint No. 2007-33 (in which another Administrative Law Judge found that (b)(3)/26 USC 6103
(b)(3)/26 USC 6103).

³ As in effect June 20, 2005. While the specific provision dealing with (b)(3)/26 USC 6103
(b)(3)/26 USC 6103. For simplicity, I will refer to this as section 10.51(f).

(b)(3)/26 USC 6103

. I find that

(b)(3)/26 USC 6103

Willfulness 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. Pomponio, 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. 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. Since 1993, Respondent has worked full time either as a tax attorney for the Internal Revenue Service or as a tax attorney in private practice. He has an L.L.M. in tax and considers himself one of the most highly regarded tax controversy attorneys in Boston.

(b)(3)/26 USC 6103

Respondent also argues that OPR's complaint should be dismissed because of actions taken by a Revenue Officer for the IRS. Respondent alleges that the Revenue Officer referred (b)(3)/26 USC 6103 to OPR because the Revenue Officer was unhappy with Respondent's zealous representation of a client. Respondent alleges that the Revenue Officer (b)(3)/26 USC 6103 and improperly made the referral because of a personal vendetta.

The ALJ found that there is no evidence indicating the Revenue Officer either (b)(3)/26 USC 6103 or made the referral because of a personal vendetta. I concur that other than Respondent's accusations there is no evidence supporting Respondent's argument. I also concur in the ALJ's finding that these allegations, even if true, are not a defense to this proceeding. At issue is (b)(3)/26 USC 6103.

Respondent also argues that (b)(3)/26 USC 6103 he was taking care of his ill parents during this period. While it is certainly admirable that he would assist with the care of his ailing parents, most people have time consuming obligations such as caring for ill relatives or caring for young children and yet are able to (b)(3)/26 USC 6103. In this instance Respondent was working full time as an attorney for a major law firm engaged in tax practice. In fact, he became a partner in the fifth largest law firm in Boston during this time. I find that, given the fact that Respondent worked full time during the relevant period as an attorney with a major law firm engaged in a tax controversy practice, Respondent's (b)(3)/26 USC 6103 is without merit.

Appropriate Sanction

Complainant requests a 48 month suspension from practice before the Internal Revenue Service. Respondent asserts that a private reprimand is the appropriate sanction. In recommending that Respondent be suspended for 48 months, OPR took into consideration as aggravating factors (b)(3)/26 USC 6103, the fact that he was a tax attorney with a large firm, and the fact that he previously worked as an attorney for the Internal Revenue Service. OPR also considered as a mitigating factor that he took care of his seriously ill parents during this period. I do not consider that his taking care of his parents qualifies as a mitigating factor. Throughout the (b)(3)/26 USC 6103, the Respondent worked full time as a tax attorney representing hundreds of people before the Internal Revenue Service.

I believe the record supports disbarment of Respondent from practice before the Internal Revenue Service. OPR has proposed a 48 month suspension from practice before the Internal Revenue Service, which is a lesser sanction. I will defer to OPR and impose the sanction requested in this case.

Conclusion

For the reasons stated, I hereby determine that the Respondent is suspended from practice before the Internal Revenue Service for a period of forty-eight (48) months, reinstatement thereafter being at the sole discretion of OPR, (b)(3)/26

[REDACTED] 6103
[REDACTED]
[REDACTED] This constitutes FINAL AGENCY ACTION in this proceeding.

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

January 20, 2010
Lanham, MD