United States

Department of the Treasury

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

v. **Complaint No. 2007-12**

[redacted], **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 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 on Motion for Summary Judgment entered by Chief Administrative Law Judge Robert A, Gianassi of the National Labor Relations Board(the "ALJ") on June 9, 2008.[1]

This proceeding commenced on March, 30, 2007 when C-A filed a Complaint against R-A alleging that [redacted] On April 15, 2008, R-A filed his Answer to the Complaint. On May 7, 2008, C-A filed a Motion for Summary Judgment contending that there were no material facts in dispute, that the uncontested material facts showed that C-A [redacted], and, as C-A had charged, C-A had engaged in a pattern of disreputable conduct that justified his suspension from practice for a period of 36 months. On September 25, 2008, R-A filed his Appeal from the ALJ's Decision, challenging whether [redacted].

[1] The ALJ's Decision appears as Attachment 1 to this Decision on Appeal. The R-A's Appeal from the Judge's Decision appears as Attachment 2 to this Decision on Appeal. The C-A's Reply to R-A's Appeal appears as Attachment 3 to this Decision on Appeal. All three of these Attachments, as well as Attachment 4 hereinafter referred to are incorporated in this Decision on Appeal as if fully set forth herein.

I first considered the issue of "willfulness" in a Treasury Circular 230 disciplinary proceeding in Director, Office of Professional Responsibility v. [redacted], Complaint No. 2003-02. Of particular importance to the charges brought against R-A in this proceeding are four cases discussed in the Decision on Appeal in [redacted][2] – Bishop,[3] Pomponio,[4] Cheek,[5] and Boyle.[6] 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 defendant (an airline pilot) was entitled to a jury instruction to the effect that an honestly held belief (determined subjectively) was entitled to be treated as a defense even though the belief was unreasonable (objectively). Cheek had two reasons for his belief. One was an objectively unreasonable belief in an interpretation of a technical provision of the Internal Revenue Code. The other was his belief that the Federal income tax was unconstitutional. The Supreme Court reasoned that the taxpayer was entitled to the instruction for his claim relating to statutory construction but not for his constitutional claim. The Court reasoned that Congress intended through adopting a "willfulness" standard to impose a higher burden of subjective proof as to technical provisions of the Internal Revenue Code. But the Court found that Cheek's constitutional claim was governed by the rule well rooted in the American legal system that a defendant is presumed to know the law (a rule of presumed general intent).

Which of these two rules applies in determining [redacted]? That issue was decided by the Supreme Court six years before it decided the Cheek case, albeit in a somewhat different context. In Boyle, supra, the issue before the Supreme Court was whether an estate fiduciary could be relieved of a civil penalty for late filing of an estate tax return because he relied on a tax advisor to file the return. Reasoning that the duty of timely file a tax return was non-delegable duty because it was a basic duty of citizenship easily understood by a laymen [*sic*], the Supreme Court reasoned that the duty was unlike situations calling for specialized knowledge of the Internal Revenue Code where reliance on a tax advisor was reasonable. I therefore find that [redacted] is governed by the common law of presumed general intent, not the heightened standard of proof for matters of statutory construction established in Cheek.

I also find that R-A failed to submit any evidence in mitigation of these charges.

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[2] The relevant pages of the Decision on Appeal in [redacted], pages 40 - 52, appear as Attachment Attachment 4.

[3] United States v. Bishop, 412 U.S, 346 (!973).

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

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

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

(b)(3)/26 USC 6103

The Sanction

As the Appellate Authority in Treasury Circular 230 disciplinary proceedings, I review the sanction determinations of the ALJ de novo and possess the full authority of the charging agency and the Secretary of the Treasury. In the past, I have consistently imposed a sanction of disbarment on practitioners [redacted (b)(3)/26 USC 6103] I view such conduct as a failure to meet a basic obligation of citizenship and inconsistent with a right to practice before the Internal Revenue Service. 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. Accordingly, I AFFIRM the findings and conclusions of the ALJ concerning the charges against R-A and DISBAR R-A from practice before the Internal Revenue Service.

Conclusion

This Decision on Appeal constitutes FINAL AGENCY ACTION in this proceeding.

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)

April 21, 2009
Washington, D.C,

Certificate of Service

I hereby certify that the Decision on Appeal in Complaint No. 2007-12
Was sent this day by Certified Mail/Return Receipt and by First Class U.S. Mail to the addressees listed below:

Honorable Robert A. Giannasi, Chief Administrative Law Judge, National Labor Relations Board, Division of Judges, Suite 5400, East Wing, 1099-14th Street, N.W., Washington, D.C. 20005-0001

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

Carolyn H. Gray, Acting Director, Office of Professional Responsibility, 1111 Constitution Avenue, N.W., Room 7217, Washington, D.C. 20224

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April 21, 2009
Washington, D.C,