

United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellee

v.

Complaint No. 2015-02

[Redacted]

(b)(3)/26 USC 6103

Respondent-Appellant

Order

Pursuant to General Counsel Order No. 9 (January 19, 2001) and Office of Chief Counsel Notice CC-2014-008 (September 8, 2014), I decide disciplinary appeals to the Secretary of the Treasury filed under 31 C.F.R. Part 10, Practice Before the Internal Revenue Service (IRS), hereinafter referred to as Circular 230 (all references are to Circular 230 as in effect for the periods at issue).

The matter before me is the Motion to Dismiss Appeal as Improperly Filed (Motion to Dismiss) filed by the Complainant-Appellee, Director, Office of Professional Responsibility (OPR). For the reasons stated below, I will grant the Motion to Dismiss.

Background

On July 9, 2015, OPR served a copy of the Initial Complaint, with a cover letter, on [Redacted] Respondent-Appellant (Respondent) at his last known address. OPR (b)(3)/26 USC 6103 sought Respondent's disbarment from practice before the Internal Revenue Service based upon 10 counts, including the [Redacted] (b)(3)/26 USC 6103 [Redacted] (b)(3)/26 USC 6103 [Redacted] (b)(3)/26 USC 6103 inclusive; and the willful failure to respond to OPR's lawful requests for information. The Initial Complaint and cover letter were returned by the United States Postal Service and marked "Unclaimed."

On July 14, 2015, Walter J. Brudzinski, Chief, Administrative Law Judge for the United States Coast Guard, issued a Notice of Assignment of Administrative Law Judge that was sent to OPR and the Respondent. This Notice assigned the case to the Honorable Parlen J. McKenna, Administrative Law Judge (the ALJ), and gave instructions to the parties on the proper filing of documents and pleadings in this matter. This Notice was served on the Respondent via Federal Express.

On October 13, 2015, OPR served a second copy of the Complaint on Respondent at his last known address, via regular mail. This copy was delivered to Respondent on October 15, 2015. The Complaint notified Respondent that he was required to file an

Answer to the Complaint by November 16, 2015; otherwise, a decision by default might be rendered against him. Respondent did not file an Answer to this Complaint.

On November 23, 2015, OPR filed a Motion for Decision by Default. A copy of the motion was served on the Respondent at his last known address, but Respondent failed to respond to this Motion.

On January 8, 2016, the ALJ entered an Order granting OPR's Motion for Decision by Default, and determined that each of the ten Counts alleged in the Complaint were proven by clear and convincing evidence, warranting the Respondent's disbarment from practice before the IRS. This Order was served on Respondent via certified and regular mail, and was delivered to Respondent's address on January 14, 2016.

On February 24, 2016, I received from OPR a copy of a letter dated January 31, 2016, mailed by Respondent. The purpose of the letter is not clear; however, it appears to contest the Order Granting Complainant's Default Decision and Order entered by the ALJ.

On March 23, 2016, OPR filed a Motion Seeking Leave to File a Motion to Dismiss Respondent's Appeal as Improperly Filed and to Extend Complainant's Deadline for Opposition to Appeal (Motion for Leave). Complainant's Motion to Dismiss Appeal as Improperly Filed (Motion to Dismiss) was lodged with that motion. The Motion to Dismiss alleges that the Respondent's letter was not a proper Notice of Appeal, as it did not include a brief that stated the exceptions to the decision of the Administrative Law Judge, as required by § 10.77 of Circular 230.

On March 24, 2016, I granted OPR's Motion for Leave, filed OPR's Motion to Dismiss, and directed Respondent to file his Response to the Motion to Dismiss within 30 days from the date of the service of that Order. In that Order, I specifically noted: "In the event Respondent does not file a proper Notice of Appeal and Brief within the deadline established by this Order, the matter will be dismissed." By this Order, I allowed Respondent the additional opportunity to submit an appropriate brief required by the provisions of Circular 230 for an appeal, and to make the necessary descriptions of the exceptions to the decision of the ALJ.

On May 13, 2016, after the period of time for Respondent to file his Response to OPR's Motion to Dismiss expired, with no Response made by Respondent, I issued an Order granting OPR's Motion to Dismiss, and dismissed this case. Soon thereafter, on May 18, 2016, I received via Express Mail, a letter from Respondent, asserting that he had submitted a response dated April 20, 2016, pursuant to my previous Order of March 24 directing the filing of such a response. Respondent indicated that while he had served other parties, he had not served a copy with me. Concluding that this response was made pursuant to my Order of March 24 and had been timely (though improperly served), on May 20, 2016, I issued an Order vacating my Order granting OPR's Motion to Dismiss, and allowed OPR 30 days within which to file any desired response to the Respondent's letter of April 20th.

On June 17, 2016, OPR filed its Reply to Respondent's letter. In this Reply, OPR stated that the Respondent failed to specify any exceptions on which to Appeal; and that the ALJ's Decision was consistent with the Loving case. OPR renewed its request that the case be dismissed and the ALJ's decision affirmed in its entirety.

Analysis

Respondent's correspondence in this matter appears to be intended, at least in part, to appeal the ALJ's Order Granting OPR's Motion for Decision by Default (Default Order); however, in both instances, and despite being given two opportunities to do so, Respondent has failed to note any exceptions or other errors supporting such an appeal, and has failed to comply with the requirements for filing an Appeal: for example, he failed to include a brief that states exceptions to the decision of the Administrative Law Judge and supporting reasons for such exceptions. See, § 10.77(a) of Circular 230. Moreover, in his correspondence, Respondent admitted to the factual basis underlying OPR's Complaint and the Decision by Default: [REDACTED]

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[REDACTED] Finally, Respondent did not contest the determination by the ALJ that Respondent failed to participate in the proceedings before the ALJ. For these reasons, the appeal filed by the Respondent should be dismissed.

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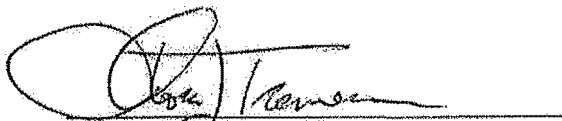
Besides ruling on OPR's Motion to Dismiss, one other matter should be covered. Much of Respondent's letter of April 20, 2016 is a discussion of the Loving v. Internal Revenue Service case (742 F.3d 1013 (D.C. Cir. 2014)). Respondent asserted that the "suspension or disbarment from practice before the IRS based on discipline under Circular 230 may not include restrictions of return preparation for compensation or access to the PTINS needed to provide return preparation." This is an allegation separate from the determination of the ALJ, and is not a statement of exception to the decision of the ALJ; nevertheless, in its reply to Respondent's letter in support of the Motion to Dismiss, OPR states that it "has taken the position that an enrolled agent suspended from practice before the IRS pursuant to Circular 230 is precluded from representing taxpayers before the IRS but is not precluded from preparing tax returns for taxpayers." (emphasis added). OPR further states "The ALJ decision does not preclude Respondent from preparing tax returns." OPR further asserts that because the ALJ decision is consistent with Loving, there is no basis for modifying that decision.

It should be noted that on May 23, 2014, OPR's office advised that, in light of the Loving decision, OPR determined that a suspension or disbarment from practice before the IRS may not include a restriction on return preparation for compensation, and that access to the Preparer Tax Identification Number (PTIN) required for such services may no longer be blocked based on discipline under Circular 230. There are still certain separate statutory requirements to obtain a PTIN; however it appears OPR and Respondent agree that the suspension or disbarment from practice before the IRS does not, in itself,

preclude the Respondent from preparing tax returns for taxpayers. No opinion is made here by me with reference to Respondent's qualifications or eligibility to obtain or retain a PTIN.

Accordingly, and for the reasons stated in OPR's Motion to Dismiss:

It is **ORDERED** that OPR's Motion to Dismiss is GRANTED.

A handwritten signature in black ink, appearing to read "Thomas J. Travers", is written over a horizontal line.

Thomas J. Travers
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of the
Secretary of the Treasury)
July 8, 2016
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing ORDER upon the following parties in this proceeding by UPS Next Day Air to the addresses listed below:

Honorable Parlen L. McKenna
Administrative Law Judge
United States Coast Guard
Coast Guard Island
Building 54A
Alameda, CA 94501

Mikel C. Deimler, Senior Attorney
Office of Chief Counsel (IRS)
100 First Street, Suite 1800
San Francisco, CA 94105



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Done and Dated: July 8, 2016

A handwritten signature in black ink, appearing to read "Thomas J. Travers".

Thomas J. Travers
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
Lanham, MD