



KEVIN KILDUFF

Public Reprimand No. 2011-13

Order (public reprimand) entered by the Board on May 25, 2011.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR THE COUNTY OF SUFFOLK
DOCKET NO. BD-2010-061

IN RE: KEVIN KILDUFF

MEMORANDUM OF DECISION

Bar counsel filed a Petition for Reciprocal Discipline pursuant to S.J.C. Rule 4:01, § 16, and an order issued by the United States Department of Treasury, Office of Professional Responsibility suspending the respondent from practice before the Internal Revenue Service (IRS) for forty-eight months. Bar counsel contends that the respondent's conduct was in violation of Mass. R. Prof. C. 8.4 (b), and that, consequently, the respondent should be suspended from the practice of law for four months. For the reasons discussed below, I conclude that the proceedings before the IRS established that the respondent's conduct violated Mass. R. Prof. C. 8.4 (h), but a four month suspension is not the appropriate sanction in these circumstances.

Background. Upon a complaint issued by the Director, Office of Professional Responsibility, Department of the Treasury, IRS, and following a hearing before an administrative law judge (ALJ), the respondent was suspended from practice before the IRS for a period of twenty-four months because he engaged in "disreputable

conduct" as set forth in 31 C.F.R., § 10.51 ("wilfully failing to make a federal tax return"). Following an appeal to the Secretary of the Treasury, the Office of Chief Counsel of the IRS (the IRS Appellate Authority), acting through an order of delegation, accepted the proposal of the Office of Professional Responsibility and imposed a forty-eight month period of suspension.¹

Thereafter, bar counsel filed the instant petition. A hearing on the matter was held on March 22, 2011. During the hearing, I gave leave to the respondent to submit additional documentation; the documents he submitted are discussed in note 2, infra.

Discussion. 1. Federal administrative body. As a preliminary matter, I address the respondent's claim, made without citation to relevant authority, that the IRS is not a "federal administrative body" and that he is therefore not subject to S.J.C. Rule 4:01, § 16(1), which provides that this court may reciprocally discipline a Massachusetts attorney who

¹ The Office of Chief Counsel of the Internal Revenue Service (IRS) (the IRS Appellate Authority) increased the sanction from that imposed by the administrative law judge (ALJ) because the ALJ concluded incorrectly that the respondent's late filing of Federal tax returns for the tax years 2000, 2001, 2003, 2004, and 2005 was not subject to discipline under 31 C.F.R., § 10.51(f). As noted by the IRS Appellate Authority, and not disputed by the respondent, "Failing to file a return within the time requirements of I.R.C. §§ 6072 and 6081 is in violation of the revenue laws of the United States even if the return is ultimately filed."

"has been suspended or disbarred from the practice of law in another jurisdiction (including any federal court and any state or federal administrative body or tribunal)." A State or Federal administrative body is an agency created by Federal or State legislation that is endowed with governmental functions. I agree with bar counsel that the IRS is a Federal administrative body or agency. The Federal Administrative Procedure Act (APA) defines the term "agency" to include "each authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . ." 5 U.S.C. § 551 (1). Black's Law Dictionary (9th ed., 2009), defines "administrative tribunal" as "[a]n administrative agency before which a matter may be heard or tried, as distinguished from a purely executive agency." See also Donaldson v. United States, 400 U.S. 517, 534 (1971) ("the Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the Treasury under section 7801(a) of the 1954 Code for the administration and enforcement of the internal revenue laws"); LaSalle Rolling Mills, Inc. v. U.S. Dept. of Treasury, 832 F.2d 390, 392 (7th Cir. 1987) ("the IRS is an agency of the Treasury Department"). Thus, S.J.C. Rule 4:01, § 16(1), provides the proper basis for bar counsel's petition.

2. Wilful failure to file tax return. As stated, the respondent was suspended by the IRS pursuant to 31 C.F.R.,

§§ 10.50, 10.51(a)(6), 10.52(a) (stating that practitioner may be censured, suspended or disbarred for "wilfully failing to make a Federal tax return"). "Under our bar discipline rules, a 'final adjudication in another jurisdiction that a lawyer has been guilty of misconduct . . . may be treated as establishing the misconduct for purposes of a disciplinary proceeding in the Commonwealth.' S.J.C. Rule 4:01, § 16(5) . . . For reciprocal discipline purposes, '[t]he judgment of suspension. . . shall be conclusive evidence of the misconduct unless the bar counsel or the respondent-lawyer establishes, or the court concludes, that the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard or there was significant infirmity or proof establishing the misconduct. S.J.C. Rule 4:01, § 16(3)." Matter of Steinberg, 448 Mass. 1024 (2007), quoting Matter of Kersey, 444 Mass. 65, 68-69 (2005).

The respondent does not claim that the proceedings before the IRS Appellate Authority or the ALJ deprived him of notice and an opportunity to be heard. Moreover, the arguments that he makes that certain findings of the ALJ are erroneous do not support a claim that there was a significant infirmity of proof.

The ALJ did not credit the respondent's testimony that he filed his 2002 tax return. The ALJ noted that "the IRS Certified record states that although he was granted two extensions of time to file the return, on April 15 and August 15, 2003, there is no

record of a return having been filed. As the respondent testified he mailed the return by first class mail, there is no proof of his having filed his return other than by determining his credibility herein, which I do reluctantly, because the conflict between his testimony and the IRS' certified official records require me to do so."

The ALJ observed further that the respondent failed timely to respond to the notification of the allegations against him, and that when he did respond he failed to provide a copy of his 2002 Federal tax return; the respondent also did not respond to the ALJ's order setting forth the deadline for notification of his proposed witnesses and exhibits. Under 31 C.F.R., § 10.50 (2) (b), "[w]hen a proper and lawful request is made by the Director of the Office of Professional Responsibility, a practitioner must provide the Director of the Office of Professional Responsibility with any information the practitioner has concerning an inquiry by the Director of the Office of Professional Responsibility into an alleged violation of the regulations in this part by any person . . . unless the practitioner believes in good faith and on reasonable grounds that the information is privileged."² Therefore, the respondent

² The respondent has provided me with copies of his 2002 Federal tax return, which he claims to have filed in March of 2005, and his 2002 State tax return, which he claims to have filed June 30, 2006. In his supplemental memorandum, the respondent asserts further that he "unearthed additional

was not permitted call witnesses or to introduce exhibits at the proceeding before the ALJ.

The ALJ based his determination of wilfulness, in part, on the fact that the respondent "is an experienced practitioner in the field with fifteen years experience as a practitioner with IRS procedure. He was obviously aware of the requirement of filing Federal tax returns, and doing so on a timely basis. That he went six years without filing a return, or a timely return, could not have been because he was unaware of his tax obligations." In this connection, the ALJ noted that "'wilfull' has consistently been held to mean the 'voluntary, intentional violation of a known legal duty.'" quoting United States v. Pomponio, 429 U.S. 10, 12 (1976).

The ALJ's findings of fact support the determination that the respondent wilfully failed to file his 2002 individual Federal tax return.³ The respondent's argument essentially

corroborative evidence [that he filed the 2002 Federal return], such as his 2002 Massachusetts state income tax returned, stamped by the Massachusetts Department of Revenue in June 2006." In an additional supplemental response, the respondent argues further that his 2003 tax return corroborates his claimed filing of the 2002 return, because "he could not have completed his 2003 Return without the information contained within his 2002 return." The difficulty with these arguments is that they should have been made to the ALJ, but were not; nor did the respondent list as potential exhibits any of the forgoing documents.

³ The ALJ appears to have credited the respondent's testimony that he failed to timely file certain tax returns because, in 1999, his mother was diagnosed with lymphoma. He quit his job in Philadelphia and moved to Massachusetts, where he

challenges the credibility determinations made by the ALJ, who "was in a far better position to make those determinations." Matter of Mitrano, 453 Mass. 1026, 1027 (2009). "We generally give effect to the disciplinary decisions of another jurisdiction without undertaking the often 'difficult and protracted task of redoing the inquiry which has already been concluded there.'"

The respondent's conduct "adversely reflects on his . . . fitness to practice law." Mass. R. Prof. C. 8.4 (h). However, the respondent was not charged with or convicted of a criminal offense under 26 U.S.C. § 7203 (misdemeanor to wilfully fail to make a return) or any other statute, nor was a sanction imposed under 31 C.F.R. § 10.51(a)(1) (allowing sanctions for "[c]onviction of any criminal offense under the Federal tax laws"). Thus, a conclusion that his conduct violated Mass. R. Prof. C. 8.4 (b) ("commit[ting] a criminal act that reflects adversely" on fitness as a lawyer) is not warranted.

3. Sanction. "Pursuant to S.J.C. Rule 4:01, § 16, we may

lived with his parents for five years to help care for his mother and father, who also was ill. While sympathizing with the respondent's "obligations and sacrifices," the ALJ noted that the respondent was employed full time during this period and "it is difficult to imagine that he could not find the time to prepare and timely file these returns." The Appellate Authority concurred: "While it is certainly admirable that he would assist in the care of his ailing parents, most people have time consuming obligations . . . [G]iven the fact that [r]espondent worked full time during the relevant period as an attorney with a major law firm engaged in a tax controversy practice, [r]espondent's reasonable cause defense is without merit."

impose whatever level of discipline is warranted by the facts, even if that discipline, exceeds, equals, or falls short of the discipline imposed in another jurisdiction." Matter of Watt, 430 Mass. 232, 234 (1999). The offending attorney "must receive the disposition most appropriate in the circumstances." Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984). "The conclusions and recommendations of the board are entitled to great weight, but we are not bound by them." In re Angwafo, 453 Mass. 28, 34 (2009). "When deciding what sanction is appropriate we look to the discipline imposed in comparable cases." Id. at 37. The sanction imposed should not produce outcomes "markedly disparate" from the results in similar cases. Matter of Murray, 455 Mass. 872, 882-883 (2010), citing Matter of Griffith, 440 Mass. 500, 507 (2003).

Based on differences in the accompanying circumstances, we have imposed a range of sanctions in cases where an attorney was convicted of wilfully failing to file tax returns. Compare Private Reprimand No. PR-90-8, 6 Mass. Att'y. Disc. R. 82 (1990) (private reprimand where respondent, who pled guilty to one count of failure to file income tax returns, "had been through a long and extraordinarily difficult period of his business and personal life"), with Matter of Hall, 23 Mass. Att'y. Disc. R. 258 (2007) (nine-month suspension for conviction under 26 U.S.C. § 7203, where lawyer was imprisoned for twelve months). Convictions

under 26 U.S.C. § 7203, have often resulted in six-month suspensions, particularly where multiple violations were found or where the criminal penalties included imprisonment. See Matter of Minkel, 13 Mass. Att'y. Disc. R. 548 (1997) (two separate convictions for failure to file income tax returns for four years); Matter of Remillard, 12 Mass. Att'y. Disc. R. 479 (1996) (lawyer/certified public accountant); Matter of Barkin, 1 Mass. Att'y. Disc. R. 18 (1977) (wilfully failing to file tax returns for two years).

However, where, as here, mitigating factors are present, the sanctions imposed have been far less severe. See Matter of Paris, 5 Mass. Att'y. Disc. R. 286, 287 (1987) (public censure where attorney suffered "severe psychological, physical and financial difficulties" and received six-month suspended sentence and one year probation for failing to file Federal tax returns for two years); Matter of McCarron, 5 Mass. Att'y. Disc. R. 82 (1986) (public reprimand and two year probation for failure to file Federal tax return, where attorney suffered from alcoholism for which he sought treatment after his conviction; it was considered a mitigating factor that he nonetheless "maintained his practice and kept his family together"); Matter of Allison, 1 Mass. Att'y. Disc. R. 16 (1979) (approximately one month suspension for conviction under 26 U.S.C. § 7203, where respondent suffered from "serious illness" and "traumatic

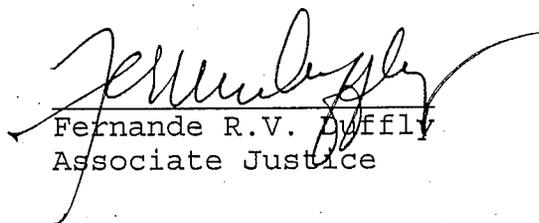
personal difficulties"); Matter of Kellogg, 1 Mass. Att'y. Disc. R. 164 (1979) (public censure for failure to file Federal income tax return where there were substantial mitigating circumstances due to then existing mental disease).

No case has been brought to my attention, and I have found none, in which sanctions were imposed for an attorney's failure to file a tax return in the absence of a criminal conviction. The distinction is far from meaningless, and I disagree with bar counsel that the sanction should mirror that of an attorney who was convicted for having failed to file a tax return. Somewhat analogous to the present case are matters in which attorneys were disciplined for uncharged illegal conduct. See, e.g., In re Balliro, 453 Mass. 75, 80-83 (2009) (six month suspension where attorney knowingly gave false testimony under oath during trial; bar counsel sought sanction under Mass. R. Prof. C. 8.4 (h), of suspension for one year and one day and minimum sanction was ordinarily two years); Matter of Parkhurst, 7 Mass. Att'y. Disc. R. 232 (1991) (public censure; attorney knowingly prepared and introduced in evidence client's false Federal tax return; no prior discipline).

Conclusion. The findings of the IRS Appellate Authority establish the facts governing this matter. Having considered these facts and the discipline that has been imposed in comparable cases, I conclude that the appropriate sanction in

this case is a public reprimand. In addition, for tax year 2010, the respondent shall establish to bar counsel, by means satisfactory to bar counsel, that he has timely filed all personal State and Federal income tax returns that are required to be filed.

By the Court,



Fernande R.V. Duffly
Associate Justice

Entered: May 12, 2011