



UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

March 20, 2023

PRESS RELEASE

The Chief Judge of the United States Tax Court announced today that the following practitioners have been suspended by the United States Tax Court for reasons explained in the attached orders.

1. David C. Johnston
2. Nathan B. Kennedy



United States Tax Court

Washington, DC 20217

In the Matter of

David C. Johnston

ORDER OF SUSPENSION

The Court issued an Order to Show Cause to Mr. Johnston on September 18, 2022, affording him the opportunity to show cause why he should not be suspended or disbarred from practice before this Court, or otherwise disciplined, and to appear at a hearing concerning proposed discipline. *See* Rule 202(c), Tax Court Rules of Practice and Procedure. Mr. Johnston failed to respond to the Order to Show Cause and thereby waived his right to a hearing.

I. *Discipline by the State Bar Court of California*

Mr. Johnston was admitted to practice before this Court on December 22, 1998 based, in part, on a certificate of good standing from the state Bar of California. By order filed August 23, 2021, and effective November 22, 2021, the Supreme Court of California suspended Mr. Johnston from the practice of law for one year, with execution stayed, and placed him on probation for one year subject to conditions, including that he be actually suspended for 60 days. *See Johnston on Discipline*, No. S269339, 2021 Cal. LEXIS 6377 (Aug. 23, 2021). Additionally, Mr. Johnston was previously publicly reprimanded by the Bar of California by Reprimand Order filed November 6, 2017, and effective November 28, 2017.

A member of the Bar of this Court may be disciplined by this Court as a result of, among other things, imposition of discipline by any other court of whose bar an attorney is a member. Rule 202(a)(2), Tax Court Rules of Practice and Procedure. The State Bar Court of California's Reprimand Order and the Supreme Court of California's order of suspension constitute orders imposing discipline.

Selling v. Radford, 243 U.S. 46 (1916), establishes the legal standard that governs the imposition of reciprocal discipline. Under *Selling*, we will recognize the suspension by the Bar of California unless, from an examination of the record, it appears that the state procedure was wanting in due process, there was such an infirmity of proof as to give rise to a clear conviction that we could not accept the conclusion of the state court, or that some other grave reason exists that convinces us not to accept the action taken by California. *See Id.* at 51.

This Court will suspend Mr. Johnston based upon his suspension in California. He may not resume practice before this Court until reinstated by order of this Court. *See* Rule 202(f)(2), U.S. Tax Court Rules of Practice and Procedure.

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II. Conduct before the United States Tax Court

A. Rule 202(b), U.S. Tax Court Rules of Practice and Procedure

A member of the Bar of this Court is required to report, in writing, imposition of discipline by a court of whose bar an attorney is a member no later than 30 days after the entry of the order of discipline. Rule 202(b), U.S. Tax Court Rules of Practice and Procedure.

Mr. Johnston failed to report either of the orders imposing discipline by the Bar of California to this Court in writing within 30 days in violation of Rule 202(b).

B. Rule 201(a), U.S. Tax Court Rules of Practice and Procedure

Practitioners before the Court shall carry on their practice in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association. Rule 201(a), U.S. Tax Court Rules of Practice and Procedure. A member of the Bar of this Court may be disciplined as a result of conduct with respect to the Court which violates the letter and spirit of the Model Rules of Professional Conduct, the Rules of the Court, or orders or other instructions of the Court. Rule 202(a)(3), U.S. Tax Court Rules of Practice and Procedure.

In two separate cases, and as discussed below, Mr. Johnston's conduct before this Court violated rules, orders, or instructions of the Court.

1. Raman Benjamin & Tamara Toma v. Commissioner, Docket No. 6561-21S

On May 10, 2021, Mr. Johnston entered an appearance for petitioners in *Raman Benjamin & Tamara Toma v. Commissioner*, Docket No. 6561-21S, by filing a petition on their behalf. A notice was issued setting the case for trial at the trial session beginning on September 6, 2022. On August 11, 2022, respondent filed a Motion to Dismiss for Failure to Properly Prosecute, stating that petitioners had failed to respond to the request by respondent's Independent Office of Appeals (Appeals Office) for documentation to support their position and that Mr. Johnston had failed to respond to seven separate communication attempts, by letter or telephone, of respondent's counsel and the Appeals Office.

By Order issued August 12, 2022, the Court directed petitioners to file a response to respondent's motion to dismiss on or before August 29, 2022, and set the motion for hearing during the Court's September 6, 2022, trial session. The Order advised that failure to comply with the Order or to appear at the hearing might result in the Court granting the motion and entering an order and decision against petitioners. The Order was amended on August 15, 2022, to correct the hearing time from Central Time (CT) to Pacific Standard Time (PST) but otherwise remained in full force and effect. By Order issued August 17, 2022, the Court directed Mr. Johnston to file a Proposed Stipulated Decision, a Pretrial Memorandum, or a Status

Report as required by the Court's standing pretrial order that had been issued in the case. Neither Mr. Johnston nor petitioners responded to the Court's orders.

On September 6, 2022, the case was called and recalled from the calendar during the Court's trial session. There was no appearance by or on behalf of petitioners. On September 14, 2022, the Court entered an Order of Dismissal and Decision granting respondent's motion.

2. *Ray R. Guerra & Sandra M. Guerra v. Commissioner, Docket No. 18700-21S*

On August 15, 2021, Mr. Johnston entered an appearance for petitioners in *Ray R. Guerra & Sandra M. Guerra v. Commissioner*, Docket No. 18700-21S, by filing a petition on their behalf. A notice was issued setting the case for trial at the trial session beginning on September 6, 2022. On August 15, 2022, respondent filed a Motion to Dismiss for Failure to Properly Prosecute, stating that petitioners had failed to respond to the request by respondent's Appeals Office for documentation to support their position and that Mr. Johnston had failed to respond to eight separate attempts to contact him by respondent's counsel or the Appeals Office by letter or by telephone.

By Order issued August 19, 2022, the Court directed petitioners to file a response to respondent's motion to dismiss on or before August 31, 2022, and set the motion for hearing during the Court's September 6, 2022 trial session. The Order advised that failure to comply with the Order or to appear at the hearing might result in the Court granting the motion and entering an order and decision against petitioners.

On September 6, 2022, the case was called and recalled from the calendar during the Court's trial session, but there was no appearance by or on behalf of petitioners. On September 14, 2022, the Court entered an Order and Decision granting respondent's motion.

3. *Relevant Standards of Conduct*

Practitioners before the Court shall carry on their practice in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association. Rule 202(a), U.S. Tax Court Rules of Practice and Procedure. Mr. Johnston failed to appear at hearings and trials; failed to respond to Court orders; and failed to cooperate with opposing counsel. Such conduct may have violated the following Model Rules: Rule 1.1 (Competence); Rule 1.3 (Diligence); Rule 3.2 (Expediting Litigation); Rule 3.4 (Fairness to Opposing Party & Counsel); Rule 8.4 (a) (Misconduct).

Upon due consideration of the foregoing, it is

ORDERED that the Court's Order to Show Cause, issued September 18, 2022,

is made absolute in that, under the provisions of Rule 202, Tax Court Rules of Practice and Procedure, Mr. Johnston is suspended from practice before the United States Tax Court until further order of the Court. It is further

ORDERED that, until reinstated, Mr. Johnston is prohibited from holding himself out as a member of the Bar of the United States Tax Court. It is further

ORDERED that Mr. Johnston's practitioner access to case files maintained by the Court in electronic form, if any access was given to him, is revoked. It is further

ORDERED that the Court will file orders to withdraw Mr. Johnston as counsel in any pending cases in which he appears as counsel of record.

By the Court:

(Signed) Kathleen Kerrigan
Chief Judge



United States Tax Court

Washington, DC 20217

In the Matter of

Nathan B. Kennedy

ORDER OF SUSPENSION

On July 27, 2022, Mr. Kennedy self-reported his suspension from the practice of law in Colorado for five months with conditions. A member of the Bar of this Court is required to report, in writing, imposition of discipline by another court of whose bar an attorney is a member no later than 30 days after the entry of the order of discipline. Rule 202(b), U.S. Tax Court Rules of Practice and Procedure.

A member of the Bar of this Court may be disciplined by this Court as a result of, among other things, suspension by consent from the bar of another court. Rule 202(a)(2), Tax Court Rules of Practice and Procedure. No person shall be suspended from practice before this Court for more than 60 days until such person has been afforded an opportunity to be heard. Rule 202(c), Tax Court Rules of Practice and Procedure. Accordingly, the Court issued an Order to Show Cause to Mr. Kennedy on September 28, 2022, affording him the opportunity to show cause why he should not be suspended or disbarred from practice before this Court, or otherwise disciplined, and to appear at a hearing concerning his proposed discipline.

Mr. Kennedy submitted several written responses and appeared at an in-person hearing held on December 7, 2022.

I. Original Discipline

As described therein, the Order to Show Cause was predicated on the Order Approving Stipulation to Discipline Under C.R.C.P. 242.19(c) of the Presiding Disciplinary Judge of the Supreme Court of Colorado (the Colorado Order), issued June 22, 2022, suspending Mr. Kennedy from the practice of law in Colorado for five months with conditions. The Colorado Order required Mr. Kennedy to provide notice of his suspension to other jurisdictions where he is licensed or otherwise authorized to practice law, and to provide an affidavit attesting to his compliance. In his first written response to the Order to Show Cause, Mr. Kennedy attached Respondent's Unopposed Motion for Extension of Time to File Affidavit Pursuant to C.R.C.P. 242.32(f) pursuant to which he requested from the Supreme Court of Colorado, and was granted, an extension of time in which to comply with these requirements (the Colorado extension).

Mr. Kennedy self-reported the suspension on July 27, 2022. The Colorado extension did not change the issuance of the Colorado Order, and did not affect the

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timing of Mr. Kennedy's suspension. Despite the Colorado extension, Mr. Kennedy was required to report his suspension to this Court by July 22, 2022. *See* Rule 202(b), U.S. Tax Court Rules of Practice and Procedure. Mr. Kennedy's self-reporting was therefore untimely by 5 days. *See* Rule 202(b), U.S. Tax Court Rules of Practice and Procedure.

The Court will not discipline Mr. Kennedy for his untimely self-reporting. The Court has taken into account that his self-reporting of the discipline was untimely by only a matter of days, that the Supreme Court of Colorado found a reasonable basis on which to grant Mr. Kennedy an extension, that he responded promptly to the Court's Order to Show Cause, and that he expressed genuine remorse at the hearing for failing to provide notice within 30 days.

II. *Reciprocal Discipline*

As described above, the Order to Show Cause was predicated on the Colorado Order suspending Mr. Kennedy from the practice of law in Colorado for five months with conditions. Also as stated above, a member of the Bar of this Court may be disciplined by this Court as a result of, among other things, suspension by consent from the bar of another court. Rule 202(a)(2), Tax Court Rules of Practice and Procedure.

Selling v. Radford, 243 U.S. 46 (1916), establishes the legal standard that governs the imposition of reciprocal discipline. Under *Selling*, we will recognize the suspension of the State Bar of Colorado unless, from an examination of the record, it appears that the state procedure was wanting in due process, there was such an infirmity of proof as to give rise to a clear conviction that we could not accept the conclusion of the state court, or that some other grave reason exists that convinces us not to accept the action taken by Colorado. *See Id.* at 51.

Mr. Kennedy submitted a written response on October 27, 2022, in which he stated that he had never been disciplined before, that he denied the allegations in each disciplinary narrative against him, and that he had taken a voluntary suspension only because he thought it would expedite his application for admission to the Bar of New York. At his hearing, Mr. Kennedy again denied the allegations on which the Colorado suspension was based and highlighted that the Colorado Stipulation to Discipline preserves certain factual denials. He also requested that the Court impose reciprocal discipline.

Although he denies the allegations of misconduct, Mr. Kennedy consented to a suspension from the Bar of Colorado. Specifically, Mr. Kennedy stipulated that the conduct described in the Colorado Stipulation to Discipline constituted grounds for the imposition of discipline. Mr. Kennedy's repudiation of allegations of misconduct to which he previously admitted is inadequate to demonstrate the existence of any *Selling* factor. *See Selling v. Radford*, 243 U.S. 46, 50-51 (1917).

We will suspend Mr. Kennedy as reciprocal discipline based upon his suspension in Colorado. This Court does not impose conditional or temporary suspension as a form of discipline. A practitioner suspended for more than 60 days may not resume practice before this Court until reinstated by order of the Court. Rule 202(f)(2), U.S. Tax Court Rules of Practice and Procedure. To be reinstated before the Court, a practitioner must file a petition for reinstatement and demonstrate by clear and convincing evidence that such practitioner's reinstatement will not be detrimental to the integrity and standing of the Court's Bar or to the administration of justice, or subversive of the public interest. At his hearing, Mr. Kennedy represented that, although eligible for reinstatement, he remained suspended from practice before Colorado. Mr. Kennedy may file a petition for reinstatement to practice before this Court upon his reinstatement to the practice of law in Colorado.

Upon due consideration and for cause, it is

ORDERED that the Court's Order to Show Cause, issued September 28, 2022, is made absolute in that, under the provisions of Rule 202, Tax Court Rules of Practice and Procedure, Mr. Kennedy is suspended from practice before the United States Tax Court until further order of the Court. It is further

ORDERED that, until reinstated, Mr. Kennedy is prohibited from holding himself out as a member of the Bar of the United States Tax Court. It is further

ORDERED that Mr. Kennedy's practitioner access to case files maintained by the Court in electronic form, if any access was given to him, is revoked. It is further

ORDERED that the Court will file orders to withdraw Mr. Kennedy as counsel in any pending cases in which he appears as counsel of record.

By the Court:

(Signed) Kathleen Kerrigan
Chief Judge