United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellant

v. Complaint No. 2010-12

[redacted],
Respondent-Appellee

Decision on Appeal

Authority

Under the authority of General Counsel Order No. 9 (January 19, 2001) and a delegation order dated March 2, 2011, I have been delegated 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 (IRS), reprinted by the Treasury Department and hereinafter referred to as Circular 230 - all references are to Circular 230 as in effect for the period(s) at issue). This is such an appeal from a Decision and Order on Motion for Summary Judgment (Decision and Order) entered into this proceeding by Chief Administrative Law Judge Susan L. Biro (the ALJ) on January 13, 2011.

Procedural History

This proceeding was commenced on June 28, 2010, when the Complainant-Appellant Director of the Office of Professional Responsibility (OPR) filed a Complaint against Respondent-Appellee [redacted] ("[redacted]"). The Complaint alleges that [redacted] has engaged in practice before the IRS, as defined by §10.2, as a certified public accountant, and further, that [redacted]

[redacted]:

[redacted]	[redacted] [redacted][1]	[redacted]
[redacted] (count 1)	[redacted]	[redacted]
[redacted] (count 3)	[redacted]	[redacted]
[redacted] (count 5)	[redacted]	[redacted]
[redacted] (count 7)	[redacted]	[redacted]
[redacted] (count 9)	[redacted]	[redacted]
[redacted] (count 11)	[redacted]	[redacted]
[redacted] (count 13)	[redacted]	[redacted]

The Complaint also alleges that [redacted] [the [redacted] citation should have included [redacted]] for [redacted]. The Decision and Order and [redacted] evidence that as of shortly before the date that the Complaint was filed that [redacted]:

[redacted]	[redacted]
[redacted] (count 2)	[redacted]
[redacted] (count 4)	[redacted]
[redacted] (count 6)	[redacted]
[redacted] (count 8)	[redacted]
[redacted] (count 10)	[redacted]
[redacted] (count 12)	[redacted]
[redacted] (count 14)	[redacted]

The [redacted]. [redacted] Further, [redacted] between the time [redacted] and the commencement of this proceeding.

The Complaint states that with respect to [redacted] constituted disreputable conduct within the meaning of §10.51 of Circular 230 for which [redacted] may be censured, suspended, or disbarred from practice before the IRS. The Complaint states that with respect to [redacted] and constituted disreputable conduct within the meaning of §10.51 of Circular 230 for which [redacted] may be censured, suspended, or disbarred from practice before the IRS.

[1] [redacted], which have no bearing on the result herein.

The Complaint requests that [redacted] be disbarred from practice before the IRS pursuant to §§10.50 and 10.70 of Circular 230.

[redacted] filed an Answer explaining the reasons for [redacted], and OPR submitted a prehearing memorandum to which [redacted] did not respond. On December 13, 2010, OPR submitted a motion for summary judgment, to which [redacted] did not respond. In the Decision and Order, the ALJ found that (i) the counts for [redacted] are barred by the statute of limitations contained in 28 U.S.C. §2462 for [redacted], (ii) [redacted], and (iii) [redacted]. As to the sanction, the ALJ held that Mr. Craft "is held liable for [redacted] rather than [redacted] alleged in the Complaint, due to the statute of limitations" and that since [redacted] had often been the break point between a suspension of 36 to 48 months and disbarment that a sanction of indefinite suspension was commensurate with the seriousness of the disreputable conduct that was to be found. Decision and Order at 14.

OPR filed an appeal asserting that the Decision and Order was in error as (i) §2462 does not apply to [redacted] counts in OPR practitioner proceedings; and (ii) the sanction should be modified to disbar [redacted] rather than subject him to an indefinite suspension. On July 18, 2011, I issued an Order asking OPR to address several issues, to which OPR responded. [redacted] did not respond to OPR's brief in support of its appeal or its supplemental brief responding to the issues that I raised.

<u>Findings of Fact</u>

The Appellate Authority reviews the ALJ's findings of fact under a clearly erroneous standard of review. Section 10.78 of Circular 230. The ALJ's extensive findings of fact are well supported by the record and are not clearly erroneous.

<u>Analysis</u>

The Appellate Authority reviews the ALJ's findings as to issues that are exclusively matters of law de novo. Section 10.78 of Circular 230. The application of §2462 is exclusively a matter of law.

In *OPR v.* [redacted], Complaint No. 2010-09 (Decision on Appeal, May 26, 2011), I held that (i) §2462 was applicable to OPR disciplinary proceedings with regard to [redacted] count, (ii) the date that the §2462 limitations period commences running is [redacted], and (iii) [redacted] was not a continuing violation.

OPR has asked to revisit the holding as it applies to [redacted] (the regulation has used slightly different phrasing as Circular 230 has been amended over the years, but the concept is that of [redacted]

[redacted]). In support of its position that discipline under [redacted] count is remedial, OPR emphasizes that [redacted]. However, each of the counts presented is a distinct one, and the presence of more recent valid counts does not change the character of the older counts for purposes of the statute of limitation.

Today, I find that §2462 also applies to [redacted]. The rationale of *Johnson v. Securities and Exchange Commission*, 87 F.3d 484, 488-90 (D.C. Cir. 1996), and the authorities cited therein control, so that I am compelled to hold that the suspension of a tax practitioner for [redacted] is a penalty within the meaning of §2462. As I stated in [redacted], one must consider the characteristics of a suspension to determine whether the overall purpose is penal or remedial. I agree with the ALJ: a count instituted against a practitioner for [redacted] more than five years before the institution of proceedings is, as a matter of law, a penalty within the meaning of §2462.

OPR argues that the date that should start the running of the period of limitations for [redacted] is no earlier than [redacted]. However, [redacted] provides the general rule that [redacted]. No exceptions to the general rule apply here. Thus, [redacted] is the date that begins the running of §2462 for a count based [redacted] when the Count is based on [redacted]. A subsequent affirmative act in furtherance of [redacted] could trigger a later date for the violation (*see e.g.,* [redacted]), but OPR has not asserted a subsequent act here. OPR has also argued that a pattern of conduct is often necessary to prove willfulness, and that the limitations period should only start to run when a pattern proving willfulness has been established, but I hold that [redacted] is the date that should be used to start the running of the statute of limitations.

Finally, in [redacted], I found that [redacted] is not a continuing one and I believe that same principle applies here. In the event that [redacted] might give rise to a new violation on that date (*see, e.g.,* [redacted], *supra*); however, [redacted] will not result in a continuing violation. In the instant case there is no assertion of subsequent [redacted] – [redacted] counts are based entirely on [redacted].

The application of §2462 has arisen in the majority of the cases coming to me on appeal since the issue was first identified by Chief Judge Biro *sua sponte*. The reason that §2462 frequently arises is that OPR often does not file a Complaint until long after it

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[2] Further, beginning the running of the statute on [redacted] would suggest that [redacted].

initially identifies [redacted] violation so that in each case to which §2462 applies, several years of violations are more than five years old.

The administrative file evidences that OPR sent [redacted] a letter dated January 10, 2007 asserting that [redacted] (the file indicates that OPR was also aware [redacted]), and stating that further action would not be taken for 30 days during which [redacted] could submit a response. On February 2, 2007, [redacted] sent OPR an extensive reply admitting that [redacted] and describing his personal and financial difficulties over the preceding 12 years. [redacted]. The file also contains a letter sent to [redacted] by OPR's counsel dated March 5, 2010, stating that OPR had sent [redacted] letters on January 10, 2007; April 18, 2008; and October 6, 2009; concerning his eligibility to practice and asserting that [redacted]. [redacted] shortly before the Complaint was filed. It is unclear from the file whether or to what extent [redacted] had interacted with OPR after his February 2, 2007 response. The Complaint was filed June 28, 2010.

In response to my question as to why OPR waited almost three and a half years after it had identified [redacted] to file the Complaint in this case, OPR explained that it waited an appropriate length of time because its focus is on assuring that practitioners are fit to practice and that it has a policy of putting practitioners on notice of the opportunity [redacted] and minimize the use of government resources. Further, that sometimes a practitioner that has been [redacted] will demonstrate fitness to practice by correcting [redacted] subsequent to OPR contact.

[redacted] track record as described above is that of a practitioner who makes a living preparing the tax returns of others but who [redacted]. Further, upon being contacted by the IRS, he was not forthcoming with [redacted]. I would have thought that under the circumstances that it would have been an easy decision that [redacted] was not a suitable person to represent clients before the IRS and that a proceeding should have been instituted in far less time than three and a half years. But I understand that OPR has additional considerations before it. Be that as it may, *Johnson* is a controlling precedent and, thus, §2462 commences as to [redacted] and commences as to [redacted], unless a subsequent act occurs as described above. If OPR wants to delay proceedings for extended periods, it must realize that one cost of doing so is that it will be unable to present counts [redacted].

Accordingly, I affirm the conclusions of law contained in the Default Order on the statute of limitations issues and conclude that only the violations [redacted] provide the basis for bringing a disciplinary action.

<u>Appropriate Sanction</u>

The Appellate Authority reviews the sanction sought by OPR and imposed by the ALJ de novo. *See, e.g.*, *Director, OPR v.* [redacted], Complaint No. 2007-12 (April 21, 2009) at p. 3; *Director of OPR v.* [redacted], Complaint No. 2006-23 (April 2008) at p. 3; *Director, OPR v.* [redacted], Complaint No. 2007-08 (July 2008) at p. 4; *Director, OPR v.* [redacted], Complaint No. 2008-12 (January 20, 2010) at p. 6; *Director, OPR v.* [redacted], Complaint No. 2008-19 (May 26, 2009) at p. 4. I modify the suspension imposed by the ALJ for the reasons stated below.

The Complaint requests a sanction of disbarment, based on [redacted], and [redacted], but, as stated above, because of §2462, only the violations for [redacted] may be properly charged. Because fewer counts were sustained, the Decision and Order imposes a lesser sanction - it provides for an indefinite suspension which allows OPR "sole discretion" to determine when [redacted] may be reinstated. Decision and Order at 15. OPR has appealed the indefinite suspension and asks for a sanction of disbarment.

Initially, a practitioner whose sanction is initiated through a disciplinary proceeding, as provided for in §§10.60 *et seq*. of Circular 230, that is not resolved between the practitioner and OPR consensually as provided for in §10.61 of Circular 230, should have his case resolved by the ALJ as provided for in §10.76 of Circular 230, or by the agency on appeal as provided for in §10.78 of Circular 230. The purpose of the disciplinary proceeding is to have the sanction determined by the ALJ or the agency, not by OPR. Section 10.82 of Circular 230 provides for an expedited suspension for a duration within the control of OPR, but that section applies only under narrow and specifically defined circumstances and is an interim measure that provides the practitioner with the ability to obtain prompt resolution with a sanction determined by the ALJ or agency as described above in a proceeding administered per §10.60 of Circular 230. I conclude that practitioners and OPR are entitled to a determinate sanction by the ALJ under §10.76 of Circular 230, the application of which may be readily and unambiguously understood and complied with by the practitioner and OPR, subject to any specific conditions as provided in §10.79(d) of Circular 230.

OPR has taken as its primary position that §2462 does not apply to [redacted] violations in OPR practitioner proceedings. As indicated above, I disagree and have found that §2462 applies. I asked OPR whether assuming *arguendo* that I find that §2462 bars [redacted] counts [redacted] should be considered as aggravating factors in determining the sanction to be imposed and OPR stated that they should not, that it would be inappropriate "to consider past bad acts that can no longer be charged directly in the complaint."

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In several previous cases, I deferred to OPR as to this pro-practitioner position, but I decline to do so here.[3] The record contains clear and convincing evidence as to [redacted]

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[3] In the future, if OPR wants to achieve its policy objective, it may do so by not including a [redacted] barred by §2462 in the record. However, a practitioner may attempt to provide

[redacted], and I believe that considering a practitioner's [redacted] immediately before those covered by timely counts is consistent with the law and regulations and helpful in determining an appropriate sanction as to a practitioner's fitness to practice.

Specifically, Circular 230 provides that in determining sanctions, "[t]he sanctions imposed by this section shall take into account all relevant facts and circumstances." *See* §10.50(d). It provides that the rules of evidence prevailing in courts of law and equity are not controlling, but that evidence that is irrelevant, immaterial, or wholly repetitious may be excluded. *See* §10.73. [redacted] leading up to the sanction and the reasons for same may shed light on the character of the violations, and therefore, unless barred by §2462 or some other rule of law or evidence, [redacted] immediately preceding those for which OPR has presented valid counts are relevant and ought to be admissible in determining the appropriate sanction.

Initially, the function of a statute of limitations is to bar stale claims – it is a defense, not a rule of evidence. A statute of limitations does not operate to bar the use of a document that predates the commencement of the limitations period but that is relevant to events during the period. *See, e.g., Sir Speedy, Inc. v. L&P Graphics, Inc.*, 957 F.2d 1033, 1037 (2d Cir. 1992). The Supreme Court has explicitly addressed the admission of evidence as to periods barred by a six month statute of limitation in an unfair labor practice case. In *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960), the Court described two types of situations:

> The first is one where occurrences within the six month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10 (b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. *Id*. at 416-17 (footnote omitted)

The consideration of evidence of misconduct prior to the limitations period to the extent it cast light upon the culpability within the limitations period has been recognized as allowable in a §2462 case. *See H. P. Lambert Co., Inc., v. Secretary of the Treasury*, 354 F.2d 819, 822 (1st Cir. 1965); *Article II Gun Shop, Inc. v. Gonzales*, 441 F.3d 492, 496-97 (7th Cir. 2006), *cert. denied*, 2006 U.S. Lexis 8059 (2006).

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context to [redacted] violations and mitigate the sanction by demonstrating [redacted] prior to a Circular 230 Complaint.

In the current proceeding, the ALJ has found and I have sustained timely violations of Circular 230. The violations of earlier years, the anterior events, may be properly considered to shed light on the violations occurring within the limitations period [redacted]. Accordingly, I do not see any impediments to the consideration of [redacted]'s conduct [redacted] in imposing a sanction.[4]

[redacted], [redacted] after he was contacted by OPR. In similar cases, the sanction for similar [redacted] violations alone have typically been a suspension for 24 months. *See generally*, *Director, OPR v.* [redacted], Complaint No. 2010-08 (June 2, 2011) in which I set out relevant facts and circumstances in [redacted] cases. However, this case is different from the typical [redacted] case. In addition to [redacted] has also been found to [redacted].

A baseline sanction for a practitioner who has attempted to [redacted] both with regard to [redacted] and [redacted] before consideration of aggravating or mitigating factors would ordinarily be a suspension of either four years or disbarment. In such a case an effort would be made to tease out the degree of willfulness, the extent to which the misconduct was a temporary lapse, and to consider other aggravating and mitigating factors. In the instant case there are two very substantial aggravating factors. First, [redacted] immediately preceding those for which counts were properly sustained make clear the character of [redacted] violations. [redacted] clearly intended to [redacted] to the extent that he could get away with it. Secondly, OPR's delay in initiating this Complaint gave [redacted] to right the situation, but [redacted] not only did not engage in any attempt to [redacted] but he [redacted]. Under these circumstances disbarment is the appropriate sanction, and the decision to impose this sanction is not a close one.

I have considered all of the arguments made by OPR and [redacted] and to the extent not mentioned herein, I find them to be irrelevant or without merit.

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[4] Although different considerations apply in criminal cases, I note that once a criminal violation has been sustained, the courts have broad discretion to consider various kinds of information in sentencing. In *People v. Barnwell*, 41 Cal. 4th 1038, 1058 (Cal. 2007), *cert. denied,* 128 S. Ct. 1651 (2008) the court held that with regard to the introduction of evidence of prior unadjudicated offenses in a criminal sentencing decision, the "expiration of the statute of limitations for some of the unadjudicated offenses affected the weight of the evidence, not its admissibility." *Accord, People v. Harris*, 43 Cal. 4th 1269, 1315-16 (Cal. 2008), *cert. denied,* 129 S.Ct. 922 (2009). *See also* 18 U.S.C. §3661; *United State v. Watts*, 519 U.S. 148, 152 (1997 (*per curiam*) (information that resulted in an acquittal could be considered); *United States v. Luttrell*, 612 F.2d 396; (8th Cir. 1980) (evidence of prior and subsequent tax returns to years charged ??? was admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."). Similarly, in professional disciplinary proceedings evidence as to aggravating and mitigating factors is broadly admitted. *See, e.g., In the Matter of Burtch*, 175 P.3d 1070 (Wash. 2008).

Conclusion

For the reasons stated, I hereby determine that [redacted] is disbarred from practice before the IRS. This constitutes FINAL AGENCY ACTION in this proceeding.

/s/______________________________
Bernard H. Weberman
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of the
Secretary of the Treasury)
October 12, 2011
Lanham, MD

CERTIFICATE OF SERVICE

I hereby certify that the Order dated October 12, 2011 in Complaint No. 2010-12 was sent this day by Certified Mail and by First Class United States Mail to the addresses listed below:

Certified Mail:

[redacted]
Redacted
[redacted]

First Class U.S. Mail:

Honorable Susan L. Biro
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U.S. Environmental Protection Agency
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______/s/______________________________________
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(As Authorized Delegate of the
Secretary of the Treasury)
October 12, 2011
Lanham, MD