United States Department of the Treasury

Director, Office of Professional Responsibility, Complainant-Appellant

٧.

Complaint No. 2010-12

(b)(3)/26 USC 6103

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.

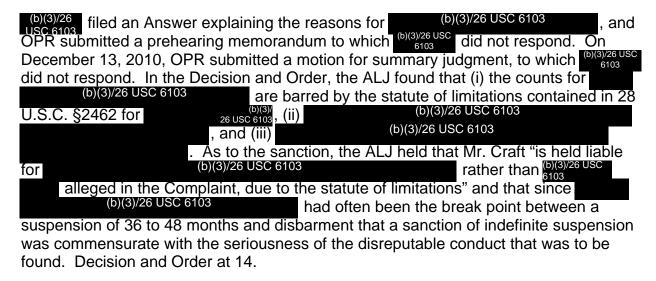
Procedural History

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 (b)(3)/26 USC 6103 ("(b)(3)/26 USC 6103"). The Complaint alleges that has engaged in practice before the IRS, as defined by §10.2, as a certified public accountant, and further, that (b)(3)/26 USC 6103

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. The Decision before the date that:	citation should have incluin and Order and (b)(3)/26 US It the Complaint was filed	evidence that as of shortly
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The betwee this proceeding.	(b)(3)/26 US (b)(3)/26 Further, n the time ^{(b)(3)/26} USC 6103	USC 6103 (b)(3)/26 USC 6103
Circular 230 for wh practice before the constituted disrepu	ich (b)(3)/26 may be cer IRS. The Complaint stantable conduct within the	(b)(3)/26 USC 6103 le conduct within the meaning of §10.51 of asured, suspended, or disbarred from tes that with respect to (b)(3)/26 USC 6103 and meaning of §10.51 of Circular 230 for which disbarred from practice before the IRS.
no bearing on the resu	(b)(3)/26 USC 6	, which have

no bearing on the result herein.

The Complaint requests that use 6103 be disbarred from practice before the IRS pursuant to §§10.50 and 10.70 of Circular 230.



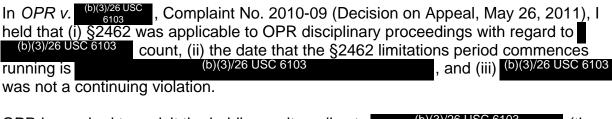
OPR filed an appeal asserting that the Decision and Order was in error as (i) §2462 does not apply to (b)(3)/26 USC 6103 counts in OPR practitioner proceedings; and (ii) the sanction should be modified to disbar (b)(3)/26 USC (6103) rather than subject him to an indefinite suspension. On July 18, 2011, I issued an Order asking OPR to address several issues, to which OPR responded. (b)(3)/26 USC (6103) did not respond to OPR's brief in support of its appeal or its supplemental brief responding to the issues that I raised.

Findings of Fact

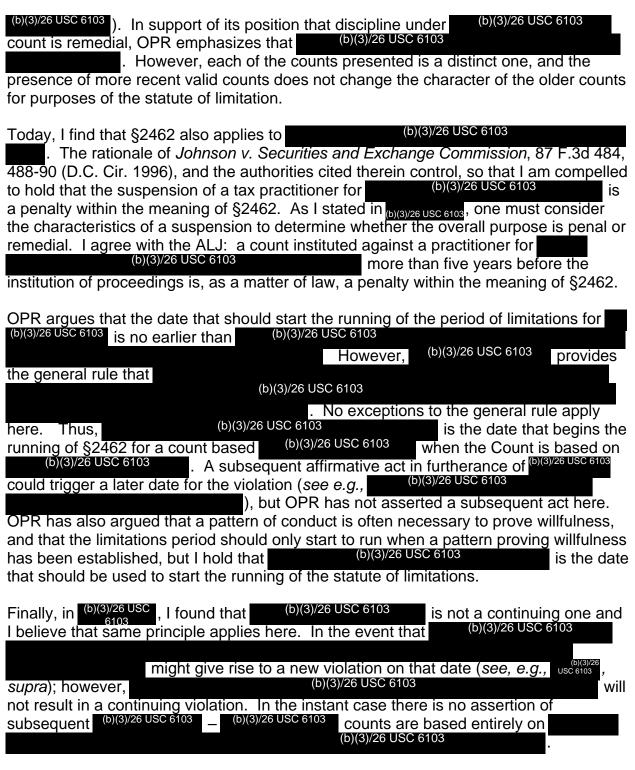
The Appellate Authority reviews the ALJ's findings of fact under a clearly erroneous standard of review. Section 10.78 of Circular 230. The ALJ's extensive findings of fact are well supported by the record and are not clearly erroneous.

Analysis

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.



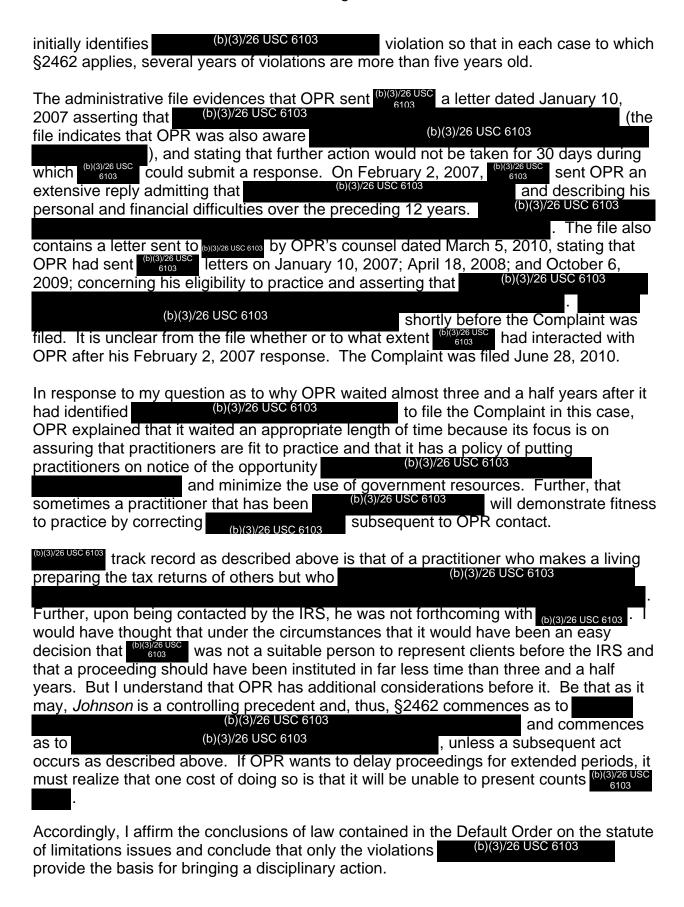
OPR has asked to revisit the holding as it applies to regulation has used slightly different phrasing as Circular 230 has been amended over the years, but the concept is that of



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

² Further, beginning the running of the statute on (b)(3)/26 USC 6103

would suggest that (b)(3)/26 USC 6103



Appropriate Sanction

The Appellate Authority reviews the sanction sought by OPR and imposed by the ALJ de novo. See, e.g., Director, OPR v. (6)(3)/26 USC (April 21, 2009) at p. 3; *Director of OPR v.* (b)(3)/26 USC (April 2008) at p. 3; *Director,* OPR v. $\frac{(b)(3)/26 \text{ USC}}{6103}$, Complaint No. 2007-08 (July 2008) at p. 4; Director, OPR v. $\frac{(b)(3)/26 \text{ USC}}{1000}$ Complaint No. 2008-12 (January 20, 2010) at p. 6; *Director, OPR v.* USC 6103, Complaint No. 2008-19 (May 26, 2009) at p. 4. I modify the suspension imposed by the ALJ for the reasons stated below.

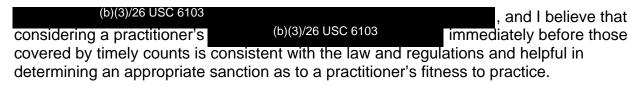
(b)(3)/26 USC 6103 The Complaint requests a sanction of disbarment, based on (b)(3)/26 USC 6103 , and , but, as stated above, because of §2462, only the violations for may be properly charged. Because fewer counts were sustained, the Decision and Order imposes a lesser sanction - it provides for an indefinite suspension which allows OPR "sole discretion" to determine when 6103 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 (b)(3)/26 USC 6103 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 counts (b)(3)/26 USC should be considered as (b)(3)/26 USC 6103 §2462 bars 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."

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

³ In the future, if OPR wants to achieve its policy objective, it may do so by not including a (b)(3)/26 USC 6103 barred by §2462 in the record. However, a practitioner may attempt to provide

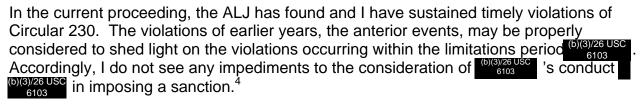


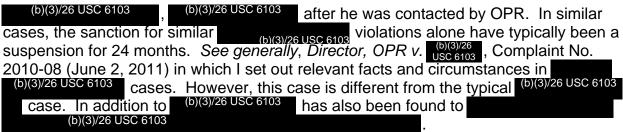
Specifically, Circular 230 provides that in determining sanctions, "[t]he sanctions imposed by this section shall take into account all relevant facts and circumstances." See §10.50(d). It provides that the rules of evidence prevailing in courts of law and equity are not controlling, but that evidence that is irrelevant, immaterial, or wholly repetitious may be excluded. See §10.73. (b)(3)/26 USC 6103 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 (b)(3)/26 USC 6103 some other rule of law or evidence. 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).





(b)(3)/26 USC 6103 A baseline sanction for a practitioner who has attempted to (b)(3)/26 USC 6103 both with regard to and (b)(3)/26 USC 6103 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, (b)(3)/26 USC 6103 immediately preceding those (b)(3)/26 USC 6103 for which counts were properly sustained make clear the character of violations. (b)(3)/26 USC clearly intended to (b)(3)/26 USC 6103 to the extent that he could get away with it. Secondly, OPR's delay in initiating this Complaint (b)(3)/26 USC 6103 to right the situation, but 6103 not only did not engage gave (b)(3)/26 USC 6103 in any attempt to but he (b)(3)/26 USC 6103 . 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 6103 and to the extent not mentioned herein, I find them to be irrelevant or without merit.

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 (b)(3)/26 USC 6103 is disbarred from practice before the IRS. This constitutes FINAL AGENCY ACTION in this proceeding.

<u>/s</u>

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:

(b)(3)/26 USC 6103

Redacted

(b)(3)/26 USC 6103

First Class U.S. Mail:

Honorable Susan L. Biro Chief Administrative Law Judge U.S. Environmental Protection Agency Office of Administrative Law Judges Redacted Redacted Washington, D.C. 20460

Karen L. Hawkins Director, Office of Professional Responsibility Internal Revenue Service Redacted Washington, DC 20224

Charlie W. Priest, Esq. Internal Revenue Service Office of Chief Counsel, General Legal Services Redacted Redacted Atlanta, GA 30308

/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