United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellant

v. Complaint No. 2010-19

[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 Default (Default Order) entered into this proceeding by Chief Administrative Law Judge Susan L. Biro (the ALJ) on February 4, 2011.

Procedural History

This proceeding was commenced on November 10, 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] and that [redacted]

[redacted]:

[redacted]	[redacted][1]	[redacted]	[redacted]	[redacted]
[redacted] (count 1)	[redacted]	[redacted]	[redacted]	[redacted]
[redacted] (count 2)	[redacted]	[redacted]	[redacted]	[redacted]
[redacted] (count 3)	[redacted]	[redacted]	[redacted]	[redacted]
[redacted] (count 4)	[redacted]	[redacted]	[redacted]	[redacted]
[redacted] (count 5)	[redacted]	[redacted]	[redacted]	
[redacted] (count 6)	[redacted]	[redacted]	[redacted]	
[redacted] (count 7)	[redacted]	[redacted]	[redacted]	

For counts 1-3, [redacted]. For counts 1-4, the Complaint states that [redacted]. [redacted].

The Complaint contains three additional counts. Count 8 of the Complaint alleges that on about April 30, 2007, OPR wrote [redacted] alleging that [redacted], giving him 30 days to respond. The Complaint states that his failure to respond [redacted] constitutes a willful violation of§10.20(b) of Circular 230, which requires practitioners to provide responsive information concerning OPR inquiries.[2] Count 9 of the Complaint alleges that on about August 30, 2009, OPR again wrote [redacted] this time alleging that [redacted], giving him 30 days to respond. The Complaint states that his failure to respond [redacted] constitutes a willful violation of§10.20(b) of Circular 230. Count 10 of the Complaint alleges that on about January 5, 2010, OPR again wrote [redacted] concerning [redacted], giving him 20 days to respond. The Complaint states that his failure to respond [redacted] constitutes a violation of§10.20(b) of Circular 230.

The Complaint states that with respect to [redacted] 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 counts 8-10 that the

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

[2] The file indicates that OPR sent [redacted] a letter about [redacted] dated February 7, 2007, informing him that if he did not respond within 30 days that OPR would initiate a disciplinary proceeding against him under Circular 230. I did not see anything in the file indicating that [redacted] responded to any of OPR's correspondence nor did he answer the November 10, 2010 Complaint in this case or participate in any way in this proceeding.

failure to respond [redacted] was a willful violation of §10.20(b) for which [redacted] may be censured, suspended, or disbarred from practice before the IRS.

The Complaint requests that [redacted] be disbarred from practice before the IRS pursuant to §10.20, 10.50, 10.51, 10.52 and 10.70 of Circular 230.

[redacted] did not file an Answer to the Complaint and on December 20, 2010, OPR served on [redacted] a motion for default to which [redacted] [sic] did not respond. In entering the Default Order, the ALJ found that (i) the counts for [redacted] are barred by the statute of limitations contained in 28 U.S.C. §2462 [redacted], (ii) [redacted], and [redacted], (iii) the part of the count for [redacted] was invalid because the Complaint did not allege [redacted] and there is no support for that finding in the record, and (iv) the three counts alleging [redacted]'s willful failure to respond to OPR in violation of §10.20 of Circular 230 were sustained. As to the sanction, the ALJ held that since the counts for [redacted] were not sustained, nor was the part of the count for [redacted], that a sanction of indefinite suspension was commensurate with the seriousness of the disreputable conduct that was found. Default Order at p. 10.

OPR filed an appeal asserting that the Decision and Order was in error as (i) OPR properly charged [redacted] with [redacted], and that his failure to answer the Complaint constituted an admission of same, (ii) §2462 does not apply to [redacted] in OPR practitioner proceedings as the proposed discipline is remedial, and (iii) the sanction should be modified to disbar [redacted] rather than subject him to an indefinite suspension. On July 20, 2011, I issued an Order asking OPR to address two issues: why it took OPR so long from the time it identified [redacted] [sic] to file the Complaint, and whether if §2462 bars counts for [redacted] the underlying conduct could be considered for any purpose. OPR responded but [redacted] did not respond to OPR's brief in support of its appeal or its supplemental brief.

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 findings of fact are well supported by the record and are not clearly erroneous. However, because of the ALJ's conclusion that the statute of limitations barred the bringing of counts [redacted], she did not make a finding as to whether [redacted]. The record provides clear and convincing evidence that [redacted] As these facts were pled by OPR and not denied by [redacted], they are deemed admitted. The record also provides clear and convincing evidence that [redacted]. As this fact was pled by OPR and not denied by [redacted], it is deemed admitted.

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.

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 a [redacted] count, (ii) the date that the §2462 limitations period commences running is [redacted], and (iii) [redacted] was not a continuing violation. In *OPR v.* [redacted], Complaint No. 2010-12 (Decision on Appeal, October 12, 2011), I held that §2462 was applicable to OPR disciplinary proceedings with regard to a [redacted] count. I also held that ordinarily [redacted] is the date that should be used to start the running of the statute of limitations and that [redacted] violation is not a continuing one with an exception not applicable here. The holdings in [redacted] and [redacted] are not particular to their facts; I have not as of yet seen any circumstances whereby OPR will be able to describe proposed discipline so that it will be characterized as remedial rather than penal for purposes of §2462. I affirm the ALJ's finding that the counts [redacted] are not sustained.

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

OPR sent [redacted] a letter dated February, 8, 2007, asserting that [redacted] and stating that it would not take action for 30 days during which [redacted] could submit a response, but that if [redacted] did not respond OPR would initiate a disciplinary proceeding under Circular 230. OPR sent [redacted] similar letters dated April 13, 2007; September 30, 2009; and January 5, 2010. [redacted] apparently [redacted], but [redacted] through the commencement of this proceeding, nor did he ever respond to the OPR correspondence. The Complaint was filed November 10, 2010.

In response to my question as to why OPR waited so long after it had identified [redacted] to file the Complaint in this case, OPR explained that it waited an appropriate length of time under all the circumstances because its focus is to assure that practitioners are fit to practice.

I find it inexplicable that OPR waited well over three and a half years after identifying [redacted] [sic] to conclude that he was not a suitable person to practice before the IRS. This is particularly so given that with [redacted], even after having been flagged by OPR, [redacted], and failed to respond to OPR's repeated threats to bring a disciplinary action against him - he did not even attempt to set out mitigating circumstances. As I stated in [redacted], I find that *Johnson v. Securities and Exchange Commission*, 87 F.3d 484, 488-90 (D.C. Cir. 1996), and the authorities cited therein are a controlling precedent, and thus § 2462 commences as to [redacted] and commences as to [redacted] as described in [redacted]. OPR may continue to delay the initiation of proceedings for extended periods, but one cost of its doing so is that it will be unable to present counts [redacted].

OPR also appeals the ALJ's disallowance of [redacted]. Count 4 states that "[r]espondent [redacted] and that [redacted] of Circular 230. The ALJ held this allegation was not sufficient to allege [redacted] and further, that the record did not support such a finding (Default Order at p. 8). OPR asserts that under §10.62(a) of Circular 230 its pleading provided [redacted] with fair notice of a charge of [redacted] and that the record provided support for same. I find it unnecessary to address this issue for two reasons. First, since several valid counts have been sustained in this case the number of counts sustained is not of import and a Circular 230 proceeding that has found a violation warranting discipline may consider [redacted] in determining the sanction whether or not it is part of a count or whether [redacted]. Second, as described below, I have concluded that the appropriate sanction is disbarment without regard to sustaining this element of [redacted], so a decision on this issue is unnecessary. However, if would certainly be prudent for OPR to consider the points made by the ALJ in framing future complaints and proving up same in default motions.

<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 [redacted] and for [redacted] failure to respond to OPR in violation of §10.20 of Circular 230 were found to be a basis for liability by the ALJ. Because fewer counts than proposed were sustained, the Default Order imposes a different sanction - it provides for an indefinite suspension which allows OPR "sole discretion" to determine when [redacted]

[redacted] may be reinstated. Default Order at p. 10. 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.

[redacted] after he was contacted by OPR. As of the date of the institution of this proceeding, [redacted]. Further, [redacted] has not responded to OPR's several attempts [redacted] or to offer an explanation for [redacted], in violation of §10.20(b) of Circular 230. [redacted] did not answer the Complaint in this case or otherwise participate in this proceeding. Under these circumstances, it is clear that [redacted] is not fit to practice before the IRS and I find that the appropriate sanction is disbarment.

In light of my conclusion above, it is unnecessary to reach the issue of the consideration, if any, to be given [redacted] barred by §2462. However, since I addressed this issue in [redacted] and asked OPR to brief the issue in this case, I thought it worth clarifying that I have concluded that the same principle applies here. Specifically, I asked OPR whether assuming *arguendo* that I found that §2462 barred [redacted] counts, [redacted] should be considered in determining the sanction to be imposed. OPR responded that it would be inappropriate "to consider past bad acts that can no longer be charged directly in the complaint" but did not provide any authority for its position. OPR did state that time-barred [redacted] may be examined to show the presence of [redacted].

In several previous cases I deferred to OPR as to this position, but I declined to do so in [redacted] and would have considered barred [redacted] as an aggravating factor for sanction purposes here had it been necessary. The record contains clear and convincing evidence as to [redacted]. 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 also 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. OPR has sustained violations of Circular 230 for [redacted] that were timely brought. [redacted], even though barred as separate counts, constitute anterior events that may be properly considered to shed light on the violations that were sustained. *See Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 416-17 (1960); *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). [redacted] are relevant facts and circumstances in determining a sanction, and I do not see any impediments to the consideration of them as aggravating factors in imposing a sanction. I will consider anterior and posterior events in future cases if included in the record and substantiated with clear and convincing evidence.

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.

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.

Bernard H. Weberman
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of the
Secretary of the Treasury)
October 14, 2011
Lanham, MD

CERTIFICATE OF SERVICE

I hereby certify that the Decision on Appeal dated October 14, 2011 in Complaint No. 2010-19 was sent this day by UPS Next Day Air and by First Class U.S. Mail to the addresses listed below:

UPS Next Day Air:

(b)(3)/26 USC 6103
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First Class U.S. Mail:

Honorable Susan L. Biro
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Bernard H. Weberman
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(As Authorized Delegate of the
Secretary of the Treasury)
October 14, 2011
Lanham, MD