

United States  
Department of the Treasury

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Director, Office of Professional Responsibility,  
Complainant-Appellant

v.

Complaint No. 2010-19

Dwayne H. Coston,  
Respondent-Appellee

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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, Dwayne H. Coston ("Mr. Coston"). The Complaint alleges that Mr. Coston has engaged in practice before the IRS, as defined by §10.2, as a certified public accountant, and further, that he willfully failed to file or timely file a federal income tax return and willfully pay his income taxes as required by 26 U.S.C. §§011, 6012, 6072, and 6151 for tax years 2002-05, and that he willfully failed to file a

federal income tax return as required by 26 U.S.C. §§ 6011, 6012, and 6072 for tax years 2007-09 as follows:

Tax Year	Original Return Due Date <sup>1</sup>	Extended Return Due Date	Date IRS Received the Return	Amount Owed
2002 (count 1)	April 15, 2003	October 15, 2003	Prepared by IRS	\$12,500+
2003 (count 2)	April 15, 2004	Not requested	Prepared by IRS	\$13,780+
2004 (count 3)	April 15, 2005	Not requested	Prepared by IRS	\$13,860+
2005 (count 4)	April 15, 2006	Not requested	May 4, 2007	\$1,680+
2007 (count 5)	April 15, 2008	October 15, 2008	Not received	
2008 (count 6)	April 15, 2009	October 15, 2009	Not received	
2009 (count 7)	April 15, 2010	October 15, 2010	Not received	

For counts 1-3, the IRS prepared a substitute for return. For counts 1-4, the Complaint states that amounts owed are in excess of the amounts shown above. For 2002, the transcript shows that Mr. Coston made several relatively small payments, and, for each of the years 2002-05, the transcripts show that amounts were credited to Mr. Coston's account as W-2 or 1099 withholding, but for far less than Mr. Coston's tax liability for each year.

The Complaint contains three additional counts. Count 8 of the Complaint alleges that on about April 30, 2007, OPR wrote Mr. Coston alleging that he failed to file his 2002-05 returns, giving him 30 days to respond. The Complaint states that his failure to respond or provide proof of filing and/or payment constitutes a willful violation of §10.20(b) of Circular 230, which requires practitioners to provide responsive information concerning OPR inquiries.<sup>2</sup> Count 9 of the Complaint alleges that on about August 30, 2009, OPR again wrote Mr. Coston this time alleging that he failed to file his 2002-05 and 2007 returns, giving him 30 days to respond. The Complaint states that his failure to respond or provide proof of filing and/or payment 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 Mr. Coston concerning his failure to file and make payment on the above, giving him 20 days to respond. The Complaint states that his failure to respond or provide proof of filing and/or payment constitutes a violation of §10.20(b) of Circular 230.

The Complaint states that with respect to each of the years in question the willful failure to file a timely return constituted disreputable conduct within the meaning of §10.51 of Circular 230 for which Mr. Coston may be censured, suspended, or disbarred from practice before the IRS. The Complaint states that with respect to counts 8-10 that the

<sup>1</sup> Return due dates are exclusive of the additional time to file provided for in 26 U.S.C. §7503, which have no bearing on the result herein.

<sup>2</sup> The file indicates that OPR sent Mr. Coston a letter about his noncompliance 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 Mr. Coston 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 or to provide proof of filing and/or payment arrangements was a willful violation of §10.20(b) for which Mr. Coston may be censured, suspended, or disbarred from practice before the IRS.

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

Mr. Coston did not file an Answer to the Complaint and on December 20, 2010, OPR served on Mr. Coston a motion for default to which Mr. Crofton [sic] did not respond. In entering the Default Order, the ALJ found that (i) the counts for failure to timely file and pay are barred by the statute of limitations contained in 28 U.S.C. §2462 for the years 2002-04, (ii) Mr. Coston willfully failed to timely file his return for 2005, and willfully failed to file his returns for 2007-09, (iii) the part of the count for 2005 relating to failure to pay for 2005 was invalid because the Complaint did not allege willfully evading or attempting to evade the payment of tax and there is no support for that finding in the record, and (iv) the three counts alleging Mr. Coston'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 2002-04 were not sustained, nor was the part of the count for 2005 related to payment of taxes, 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 Mr. Coston with willfully evading taxes, and that his failure to answer the Complaint constituted an admission of same, (ii) §2462 does not apply to the failure to pay counts in OPR practitioner proceedings as the proposed discipline is remedial, and (iii) the sanction should be modified to disbar Mr. Coston 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 Mr. Coston as a nonfiler [sic] to file the Complaint, and whether if §2462 bars counts for some years the underlying conduct could be considered for any purpose. OPR responded but Mr. Coston 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 as to 2002-04, she did not make a finding as to whether Mr. Coston willfully failed to file returns for the years 2002-04 or willfully failed to pay the taxes owed for those years. The record provides clear and convincing evidence that Mr. Coston willfully failed to timely file returns and willfully underpaid his taxes for 2002-04 in the amounts shown above. As these facts were pled by OPR and not denied by Mr. Coston, they are deemed admitted. The record also provides clear and convincing evidence that Mr. Coston willfully underpaid his tax liability for 2005 in the amount shown above. As this fact was pled by OPR and not denied by Mr. Coston, 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. Hernandez*, 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 failure to timely file count, (ii) the date that the §2462 limitations period commences running is the date the return is due (including any extension), and (iii) the failure to file was not a continuing violation. In *OPR v. C. Wesley Craft*, Complaint No. 2010-12 (Decision on Appeal, October 12, 2011), I held that §2462 was applicable to OPR disciplinary proceedings with regard to a willfully evading or attempting to evade payment of tax count. I also held that ordinarily the statutorily established payment date is the date that should be used to start the running of the statute of limitations and that the failure to pay violation is not a continuing one with an exception not applicable here. The holdings in *Hernandez* and *Craft* 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 for 2002-04 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 the failure to file or pay violation so that in each case to which §2462 applies, several years of violations are more than five years old.

OPR sent Mr. Coston a letter dated February, 8, 2007, asserting that he had failed to file his personal income tax returns for 2002-05 and stating that it would not take action for 30 days during which Mr. Coston could submit a response, but that if Mr. Coston did not respond OPR would initiate a disciplinary proceeding under Circular 230. OPR sent Mr. Coston similar letters dated April 13, 2007; September 30, 2009; and January 5, 2010. Mr. Coston apparently timely filed his 2006 return, but he did not file any subsequent returns 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 Mr. Coston as a non-filer 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 Mr. Coston as a nonfiler [sic] to conclude that he was not a suitable person to practice before the IRS. This is particularly so given that with the exception of 2006, even after having been flagged by OPR, Mr. Coston continued not to file, did not make payments,

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 *Craft*, 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 failure to file counts on the date that the return is due (including any extension) and commences as to failure to pay counts on the date the payment is due, unless a subsequent act occurs as described in *Craft*. 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 for some years.

OPR also appeals the ALJ's disallowance of the failure to pay count for 2005. Count 4 states that '[r]espondent was required by 26 U.S.C. §6151 to timely pay his federal income tax for the tax year 2005, on or before April 15, 2006' and that the failure to pay was willful and constituted disreputable conduct within the meaning of §10.51(f) of Circular 230. The ALJ held this allegation was not sufficient to allege a failure of willfully *evading or attempting to evade* the payment of tax 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 Mr. Coston with fair notice of a charge of willfully evading taxes 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 willful nonpayment in determining the sanction whether or not it is part of a count or whether the failure to pay was technically evasive within the meaning of §10.51(f). Second, as described below, I have concluded that the appropriate sanction is disbarment without regard to sustaining this element of the 2005 count, so a decision on this issue is unnecessary. However, it 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.

### Appropriate Sanction

The Appellate Authority reviews the sanction sought by OPR and imposed by the ALJ de novo. See, e.g., *Director, OPR v. Hurwitz*, Complaint No. 2007-12 (April 21, 2009) at p. 3; *Director of OPR v. Chandler*, Complaint No. 2006-23 (April 2008) at p. 3; *Director, OPR v. DeLiberty*, Complaint No. 2007-08 (July 2008) at p. 4; *Director, OPR v. Kilduff*, Complaint No. 2008-12 (January 20, 2010) at p. 6; *Director, OPR v. Koenig*, 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 the failure to file or timely file, and willfully evading or attempting to evade payment for seven years, but, as stated above, because of §2462, only the violations for 2005 (less the failure to pay charge) and 2007-09 and for Mr. Coston's 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 Mr.

Coston 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.

Mr. Coston did not file for the year 2005 until after he was contacted by OPR. As of the date of the institution of this proceeding, Mr. Coston had not filed for years 2007-09 nor has he made payments for those years. Further, Mr. Coston has not responded to OPR's several attempts to bring him into compliance or to offer an explanation for his noncompliance, in violation of §10.20(b) of Circular 230. Mr. Coston did not answer the Complaint in this case or otherwise participate in this proceeding. Under these circumstances, it is clear that Mr. Coston 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 to years barred by §2462. However, since I addressed this issue in *Craft* 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 the 2002-04 evasion counts, those years 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 years may be examined to show the presence of a pattern to demonstrate willfulness.

In several previous cases I deferred to OPR as to this position, but I declined to do so in *Craft* and would have considered barred years as an aggravating factor for sanction purposes here had it been necessary. The record contains clear and convincing evidence as to Mr. Coston's willful lack of compliance for the years 2002-04. Considering a practitioner's filing and payment record in the years 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 failure to file that were timely brought. A failure to comply with the tax laws in earlier years, 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 (7<sup>th</sup> Cir. 2006), *cert. denied*, 2006 U.S. Lexis 8059 (2006). Mr. Coston’s willful failure to file and pay for 2002-04 and his payment record for 2005 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 Mr. Coston 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 Dwayne H. Coston is disbarred from practice before the IRS. This constitutes FINAL AGENCY ACTION in this proceeding.

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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:

Dwayne H. Coston  
Redacted  
Redacted  
Norfolk, VA 23505

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

Colleen A. Crane, Attorney  
Internal Revenue Service  
Office of Chief Counsel, General Legal Services  
Redacted  
Washington, DC 20224

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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