

United States  
Department of the Treasury

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Director, Office of Professional Responsibility,  
Complainant-Appellant

v.

Complaint No. 2010-12

C. Wesley Craft,  
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 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 C. Wesley Craft ("Mr. Craft"). The Complaint alleges that Mr. Craft has engaged in practice before the IRS, as defined by §10.2, as a certified public accountant, and further, that he willfully failed to timely file a federal income tax

return as required by 26 U.S.C. §§ 6011, 6012, and 6072 for tax years 2001 through 2007 as follows:

Tax Year	Return Due Date <sup>1</sup>	Date IRS Received the Return
2001 (count 1)	April 15, 2002	June 25, 2007
2002 (count 3)	April 15, 2003	June 25, 2007
2003 (count 5)	April 15, 2004	June 25, 2007
2004 (count 7)	April 15, 2005	June 25, 2007
2005 (count 9)	April 15, 2006	June 25, 2007
2006 (count 11)	April 15, 2007	December 4, 2009
2007 (count 13)	April 15, 2008	December 4, 2009

The Complaint also alleges that Mr. Craft willfully failed to timely pay his individual income tax liabilities and penalties as required by 26 U.S.C. §§ 6011, 6012, and 6072 [the failure to pay citation should have included §6151(a)] for tax years 2001 through 2007. The Decision and Order and account transcripts evidence that as of shortly before the date that the Complaint was filed that Mr. Craft owed taxes, penalties and interest as follows:

Tax Year	Taxes, penalties, and interest owing
2001 (count 2)	\$20,247.30
2002 (count 4)	\$21,533.88
2003 (count 6)	\$22,399.38
2004 (count 8)	\$12,947.50
2005 (count 10)	\$14,099.71
2006 (count 12)	\$12,048.86
2007 (count 14)	\$11,459.64

The above liabilities leave an outstanding balance owing of more than \$100,000. Mr. Craft did not file returns for the above years until the IRS caught up with him, nor did he remit any payments of tax. Further, he did not remit any payments of tax for the years in question between the time he was contacted by the IRS and the commencement of this proceeding.

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. Craft may be censured, suspended, or disbarred from practice before the IRS. The Complaint states that with respect to each of the years in question failure to pay the assessed tax liabilities, interest and penalties was willful and constituted disreputable conduct within the meaning of §10.51 of Circular 230 for which Mr. Craft may be censured, suspended, or disbarred from practice before the IRS.

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<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.

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

Mr. Craft filed an Answer explaining the reasons for failing to timely file his returns, and OPR submitted a prehearing memorandum to which Mr. Craft did not respond. On December 13, 2010, OPR submitted a motion for summary judgment, to which Mr. Craft did not respond. In the Decision and Order, the ALJ found that (i) the counts for failure to timely file and evade payment are barred by the statute of limitations contained in 28 U.S.C. §2462 for the years 2001-04, (ii) Mr. Craft willfully failed to timely file his returns for all seven years at issue, and (iii) Mr. Craft willfully evaded payment of tax for the seven years in question. As to the sanction, the ALJ held that Mr. Craft “is held liable for willful failure to file returns and to pay taxes for three years rather than the seven years alleged in the Complaint, due to the statute of limitations” and that since three to four years of failing to timely file returns 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 the failure to pay counts in OPR practitioner proceedings; and (ii) the sanction should be modified to disbar Mr. Craft 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. Mr. Craft 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.

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.

OPR has asked to revisit the holding as it applies to a willful failure to pay count (the regulation has used slightly different phrasing as Circular 230 has been amended over the years, but the concept is that of willfully evading or attempting to evade payment of

any federal tax). In support of its position that discipline under the willful failure to pay count is remedial, OPR emphasizes that Mr. Craft's evasion was continuous through to the present time. 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 willfully evading or attempting to evade payment of tax. 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 willfully evading payment of taxes is a penalty within the meaning of §2462. As I stated in *Hernandez*, 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 willfully evading or attempting to evade the payment of tax 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 the years 2001-04 is no earlier than June 25, 2007, the date that the returns for those years were filed showing the amount of the tax due. However, 26 U.S.C. § 6151(a) provides the general rule that when a return of tax is required, the person required to make the return shall pay the tax to the IRS at the time fixed for filing, determined without regard to any extension of time for filing the return. No exceptions to the general rule apply here.<sup>2</sup> Thus, the statutory date on which payment is required is the date that begins the running of §2462 for a count based on willful failure to pay when the Count is based on nonfiling and nonpayment. A subsequent affirmative act in furtherance of the evasion could trigger a later date for the violation (*see e.g., United States v. Cowan*, 2009-2 USTC ¶150,613 (E.D. Tenn. 2009)), 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 the statutorily established payment date is the date that should be used to start the running of the statute of limitations.

Finally, in *Hernandez*, I found that the failure to file violation is not a continuing one and I believe that same principle applies here. In the event that the IRS initiated collection action and a taxpayer took action to secrete assets or otherwise evade or defeat payment that action might give rise to a new violation on that date (*see, e.g., Cowan, supra*); however, the continuing failure to make payment arrangements with the IRS will not result in a continuing violation. In the instant case there is no assertion of subsequent evasive actions – the failure to pay counts are based entirely on the failure to timely pay by April 15 of the following year and the continuing unpaid debt.

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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<sup>2</sup> Further, beginning the running of the statute on the date of filing would suggest that nonpayment did not become evasive until the date of filing.

initially identifies the failure to file or failure to pay 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 Mr. Craft a letter dated January 10, 2007 asserting that he had failed to file his personal income tax returns for 2001-05 (the file indicates that OPR was also aware that Mr. Craft had also failed to file his 1999 and 2000 tax returns), and stating that further action would not be taken for 30 days during which Mr. Craft could submit a response. On February 2, 2007, Mr. Craft sent OPR an extensive reply admitting that he had not filed the returns in question and describing his personal and financial difficulties over the preceding 12 years. Mr. Craft filed the returns for 2001-05 on June 25, 2007, but did not accompany them with payment. The file also contains a letter sent to Mr. Craft by OPR's counsel dated March 5, 2010, stating that OPR had sent Mr. Craft letters on January 10, 2007; April 18, 2008; and October 6, 2009; concerning his eligibility to practice and asserting that he had also failed to timely file his 2006 and 2007 tax returns (he had filed them on December 4, 2009). Mr. Craft also failed to file his returns for 2008 and 2009 as of shortly before the Complaint was filed. It is unclear from the file whether or to what extent Mr. Craft 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 Mr. Craft as a non-filer and non-payer 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 to become tax compliant to encourage voluntary compliance and minimize the use of government resources. Further, that sometimes a practitioner that has been personally noncompliant will demonstrate fitness to practice by correcting the non-compliance subsequent to OPR contact.

Mr. Craft's track record as described above is that of a practitioner who makes a living preparing the tax returns of others but who had for numerous years exited completely from complying with the law as far as filing his own required returns or paying his taxes. Further, upon being contacted by the IRS, he was not forthcoming with any payment. I would have thought that under the circumstances that it would have been an easy decision that Mr. Craft 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 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 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 for some years.

Accordingly, I affirm the conclusions of law contained in the Default Order on the statute of limitations issues and conclude that only the violations for the tax years 2005-07 provide the basis for bringing a disciplinary action.

### 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 the three most recent years 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 Mr. Craft 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 failure to pay 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 the 2001-04 evasion counts those years 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."

In several previous cases, I deferred to OPR as to this pro-practitioner position, but I decline to do so here.<sup>3</sup> The record contains clear and convincing evidence as to Mr.

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<sup>3</sup> In the future, if OPR wants to achieve its policy objective, it may do so by not including a practitioner's filing history for years barred by §2462 in the record. However, a practitioner may attempt to provide

Craft's willful failure to file and evade payment for the 2001-04 years, and I believe that considering a practitioner's record of compliance 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 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. Mr. Craft's compliance with the tax laws or the lack thereof in the years 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, Mr. Craft's filing and payment record as to the years 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 (7<sup>th</sup> Cir. 2006), *cert. denied*, 2006 U.S. Lexis 8059 (2006).

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context to failure to file and/or pay violations and mitigate the sanction by demonstrating compliance in the immediate years 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, 2005-07. Accordingly, I do not see any impediments to the consideration of Mr. Craft's conduct in 2001-04 in imposing a sanction.<sup>4</sup>

For the years 2005-07, Mr. Craft filed only after he was contacted by OPR. In similar cases, the sanction for similar failure to timely file violations alone have typically been a suspension for 24 months. *See generally, Director, OPR v. Baldwin*, Complaint No. 2010-08 (June 2, 2011) in which I set out relevant facts and circumstances in failure to file and timely file cases. However, this case is different from the typical failure to timely file case. In addition to not filing Mr. Craft has also been found to have willfully evaded or attempted to evade payment of tax for these same years.

A baseline sanction for a practitioner who has attempted to exit entirely from compliance both with regard to his duty to timely file returns and his duty to pay his taxes in the above amounts for three years 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, Mr. Craft's consistent pattern of noncompliance for the years immediately preceding those for which counts were properly sustained make clear the character of Mr. Craft's 2005-07 violations. Mr. Craft clearly intended to exit for a very extended period or permanently from his responsibilities to file income tax returns and pay taxes to the extent that he could get away with it. Secondly, OPR's delay in initiating this Complaint gave Mr. Craft several years to right the situation, but Mr. Craft not only did not engage in any attempt to make any payments of his tax liabilities for the years in question but he continued to fail to timely file. 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 Mr. Craft and to the extent not mentioned herein, I find them to be irrelevant or without merit.

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<sup>4</sup> 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. 4<sup>th</sup> 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. 4<sup>th</sup> 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; (8<sup>th</sup> 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 C. Wesley Craft 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:

C. Wesley Craft  
Redacted  
Dawson, GA 39842

First Class U.S. Mail:

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

Karen L. Hawkins  
Director, Office of Professional Responsibility  
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/s/

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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 12, 2011  
Lanham, MD