

United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellant

v.

Complaint No. 2009-09

James E. Barr,
Respondent-Appellee

Decision on Appeal

Authority

Under the authority of General Counsel Order No. 9 (January 19, 2001) and the authority vested in him as the Chief Counsel of the Internal Revenue Service (IRS), through a delegation order dated March 2, 2011, William J. Wilkins delegated the undersigned 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 June 28, 2010.

Procedural History

This proceeding was commenced on February 26, 2010, when the Complainant-Appellant Director of the Office of Professional Responsibility (OPR) filed a Complaint against Respondent-Appellee James E. Barr ("Mr. Barr") dated February 25, 2010. The Complaint alleges that Mr. Barr 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 2006 and willfully failed to file a federal income tax return for tax years 2006 and 2007 as shown in tabular form below:

Tax Year	Original Return Due Date ¹	Extended Return Due Date	Date IRS Received the Return
2001	April 15, 2002	August 15, 2002	December 4, 2003
2002	April 15, 2003	August 15, 2003	October 11, 2005
2003	April 15, 2004	August 15, 2004	November 8, 2005
2004	April 15, 2005	August 15, 2005	June 29, 2007
2005	April 15, 2006	October 15, 2006	No return filed
2006	April 15, 2007	n/a	No return filed

The Complaint states that with respect to each of the years in question such willful failure to file a timely return or file a return constituted incompetence and disreputable conduct within the meaning of §10.51 of Circular 230 for which Mr. Barr may be censured, suspended, or disbarred from practice before the IRS. The Complaint requested a suspension from practice for a period of 48 months, with reinstatement thereafter being at the sole discretion of OPR and, at a minimum, requiring that Mr. Barr have filed all federal tax returns and paid all outstanding tax liabilities, or to have entered into an installment agreement or offer in compromise which has been accepted by the IRS and with which Mr. Barr has remained in compliance.

Mr. Barr did not file an Answer to the Complaint. On May 19, 2010, OPR filed a motion for decision by default. On June 28, 2010, the ALJ entered a Default Order suspending Mr. Barr indefinitely from practice before the IRS, with reinstatement to practice thereafter at the sole discretion of OPR. In entering the Order, the ALJ found that the five year statute of limitations in 28 U.S.C §2462 applied to this Circular 230 disciplinary proceeding. Further, since the counts for 2001, 2002, and 2003, accrued on August 15, 2002, August 15, 2003, and August 15, 2004, and the Complaint was filed on February 26, 2010, more than five years later, the ALJ found that those counts could not be grounds on which to enforce a penalty. The Default Order found that the failures to file or timely file for 2004-06 were willful. The Default Order reasons that because OPR had sought a 48 month suspension for four years of late filing and two years of non-filing, and that since the three earliest years of late filing were time barred that an indefinite suspension was warranted, which allows OPR “complete discretion to determine when [Mr. Barr] may be reinstated.” Default Order at 7.

OPR filed an appeal asserting that the Default Order was in error as (i) 28 U.S.C. §2462 does not apply to OPR practitioner proceedings; (ii) even if §2462 applies, the claim did not accrue until the “date of discovery,” that is, when OPR learned of the delinquent or non-filing; and (iii) alternatively, the willful failure to file is a continuing violation and that the statute of limitations is triggered only when the acts in violation cease. OPR requests that the sanction be modified to 48 months rather than an indefinite suspension, which it views as more serious than an indefinite suspension. Further,

¹ 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.

OPR states that if §2462 is found to apply, time-barred violations should not be considered as aggravating factors in the sanction determination.

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

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. Those holdings apply to the instant case which is factually and legally indistinguishable. 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 2004-06 provide the basis for bringing a disciplinary action.²

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 48 months, based on the failure to file or timely file for six 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 Default Order purports to impose a lesser sanction - it provides for an indefinite suspension which allows OPR "sole discretion" to determine when Mr. Barr may be reinstated. Default Order at 7. This would seem to allow OPR to suspend Mr. Barr for exactly 48 months or for a shorter or conceivably a longer period within its sole discretion. However, OPR has appealed the indefinite suspension as being less severe than a 48 month suspension because Mr. Barr may seek readmission immediately and repeatedly. OPR also expresses concern that that an indefinite suspension will not

² OPR's claim that a suspension is needed to protect the public is undercut by its not instituting this proceeding until more than two years after substantiating Mr. Barr's violations and providing him with an opportunity to present his case. Without this delay OPR would have had valid counts for at least two additional years.

provide clarity to practitioners regarding the severity of the sanction for comparable misconduct.

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 such as Mr. Barr, 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.

Circular 230 does not provide specific guidance as to the application of aggravating or mitigating factors (*see* §10.50(d), which provides that sanctions shall take into account all relevant facts and circumstances) in imposing an appropriate sanction. OPR has requested that if §2462 is found to bar the counts for the three earliest years that Mr. Barr's late filings for those years not be considered as aggravating factors in imposing a sanction (*Cf., Director, OPR v. Kilduff*, Complaint No. 2008-12 (Decision on Appeal, January 20, 2010) at p. 3, wherein OPR alleged nonfiling for years prior to the counts alleged in the Complaint as "background facts."). Since Mr. Barr has not responded and it is in his interest, I will assume that he does not disagree.

Accordingly, I will determine the sanction based on the counts for 2004 through 2006, without any consideration of 2001 through 2003. With regard to failure to file and timely file, the determination of the sanction will ordinarily involve considering the following relevant facts and circumstances. First is the number of years at issue, the greater the number of years warranting a greater suspension. Second is how recent the violations occurred, more recent violations being of greater weight. Third are the specifics as to the filing of the return - a failure to file by the date that OPR files its Complaint is the much more serious violation, followed by a delinquent filing that occurs after the practitioner was contacted by OPR, followed by a delinquent filing that the practitioner filed before being contacted by OPR, with the amount of tardiness an additional consideration. Fourth are other factors relating to the return such as whether the returns in question are refund returns or balance due returns and the extent thereof. Fifth are the practitioner's personal circumstances as to the failure to file or timely file.

The Default Order was entered based only on the Complaint which did not contain information on some of the facts and circumstances above, and OPR has not significantly elaborated on the facts and circumstances in its appeal. However, the

