

United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellant

v.

Complaint No. 2010-10

Lily Y. Lee,
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 15, 2010.

Procedural History

This proceeding was commenced on April 13, 2010, when the Complainant-Appellant Director of the Office of Professional Responsibility (OPR) filed a Complaint against Respondent-Appellee Lily Y. Lee ("Ms. Lee). The Complaint alleges that Ms. Lee has engaged in practice before the IRS, as defined by §10.2(a), as an enrolled agent and further, that she willfully failed to timely file a federal income tax return as required by 26 U.S.C. §§ 6011, 6012, and 6072 for tax years 2002 through 2005 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
2002	April 15, 2003	October 15, 2003	April 24, 2005
2003	April 15, 2004	October 15, 2004	April 15, 2006
2004	April 15, 2005	August 15, 2005	October 17, 2005
2005	April 15, 2006	October 15, 2006	May 5, 2008
2006	April 15, 2007	n/a	No return filed
2007	April 15, 2008	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 Ms. Lee may be censured, suspended, or disbarred from practice before the IRS. The Complaint requested a suspension from practice for a period of 40 months, with reinstatement thereafter being at the sole discretion of OPR and, at a minimum requiring that Ms. Lee 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 Ms. Lee has remained in compliance.

Ms. Lee did not file an Answer to the Complaint. On June 15, 2010, the ALJ *sua sponte* entered a Default Order suspending Ms. Lee 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 2002 and 2003, accrued on October 15, 2003, and October 15, 2004; and the Complaint was filed on April, 13, 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 reasons that because OPR had sought a 40-month suspension for four years of late filing and two years of non-filing, and that since the two earliest years of late filing were time barred, that an indefinite suspension was warranted, which allows OPR “complete discretion to determine when [Ms. Lee] 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, that 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 40 months rather than an indefinite suspension, which it views as more serious than an indefinite suspension. Further, OPR states that if §2462 is found to apply, time-barred violations should not be considered as aggravating factors in the sanction determination.

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.

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 2004-07 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 40 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 four most recent years may be properly charged. Because less 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 Ms. Lee may be reinstated. Default Order at 7. This would seem to allow OPR to suspend Ms. Lee for exactly 40 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 40 month suspension because Ms. Lee may seek readmission immediately and repeatedly. OPR also expresses concern that that an indefinite suspension will not 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

² OPR's claim that a suspension is needed to protect the public is undercut by its not instituting this proceeding until almost two years after substantiating Ms. Lee's violations practice and providing her with an opportunity to present her case. Without this delay OPR would have had valid counts for all six years.

OPR consensually as provided for in §10.61 of Circular 230, should have her 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 Ms. Lee, 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 two earliest years that Ms. Lee'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 Ms. Lee has not responded and it is in her interest, I will assume that she does not disagree.

Accordingly, I will determine the sanction based on the counts for 2004 through 2007, without any consideration of 2002 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 evidence in support of the Complaint submitted with the appeal contains background information and as Ms. Lee has chosen not to participate in this proceeding, I will make due [sic] with the evidence that is available.

Based on Ms. Lee's failure to timely file for 2004 and 2005 and failure to file for 2006 and 2007, I hereby impose a suspension of 36 months provided that Ms. Lee is in compliance with the tax laws at that time. Had all of the counts been sustained, I would have imposed a suspension of 40 months. I impose this sanction because failure to timely file or file by a tax practitioner is a serious offense, and the four counts sustained together comprise a significant breach of a practitioner's responsibilities; I note that Ms. Lee had filed her delinquent 2004 return, but not her delinquent 2005 return before being contacted by OPR. The reason that the reduction in suspension is not proportionate with the number of counts that were not sustained is that the sustained years are more recent, and so should be given greater weight, and include two recent year of non-filed returns.

I have considered all of the arguments made by OPR and to the extent not mentioned herein, I find them to be irrelevant or without merit.

Conclusion

For the reasons stated above, Ms. Lee is suspended from practice before the IRS for a period of 36 months, provided that Ms. Lee will be reinstated thereafter on application to OPR provided that she is still eligible to practice under §10.3 of Circular 230, if she has at that time proven to OPR that she has filed all federal tax returns that are due and paid all outstanding liabilities for the same for which she is responsible or has entered into an installment agreement or offer in compromise which has been accepted by the IRS and with which she has remained in compliance, and subject to conditions as imposed by OPR under §10.79(d) of Circular 230. 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)
June 13, 2011
Lanham, MD