Appellate Authority Confirms 5-Year Limitations Period for Nonpayment Disciplinary Cases

by Jeremiah Coder

Showing an independent streak, the Treasury appellate authority (AA) in an October 12 decision allowed the IRS Office of Professional Responsibility to disbar a CPA from practice for failure to timely file returns and failure to pay, disagreeing with an earlier holding by an administrative law judge. But the AA also confirmed the ALJ's holding that OPR is circumscribed in the length of time it can go back to claim ethical violations.

OPR's complaint against C. Wesley Craft began in 2010 and arose from his failure to timely file federal tax returns for 2001 through 2007, as well as the failure to pay associated tax liabilities for those years. OPR charged him with disreputable conduct under Circular 230 section 10.51. Although different versions of Circular 230 were in effect over the course of the years at issue, all three applicable versions provided that disreputable conduct included willful failure to file a federal tax return and evading payment of taxes.

In an initial decision and order on OPR's motion for summary judgment, the ALJ rejected OPR's argument that 28 U.S.C. 2462, a general five-year statute of limitations governing civil penalties imposed by the federal government, did not apply. The ALJ concluded that disbarment or suspension of practitioners under Circular 230 constitutes penalties under the terms of the statute. Although OPR maintained that the five-year limitations period does not begin until a tax return is filed, the ALJ declined to apply the analogy of section 6501(a)'s assessment period, because section 6501(a) turns on the date of filing, whereas section 2462 hinges on "the date when the claim first accrued." (For the ALJ's decision and order in the case, Director, OPR v. C. Wesley Craft, Complaint No. 2010-12, see Doc 2011-22025 or 2011 TNT 203-13 .)

Thus, OPR might be precluded from charges for the 2001-2004 tax years, the ALJ said, although it ultimately deemed a definitive ruling on that point unnecessary because the 2005-2007 year charges were sufficient to impose a sanction. The ALJ easily concluded that Craft's repeated failures to timely file his tax returns until many years after the due date (and only after OPR questioned his noncompliance) constituted "voluntary and intentional violations of a known legal duty and therefore 'willful.'"

Because of an absence of case law interpreting what it means to "evade" the payment of taxes under Circular 230 section 10.51(a)(6), the ALJ looked to several common dictionary definitions to conclude that "choosing not to file tax returns for several years with knowledge that they are required to be filed is a form of circumventing the tax law, which is illegal and which temporarily eliminates an assessment of, and thus liability for, taxes owed." The lack of any payment arrangement entered into by Craft with the IRS constituted prima facie evidence that he "has been willfully evading the payment of his tax liabilities," the ALJ said.

Focusing on the three years at issue in the complaint that were still unambiguously within the limitations period, the ALJ determined that the appropriate sanction was not disbarment as advocated by OPR, but rather a sanction of indefinite suspension.

Despite the favorable disposition for OPR in the matter, the agency appealed the case to the Treasury appellate authority. On review, the AA upheld the ALJ's determination that the section 2462 limitations period encompasses both failure to timely file and failure to pay charges by OPR because both are in the nature of penalties. The time period under section 2462 begins on the date of payment required by section 6151, the AA said, so the 2001-2004 years were excluded from OPR's complaint. The AA also concluded that "the continuing failure to make payment arrangements with the IRS will not result in a continuing violation." (For the AA's decision on appeal, see Doc 2011-22026 or 2011 TNT 203-14 .)

In determining the appropriate sanction, the AA agreed with OPR that disbarment of Craft was appropriate under the circumstances. But the AA's reason for doing so may not be completely palatable to OPR. In part, the AA found that an indefinite sanction was not permitted under Circular 230's provisions governing general disciplinary proceedings. "The purpose of the disciplinary proceeding is to have the sanction determined by the ALJ or the agency, not by OPR," he said. Consequently, practitioners "are entitled to a determinate sanction" so that the sanction "may be readily and unambiguously understood and complied with." An indefinite suspension does not meet those guidelines, he said.

The AA was also disinclined to accept OPR's argument that years barred under the statute of limitations should be considered in the sanction determination process. OPR said it was inappropriate "to consider past bad acts that can no longer be charged directly in the complaint," but the AA held 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." Past acts constitute relevant facts and circumstances, and "shed light on the character of the violations," the AA said.

In the case, Craft's nonfiling and nonpayment for three years merited suspension or disbarment as a baseline sanction, but the clear pattern of noncompliance in the preceding years showed that he "clearly intended to exit for a very extended period of time or permanently" his tax obligations, the AA said. Thus, disbarment "is the appropriate sanction," he concluded.

Charles J. Muller of Chamberlain, Hrdlicka, White, Williams & Aughtry told Tax Analysts that the AA's approach to determining a sanction by looking at a pattern of conduct makes sense. A pattern of conduct, even if it extends beyond the years for which OPR can bring a charge in a Circular 230 disciplinary case, is appropriate background information to help decide what the sanction should be, he said.

"It would be a mistake to treat a failure to pay as a continuing violation," Muller said, although he agreed that it might constitute an aggravating factor for the sanction determination. He said the notion that failure to pay can constitute evasion without other affirmative action disregards Supreme Court precedent (Spies v. United States, 317 U.S. 492, 499 (1943)) and could be grounds for an appeal.

Regarding application of section 2462, Muller said the AA was correct to consider sanctions for a practitioner's personal nonfiling and nonpayment as equivalent to a penalty. A practitioner's failure to file returns for a client should not be governed by the statute of limitations in section 2462, he said. It remains an unanswered question whether OPR has a time limit on taking action against a practitioner for that conduct, he said. (For prior coverage, see Doc 2011-13157 or 2011 TNT 116-1 .)

Prof. Michael B. Lang of Chapman University School of Law in Orange, Calif., said the AA's "consideration of other misconduct occurring during barred years is a significant decision." One reason is that "it somewhat undercuts the statute of limitations" if misbehavior in barred years can become factors in the sanction determination. Under the AA's reasoning, a single count of nonfiling or nonpayment could theoretically lead to disbarment because of behavior in other years not charged, Lang said, calling that possibility "worrisome."

Overall, the AA opinion reaffirms many of the same determinations made in previous decisions, Lang said, adding, "It is pretty clear that the appellate authority will generally not approve indefinite suspensions."