

United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellant

v.

Complaint No. 2009-09

(b)(3)/26 USC 6103,

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 (b)(3)/26 USC 6103 (“(b)(3)/26 USC 6103”) dated February 25, 2010. The Complaint alleges that (b)(3)/26 USC 6103 has engaged in practice before the IRS, as defined by §10.2, as a certified public accountant, and further, that (b)(3)/26 USC 6103

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. (b)(3)/26 USC 6103*, Complaint No. 2010-09 (Decision on Appeal, May 26, 2011), I held that (i) §2462 was applicable to OPR disciplinary proceedings with regard to (b)(3)/26 USC 6103 count, (ii) the date that the §2462 limitations period commences running is (b)(3)/26 USC 6103, and (iii) (b)(3)/26 USC 6103 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 (b)(3)/26 USC 6103 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. (b)(3)/26 USC 6103*, Complaint No. 2007-12 (April 21, 2009) at p. 3; *Director of OPR v. (b)(3)/26 USC 6103*, Complaint No. 2006-23 (April 2008) at p. 3; *Director, OPR v. (b)(3)/26 USC 6103*, Complaint No. 2007-08 (July 2008) at p. 4); *Director, OPR v. (b)(3)/26 USC 6103*, Complaint No. 2008-12 (January 20, 2010) at p. 6; *Director, OPR v. (b)(3)/26 USC 6103*, 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 (b)(3)/26 USC 6103, but, as stated above, because of §2462, only the violations for the (b)(3)/26 USC 6103. 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 (b)(3)/26 USC 6103 may be reinstated. Default Order at 7. This would seem to allow OPR to suspend (b)(3)/26 USC 6103 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 (b)(3)/26 USC 6103 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 (b)(3)/26 USC 6103 violations and providing him with an opportunity to present his case. Without this delay OPR would have had valid counts (b)(3)/26 USC 6103.

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 (b)(3)/26 USC 6103, 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 (b)(3)/26 USC 6103 not be considered as aggravating factors in imposing a sanction (*Cf., Director, OPR v. (b)(3)/26 USC 6103*, Complaint No. 2008-12 (Decision on Appeal, January 20, 2010) at p. 3, wherein OPR alleged (b)(3)/26 USC 6103 prior to the counts alleged in the Complaint as “background facts.”). Since Same 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 (b)(3)/26 USC 6103, without any consideration of (b)(3)/26 USC 6103. With regard to (b)(3)/26 USC 6103, the determination of the sanction will ordinarily involve considering the following relevant facts and circumstances. First is the (b)(3)/26 USC 6103, the greater the (b)(3)/26 USC 6103 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 (b)(3)/26 USC 6103 - (b)(3)/26 USC 6103 that OPR files its Complaint is the much more serious violation, followed by (b)(3)/26 USC 6103, followed by (b)(3)/26 USC 6103, with the amount of tardiness an additional consideration. Fourth are other factors relating to (b)(3)/26 USC 6103 such as whether (b)(3)/26 USC 6103 and the extent thereof. Fifth are the practitioner's personal circumstances as to (b)(3)/26 USC 6103.

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 (b)(3)/26 USC 6103 has chosen not to participate in this proceeding, I will make due [sic] with the evidence that is available.

Based on (b)(3)/26 USC 6103, I hereby impose a suspension of 40 months provided that (b)(3)/26 USC 6103. Had all of the counts been sustained, I would have imposed a suspension of 48 months. I impose this sanction because (b)(3)/26 USC 6103 by a tax practitioner is a serious offense, and the three counts sustained together comprise a significant breach of a practitioner's responsibilities. The reason that the reduction in suspension is not proportionate with the number of counts that were not sustained are that the sustained (b)(3)/26 USC 6103, and so should be given greater weight, and (b)(3)/26 USC 6103.

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, (b)(3)/26 USC 6103 is suspended from practice before the IRS for a period of 40 months, provided that (b)(3)/26 USC 6103 will be reinstated thereafter on application to OPR provided that he is still eligible to practice under §10.3 of Circular 230, if he has at that time proven to OPR that he (b)(3)/26 USC 6103, 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 16, 2011
Lanham, MD