# United States Department of the Treasury

Director, Office of Professional Responsibility, Complainant-Appellant

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Complaint No. 2009-09

(b)(3)/26 USC 6103

Respondent-Appellee

## **Decision on Appeal**

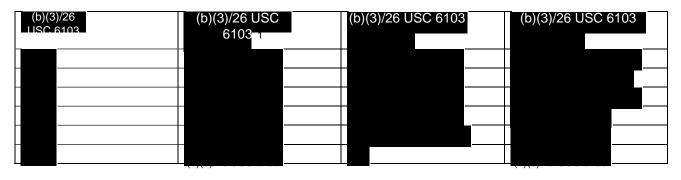
## <u>Authority</u>

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 ("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

# (b)(3)/26 USC 6103 as shown in tabular form below:



The Complaint states that with respect to

constituted incompetence and disreputable conduct within the meaning of §10.51 of Circular 230 for which 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 (b)(3)/26 USC 6103

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 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 (b)(3)/26 USC 6103 , accrued on (b)(3)/26 USC 6103 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 (b)(3)/26 USC 6103 . The Default Order reasons that because OPR had (b)(3)/26 USC 6103 sought a 48 month suspension and that since (b)(3)/26 USC 6103 were time barred that an indefinite suspension was warranted, which allows OPR "complete discretion to determine when (b)(3)/26 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 (b)(3)/26 USC 6103 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. Further,

(b)(3)/26 USC 6103 , which have no bearing on the result herein.

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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 (103), 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 (count, (iii) the date that the §2462 limitations period commences running is (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences and (iii) (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences running is (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences and (iii) (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences running is (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences and (iii) (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences running is (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences running is (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences running is (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences running is (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences running is (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences running is (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences running is (b)(3)/26 USC 6103 (count, (iii) the date that the §2462 limitations period commences running is (count, (iii) the date that the §2462 limitations period commences running is (count, (iii) the date that the §2462 limitations period commences running is (count, (iii) the date that the §2462 limitations period count, (iii) the date that the §2462 limitations period count, (iii) the date that the §2462 limitations period count, (iii) the da

# 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 (JSC 6103), Complaint No. 2007-12 (April 21, 2009) at p. 3; Director of OPR v. (b)(3)/26 (JSC 6103), Complaint No. 2006-23 (April 2008) at p. 3; Director, OPR v. (b)(3)/26 (JSC 6103), Complaint No. 2008-12 (January 20, 2010) at p. 6; Director, OPR v. (b)(3)/26 (JSC 6103), Complaint No. 2008-12 (January 20, 2010) at p. 6; Director, OPR v. (b)(3)/26 (JSC 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 but, as stated above, because of §2462, only the violations for the (b)(3)/26 USC 6103

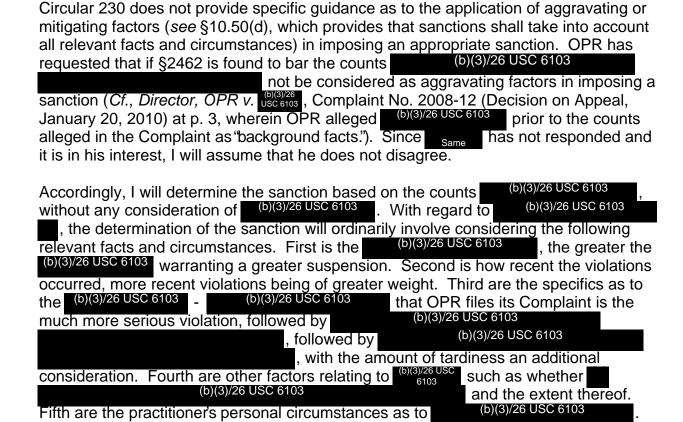
Because fewer counts were sustained, the Default Order purports to impose a lesser sanction - it provides for an indefinite suspension which allows OPR "sole discretion" to determine when sign may be reinstated. Default Order at 7. This would seem to allow OPR to suspend for exactly 48 months or for 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 of §2462, only the violations for the Because fewer counts were sustained, the Default Order purports to impose a lesser sanction - it provides for an indefinite suspension with may be reinstated. Default Order at 7. This would seem to allow OPR to suspend of the indefinite suspension as being less severe than a 48 month suspension because of §2462, only the violations for th

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<sup>&</sup>lt;sup>2</sup> 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 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

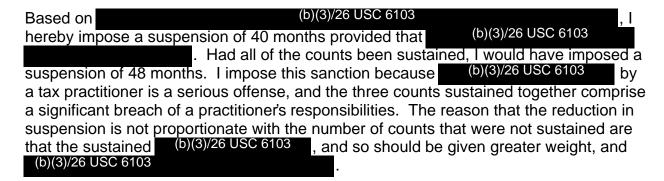
provide clarity to practitioners regarding the severity of the sanction for comparable misconduct.

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 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.



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 has chosen not to participate in this proceeding, I will make due [sic] with the evidence that is available.



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, USC 6103 is suspended from practice before the IRS for a period of 40 months, provided that 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