United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellant

V. Complaint No. 2009-16

(b)(3)/26 USC 6103, CPA
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, reprinted by the Treasury Department and hereinafter referred to as Circular 230). This is such an appeal from a Decision entered into this proceeding by Administrative Law Judge Susan L. Biro (the ALJ) on April 15, 2010.

Background

This expedited proceeding was commenced on November 13, 2008, when the Complainant-Appellant Director of the Office of Professional Responsibility (OPR) issued an Expedited Proceeding Complaint against Respondent-Appellee [redacted] (b)(3)/26 USC 6103, a Certified Public Accountant, based on (b)(3)/26 USC 6103 's September 29, 2008, conviction for aiding and abetting in the failure to pay income tax, in violation of 26 U.S.C. §7203. The Complaint sought to suspend (b)(3)/26 USC 6103 on an expedited basis. (b)(3)/26 USC 6103 filed an answer on December 10, 2008, requesting that the Complaint be dismissed or that he be granted 30 days to prepare a defense and brief in support, and further, that the Complaint be referred to an administrative law judge or that he be granted a conference with OPR. On January 13, 2009, following a telephone conference with (b)(3)/26 USC 6103 and OPR, OPR issued a January 13, 2009 decision indefinitely suspending him from practice due to his conviction as per §10.82 of Circular 230 (Rev. 4-2008).

(b)(3)/26 USC 6103 contested the decision, and on March 20, 2009, OPR issued the instant Complaint under §10.60 of Circular 230, alleging in one count that (b)(3)/26 USC 6103 's

criminal conviction evidenced his engagement in disreputable conduct warranting his indefinite suspension under §§10.50, 10.51, 10.52, 10.76 and 10.82 of Circular 230.

(b)(3)/26 USC 6103 filed an extensive Answer. Prehearing memoranda and proposed evidence were submitted, and a hearing was held on October 27-28, 2009. The ALJ's Initial Decision and Order (IOD) dated April 15, 2010, found that (b)(3)/26 USC 6103 's criminal offense was disreputable conduct within § 10.51(a)(1) of Circular 230, and imposed a sanction of suspension from practice before the IRS for a period of two years from the date his probation went into effect, September 29, 2008, so that the suspension would be lifted on September 29, 2010, upon the condition that [redacted] (b)(3)/26 USC 6103 's probation had not been revoked.

On May 14, 2010, OPR timely appealed the decision of the ALJ as to the length of the suspension and its commencement date. On June 25, 2010, (b)(3)/26 USC 6103 filed a response and both parties have submitted subsequent filings. I was appointed as Appellate Authority on March 4, 2011.

Findings of Fact and Discussion

The Appellate Authority reviews the ALJ's findings of fact under a clearly erroneous standard of review. Section 10.78 of Circular 230.

The Complaint alleges that (b)(3)/26 USC 6103: (i) has engaged in practice before the Internal Revenue Service, as defined by §10.2(d) of Circular 230 as a Certified Public Accountant[1], and (ii) engaged in disreputable conduct for which a practitioner may be sanctioned, specifically, that he had been convicted of a criminal offense under the federal tax laws. (b)(3)/26 USC 6103 was convicted of aiding and abetting in the commission of a violation of 26 U.S.C. §7203, which is a federal tax law.

The charges, history, and the course of the criminal proceedings are described in detail in the ALJ's IDO. In short, the charge against (b)(3)/26 USC 6103 was set forth in a Superseding Information that alleged that (b)(3)/26 USC 6103 "did knowingly and willfully aid and assist one Earl Wolfe in the failure to pay income taxes for the tax year 2004, in that Earl Wolfe ... who had taxable income of at least $80,000, on which taxable income was owed to the United States of America, and who was required by law on or before April 15, 2005 to pay said income tax to the Internal Revenue Service, failed to do so." (b)(3)/26 USC 6103 testified under oath that he had read the Superseding Information in its entirety and he pled guilty on August 4, 2008. (b)(3)/26 USC 6103 executed a plea agreement that included the following stipulations, which are also contained on pp. 4-5 of the ALJ's IDO:

> The defendant, (b)(3)/26 USC 6103, aided and assisted by willful blindness Earl Wolfe in failing to pay his 2004 income tax liability. On

[1] The Complaint references Circular 230 as revised on June 20, 2005; practice before the IRS is now defined in §10.2(a)(4) of Circular 230 (Rev. 4-2008).

November 20, 2003, defendant (b)(3)/26 USC 6103 caused the creation of Sun Blest Design, LLCs ([sic], an entity used to conceal income earned by Earl Wolfe as a draftsman. In 2004, in exchange for services provided by Wolfe, clients were directed to make payments by check to Sun Blest Designs. Wolfe would then cash these checks at a check cashing store. When the check cashing store realized Earl Wolfe was not a member of Sun Blest Design, LLC, the owner of the check cashing store required a letter from the defendant authorizing Wolfe to cash checks payable to Sun Blest Designs. The defendant provided such letter.

(b)(3)/26 USC 6103 arranged a private financing deal between Wolfe, Edell, and a third party for their home. At the time of the real estate closing, (b)(3)/26 USC 6103 became aware that Wolfe and Edell's personal residence was in the name of the Office of the Presiding Overseer of the Domicile Creators Services Ministry and His Successors.

Additionally, (b)(3)/26 USC 6103 opened a bank account in the name of Sun Blest Design [sic] using the Employee [sic] Identification Number of Sun Blest. Wolfe and (b)(3)/26 USC 6103 were the signatories on the account. (b)(3)/26 USC 6103 used the account to pay for construction expenses associated with the home of Wolfe and Edell. When questioned by investigators about the existence of the account, (b)(3)/26 USC 6103 transferred much of the remaining balance to additional bank accounts under his control and continued to pay Wolfe and Edell's expenses.

As a Certified Public Accountant, (b)(3)/26 USC 6103 is aware of collection actions which can be used by the Internal Revenue Service, including liens and levies. He also understands that if Wolfe's name and social security number are not associated with assets he controls, it is more difficult for the Internal Revenue Service to take such collection action.

(b)(3)/26 USC 6103, in his capacity as a Certified Public Accountant with extensive experience knew or should have known that his actions would allow Wolfe to conceal his income from third parties, including the Internal Revenue Service, and would therefore allow Wolfe to not pay his income tax liability for tax year 2004. The defendant deliberately and consciously closed his eyes to what he had every reason to believe was a fact. The tax loss to the United States for tax year 2004 was between $12,500 but less than $30,000.

On September 29, 2008, the U.S. District Court for the Southern District of Florida imposed a sentence on (b)(3)/26 USC 6103 of three years probation including 90 days of home detention, 250 hours of community service, a $3,000 fine, and a $25 assessment.

The ALJ's extensive findings of fact are well supported by the record and are not clearly erroneous. (b)(3)/26 USC 6103 's guilty plea establishes that he engaged in disreputable conduct within the meaning of § 10.51 (a)(1) of Circular 230.

Appropriate Sanction

Section 10.78 of Circular 230 provides that the decision of the ALJ will not be reversed unless the appellant establishes that the decision is clearly erroneous in light of the evidence in the record and applicable law. Issues that are exclusively matters of law will be reviewed de novo. My predecessors have applied a *de novo* standard on the matter of sanctions either explicitly (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) or implicitly (see *Director, OPR v.* Same, 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). However, I have a definite conviction under either a *de novo* standard or a standard deferential to the ALJ, that a mistake has been committed both in setting the commencement date for the suspension as well as in determining its length. Therefore, I modify the suspension imposed by the ALJ for the reasons below.

First, the ALJ imposed a sanction of two years that commenced on the day of [redacted] (b)(3)/26 USC 6103 's criminal probation, September 29, 2008. However, (b)(3)/26 USC 6103 was not suspended from practice by the OPR until January 13, 2009, and I find that January 13, 2009, should be the date from which (b)(3)/26 USC 6103 's suspension commences.

Second, the ALJ's IDO uses the three year period of (b)(3)/26 USC 6103 's probation as a departure point from which to consider the appropriate period of suspension given (b)(3)/26 USC 6103 's violation (IDO at p. 37) before consideration of the mitigating factors. I find that a conviction of knowingly and willfully assisting in the failure of another to pay income tax, albeit as a misdemeanor, is a very serious charge that strikes at the heart of the agency's mission and is directly contrary to the duties of one who practices before the IRS. It casts serious doubt as to a tax practitioner's suitability to practice before the IRS for an extended period of time. A three year-baseline is the minimum baseline or departure point from which to consider the appropriate period of suspension for conviction of this crime before consideration of aggravating or mitigating factors.

Third, after considering aggravating and mitigating factors the ALJ adjusted the period of suspension to two years. In my opinion, the mitigating factors stated (see IDO at 32-38) are, at the least, completely offset by two very seriously aggravating factors, (b)(3)/26 USC 6103 's false and misleading statements during the disciplinary process and his lack of remorse and attitude towards his crime and conviction ((iv) and (v) below).

The factors considered by the ALJ, along with my view of the factors are as follows:

(i) That (b)(3)/26 USC 6103 's lack of recent prior disciplinary offenses is a mitigating factor - I agree, but believe that this is to be expected of practitioners.

(ii) That [redacted] 's lack of a dishonest or selfish motive is a mitigating factor- I agree.

(iii) That as to whether [redacted] engaged in a pattern of misconduct is a neutral factor I agree. On the one hand [redacted] aided a single person for a single tax year, but on the other hand, he conducted multiple acts over an extended period.

(iv) That as to whether [redacted] made false statements and engaged in deceptive practices during the disciplinary process, the IDO found that [redacted] engaged in misrepresentations that were an aggravating factor, but that his cooperation in the disciplinary process was a mitigating factor, and that [redacted] 's appearance pro se supports lenience as to his misrepresentations. I disagree and find that this is a severely aggravating factor. During the administrative proceeding [redacted] stated that he falsely testified in the criminal proceeding (IDO at p. 15). The ALJ found that "[redacted] 's] testimony as a whole lacked consistency, cohesion, conviction, reflectiveness, and thoughtfulness." Further, that [redacted] 's testimony "gave the clear impression of the existence…[sic] on his part to compromise his honesty and integrity, even in a formal legal proceeding to accomplish an immediate desired goal, a characteristic which seriously adversely affects his fitness to hold a position of trust as a practitioner before the IRS." IDO at p. 26. However, in evaluating this factor the ALJ found that "[a]dvocacy and persuasiveness should not advance to the level of misrepresentation, but where the respondent is pro se, leniency must be granted (IDO at 33-34). I find that giving false and misleading testimony in a formal administrative proceeding, and stating that one has done so in a criminal proceeding are very serious aggravating factors especially in reference to [redacted] 's suitability to practice before the IRS. Whatever, leniency is given to pro se litigants in their testimony should not be granted to a litigant in a proceeding where the issue in the proceeding is the fitness of said litigant to speak truthfully for others in a representational capacity before the same agency. I am unable to find [redacted] 's cooperation in the disciplinary process to be a mitigating factor under the circumstances.

(v) That [redacted] 's lack of remorse is an aggravating factor - I agree, but believe that [redacted] 's continuing lack of remorse, his inability to own up to his own behavior, and his ongoing indignation at the prosecutors, revenue agents, and his own lawyer (see IDO at pp. 14-15, 34, and 38) are very serious aggravating factors and reflect poorly upon his ability to represent taxpayers before the IRS. [redacted] has attacked his own plea claiming that he made false statements under oath in pleading guilty (IDO at 15), and that the case against him was based on prosecutorial misconduct and federal agents lying to judges (IDO at 20-21). He continues to make this argument after receiving the ALJ's opinion.[2]

[2] Even after receiving the IDO [redacted] (b)(3)/26 USC 6103 has continued in the same vein. In his June 25, 2010 response in this proceeding at pp. 24-25 he accuses the special agents of lying and getting the wrong guy, and the prosecutors of misconduct.

(vi) That (b)(3)/26 USC 6103 's 35 years of experience should have raised concern about his dealing with Mr. Wolfe - I agree.

(vii) That (b)(3)/26 USC 6103 's reputation among his colleagues, clients, and friends was excellent and that this is a mitigating factor - I agree.

(viii) That with regard to the imposition of other penalties that [redacted] 's concern about losing his CPA license if suspended is not a mitigating factor and that the punishment imposed on [redacted] in the criminal case is a mitigating factor - I agree.

(ix) That [redacted] 's personal problems and physical disabilities are not a mitigating factor, but that his advanced age (63) and family responsibilities are mitigating factors - I agree. I note that in OPR v. [redacted], supra at p. 6 my predecessor held that age was not a mitigating factor but I find it impossible not to have some sympathy with [redacted].

(x) That efforts at restitution were a neutral factor- I agree.

(xi) That publicity about the arrest and conviction was a neutral factor- I agree.

I find that two of the above aggravating circumstances, (b)(3)/26 USC 6103 's [sic] lack of concern with telling the truth in sworn testimony in the U.S. District Court (if his statements described in the IDO are to be believed) and in his testimony in the disciplinary proceeding, and his lack of remorse, are most directly applicable to determining his current suitability to practice before the IRS, and that both weigh very heavily against suitability. I find the mitigating factors to be of much lesser import in determining an appropriate suspension, and find that that when the aggravating and mitigating factors are considered as a whole, they do not support a downward adjustment from a three year suspension from January 13, 2009.

Fourth, OPR requests that additional conditions be imposed upon (b)(3)/26 USC 6103 's reinstatement, including that he (b)(3)/26 USC 6103 and not have engaged in any other criminal conduct. I agree with the ALJ that those conditions are unnecessary for the reasons stated in the IDO.

I have considered all of the arguments made by OPR and (b)(3)/26 USC 6103, and to the extent not mentioned herein, I find them to be irrelevant or without merit.

Conclusion

For the reasons stated, I hereby determine that (b)(3)/26 USC 6103 is suspended from practice before the IRS for a period of 36 months, commencing on January 13, 2009, and running until January 13, 2012. This constitutes FINAL AGENCY ACTION in this proceeding.

Bernard H. Weberman
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of
the Secretary of the Treasury)

March 31, 2011
Lanham, MD