United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellant

v. Complaint No. 2010-09

(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, 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 of 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 (b)(3)/26 USC 6103 ("(b)(3)/26 USC 6103"). The Complaint alleges that (b)(3)/26 USC 6103 has engaged in practice before the IRS, as defined by §10.2(a)(1) of Circular 230, as an attorney. Further, that he (b)(3)/26 USC 6103

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

(b)(3)/26 USC 6103	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103
	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103
	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103
	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103
	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103

The Complaint states that, with respect to (b)(3)/26 USC 6103 constituted incompetence and disreputable conduct within the meaning of §10.51 of Circular 230 for which (b)(3)/26 USC 6103 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 that (b)(3)/26 USC 6103.

(b)(3)/26 USC 6103 did not file an Answer to the Complaint. On June 15, 2010, the ALJ *sua sponte* entered a Default Order suspending (b)(3)/26 USC 6103 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. The ALJ also found that since the counts for 2001, 2002, and 2003 accrued on (b)(3)/26 USC 6103, respectively, and the Complaint was filed on April, 13, 2010, more than five years later, those counts could not be grounds on which to enforce a penalty. The Default Order reasons that because OPR had sought a four-year suspension for (b)(3)/26 USC 6103 and that since (b)(3)/26 USC 6103 were time barred, an indefinite suspension was warranted, which allows OPR "complete discretion to determine when (b)(3)/26 USC 6103 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; and (iii) alternatively, (b)(3)/26 USC 6103 is a continuing violation and that the statute of limitations is triggered only when the violative acts cease. OPR requests that the sanction be modified to 48 months rather than an indefinite suspension, which it views

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

as more serious than an indefinite suspension. Further, OPR states that if §2462 is found to apply, that time-barred violations should not be considered as an aggravating factor 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 findings of fact are well supported by the record and are not clearly erroneous.

Analysis as to §2462

The Appellate Authority reviews the ALJ's findings as to issues that are exclusively matters of law de novo. Section 10.78 of Circular 230. The application of §2462 is exclusively a matter of law.

(i) Applicability of §2462 to this OPR Disciplinary Proceeding Generally.

28 U.S.C. §2462 provides in part:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . .

OPR argues that the authority to regulate practice before the IRS as set forth in 31 U.S.C. §330 and the implementing regulations contained in Circular 230 are remedial in nature, and do not involve the enforcement of a civil fine, penalty, or forfeiture.[2] A previous Appellate Authority held in an unpublished decision that §2462 is generally not applicable to OPR disciplinary proceedings absent a finding that the primary purpose of a particular proceeding was penal. *See Director, OPR v. Francis*, Complaint No. 2004-09, p. 12, n. 15 (Decision on Appeal, February 4, 2008). OPR emphasizes that in this particular case there were no findings that the primary purpose of this proceeding was penal as opposed to remedial. In this connection, the ALJ recognized that the suspension from practice is imposed in furtherance of the IRS regulatory duty to protect the public interest and the Treasury Department by conducting business with responsible persons only. Default Order at 5.

The five-year limitations period provided for in §2462 has been held to apply to administrative proceedings such as this one. *3M Co. v. Browner*, 17 F.3rd 1453 (D.C. Cir. 1994). The question remains whether a suspension for (b)(3)/26 USC 6103 is punitive, in which case the five year limitation period provided for in §2462 would apply, or is remedial, in which case it would not apply.

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[2] However, that section specifically provides that the Secretary may impose a "monetary penalty" even though such a penalty is not proposed here.

In *Johnson v. Securities and Exchange Commission*, 87 F.3d 484, 488-89 (D.C. Cir. 1996), the D.C. Circuit considered the imposition by the SEC of a six-month license suspension on a securities industry supervisor for failing to adequately supervise a subordinate to be a penalty within the meaning of §2462. The court found that a penalty, within the meaning of §2462, is a form of punishment imposed by the government for unlawful or proscribed conduct "which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Id.* at 488. "[T]he test for whether a sanction is sufficiently punitive to constitute a 'penalty' within the meaning of §2462 is an objective one, not measured from the subjective perspective of the accused (which would render virtually every sanction a penalty)," but "the degree and extent of the consequences to the subject of the sanction must be considered as a relevant factor in determining whether the sanction is a penalty." *Id.* The court noted that "[t]his sanction would less resemble punishment if the SEC had focused on Johnson's current competence or the degree of risk she posed to the public," and that "it is evident that the sanctions here were not based on any general finding of Johnson's unfitness as a supervisor, nor any showing of the risk she posed to the public," but rather her failure reasonably to supervise a subordinate. *Id.* at 489. The court explicitly rejected a public policy exception for government agencies protecting public interests (*Id.* at 492). The court found that the §2462 limitations period applied with respect to the SEC's proposed suspension.[3]

In *Proffitt v. Federal Deposit Insurance Co.*, 200 F3d. 855 (D.C. Cir. 2000), the FDIC's removal of a banker from his position and his expulsion from the banking industry was held to constitute a penalty within the meaning of §2462. In *Coghlan v. NTSB*, 470 F.3d 1300, 1306 (11th Cir. 2006), revocation of an airline transport pilot certificate was held to be remedial as it implicated matters of air safety. In *Meadows v. SEC*, 119 F.3d 1219, 1228 (5th Cir. 1997), the temporary bar of a stockbroker who had misrepresented the risks of investing to investors was held to be remedial where the ALJ made specific findings as to lack of fitness and the danger posed to the investing public. In *SEC v. Microtune, Inc.*, 2011 U.S. Dist. LEXIS 14850 (N.D. Tex. 2011), the court followed *Johnson* in considering an injunction penal, focusing on the degree and extent of the sanctions as a factor in whether it is a penalty; permanent public disclosure evidences SEC action as penal and a focus on past conduct also weighs in favor of considering action as penal. It has been recognized that the distinction between punitive and remedial measures is not always easy to make. *See SEC v. Quinlan*, 2008 U.S. Dist. Lexis 95789 (E.D. Mich. 2008), *affirmed*, 2010 U.S. App. LEXIS 8205 (6th Cir. 2010).

Attorney disbarment proceedings have been recognized as not for the purpose of punishment but to determine fitness to continue as an officer of the court and to prevent the ministrations of unfit persons to practice. While offenses after a lengthy lapse of time do not provide the sole foundation for a disbarment they may be considered with

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[3] For a critique of the *Johnson* application of §2462 to the suspension of a professional license see McDonald, S., *A Case of Statutory Misinterpretation: An 1839 Statute of limitation on a Form of Debt Action is Being Misapplied to Limit Modern Regulatory Proceedings*, 49 Am. U. L. Rev. 659, 701, 715-19 (2000).

more recent facts in a disciplinary proceeding at any time. *See In the Matter of Echeles*, 430 F.2d 347, 349, 355 (7th Cir. 1970).

In applying the above law to a sanction for (b)(3)/26 USC 6103, several factors support that a suspension is remedial. They include (1) that OPR has a duty to protect both taxpayers and the government from less than responsible practitioners, and (b)(3)/26 USC 6103, someone who earns his livelihood participating in the administration of the tax laws, (b)(3)/26 USC 6103 is dishonorable, unprofessional, and adversely reflects upon fitness to practice (Default Order at 5 and 6) and it is an indicator of incompetence[4]; (2) OPR credibly states that its disciplinary proceedings consider the practitioner's current fitness to practice and provide practitioners an opportunity to present their case and (b)(3)/26 USC 6103 prior to the filing of a Complaint (see §10.60(c) of Circular 230), and in this case OPR worked with (b)(3)/26 USC 6103 to try (b)(3)/26 USC 6103; and (3) that an OPR suspension only bars practice before the IRS and, for most practitioners, practice before the IRS does not comprise the bulk of their livelihood - (b)(3)/26 USC 6103 may continue to practice law and he may even continue to represent his clients in the U.S. Tax Court during the period of suspension.

The factors indicating that the sanctions proposed by OPR are punitive, at least insofar as the sanction is for (b)(3)/26 USC 6103, include (1) although OPR asserts that its sanctions are not designed to visit retribution for past acts, past sanctions proposed by OPR have strongly focused on past conduct rather than current competence, and disbarment and the duration of suspensions has strongly correlated with (b)(3)/26 USC 6103 carrying less weight the suspension to be imposed is for (b)(3)/26 USC 6103 which is personal conduct; (2) while there is a clear nexus between (b)(3)/26 USC 6103 and the competence and character needed to represent others in a tax controversy practice, improper personal behavior has a limited correlation with professional performance, particularly when there is a more than five-year gap between the improper personal behavior and the professional sanction; (3) notwithstanding that many of those of us in tax administration mightily agree with Justice Oliver Wendell Holmes that taxes are essential for a civilized society (*see Compania General De Tobaccos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927)), I believe that for the larger public the perceived degree of risk of representation by a practitioner (b)(3)/26 USC 6103 is far less than the degree of risk to the public of an unqualified pilot (*see Coghlan, supra*), an unreliable investment advisor, or the degree of risk associated with the other situations where the sanction was found to be remedial[5]; and (4) the sanction is made public.

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[4] However, if the practitioner (b)(3)/26 USC 6103 preceding the Complaint, the practitioner's having been subject to a suspension may be brought to the public's attention as the result of an OPR proceeding (b)(3)/26 USC 6103.

[5] OPR's claim that a suspension is needed to protect the public is undercut by its not instituting this proceeding until well over two years after substantiating (b)(3)/26 USC 6103 violations.

The typical reported OPR case has been for [redacted]. If OPR proposed a suspension for a practitioner who [redacted], the predominant purpose of that suspension would be penal rather than remedial. The closer in time that a suspension for [redacted] occurs to the errant conduct, the more the purpose is remedial.

In weighing the penal and remedial factors I find that although both penal and remedial purposes are present in an OPR count for [redacted], that the ALJ is correct: a count instituted against a practitioner for [redacted] more than five years before the institution of proceedings is, as a matter of law, a penalty within the meaning of §2462.[6] Further, I find that for the reasons stated below, [redacted], is the date that commences the running of the §2462 limitations period and that the violation is not a continuing one.

(ii) Date of Commencement of §2462 Accrual.

A claim normally accrues when the factual and legal prerequisites for filing suit are in place. *See 3M Co. v. Browner*, *supra* at 1460; *Proffitt, supra at 862-63.* Thus, where the basis for a disbarment from federal practice is disbarment from another jurisdiction it is the act of disbarment in the other jurisdiction that sets the statute of limitations running. *See Sheinbein v. Dudas*, 465 F.3d 493, 496 (Fed. Cir. 2006). Cf., *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2 64 (3rd Cir. 1990) (§2462 period begins when reports are filed with the EPA as public can't know of violation until a filing occurs; however, [redacted]). In *3M Co.*, the D.C. Circuit explicitly rejected the application of a "discovery of violation" rule to §2462. *Id.* at 1460-61. The court specifically found that under §2462 it is the breach of the duty, not the discovery of the violation by the federal agency, that is controlling notwithstanding the difficulties that the federal agency may have in discovering the violation or enforcing the law. Neither fraudulent concealment, latent injuries, nor any of the other special statute tolling doctrines apply here.

Although it may be difficult as a practical matter for the IRS to know for certain that [redacted], or to monitor all practitioner [redacted], the factual and legal prerequisites for the filing of a Complaint are in place when [redacted]. Because §10.51 of Circular 230 describes the conduct giving rise to the sanction as [redacted] which provides the factual and legal prerequisites for filing suit, and that date cannot be extended due to the inevitable difficulties in determining that a practitioner [redacted], or until OPR receives information from an IRS employee concerning the practitioner (see §10.53 of Circular 230). Accordingly, [redacted]

[6] Because the Default Order was entered based only on the Complaint, OPR did not present to the ALJ its evidence in support of the Complaint. I have reviewed that evidence and it would not affect my conclusion.

(b)(3)/26 USC 6103, is the date that commences the running of the §2462 limitations period.

(iii) (b)(3)/26 USC 6103 as a Continuing Violation.

Section 2462 provides that its limitations period begins to run "from the date when the claim *first* accrued" [italics added]. This is (b)(3)/26 USC 6103. *See generally United States v. Kirkman*, 755 F. Supp. 304, 306 (D. Idaho 1991) (tax evasion under 26 U.S.C. §7201 is not a continuing offense). The Supreme Court has recognized that a statutory prohibition should only rarely be construed as a continuing violation for statute of limitations purposes. *Toussie v. United States*, 397 U.S. 112, 115 (1970). In *Toussie*, the Court held that with regard to an individual legally obligated to register for the draft on or five days after his 18th birthday who did not do so, his crime was completed at that time and the applicable five-year statute of limitations began to run at that time, barring his prosecution eight years later. *See also 3M Company, supra* at 1455 n. 2. Although 26 U.S.C. §6501(c)(3) provides that when no return has been filed that tax may be assessed or a proceeding may be begun to collect the tax without assessment at any time, it does not address the time for filing a disciplinary proceeding.

Accordingly, I conclude that the limitations periods for bringing a disciplinary action for (b)(3)/26 USC 6103.

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 (b)(3)/26 USC 6103 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 (b)(3)/26 USC 6103 may be reinstated. Default Order at 8. 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 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 in imposing an appropriate sanction and OPR has not provided any aggravating or mitigating factors specifically applicable to (b)(3)/26 USC 6103. OPR has requested that if §2462 is found to bar the counts for (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 (b)(3)/26 USC 6103 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 for (b)(3)/26 USC 6103, without any consideration of (b)(3)/26 USC 6103. 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 four 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 (b)(3)/26 USC 6103 (b)(3)/26 USC 6103, and so should be given greater weight, and (b)(3)/26 USC 6103, all other things being equal.

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, if he has at that time proven to OPR that (b)(3)/26 USC 6103 [redacted], and subject to conditions as imposed by OPR under §10.79(d) of Circular 230. 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)
May 26, 2011
Lanham, MD

CERTIFICATE OF SERVICE

I hereby certify that the Decision on Appeal dated May 26, 2011 in Complaint No. 2010-09 was sent this day by UPS Next Day Air and by First Class U.S. Mail to the addresses listed below:

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(b)(3)/26 USC 6103
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May 26, 2011
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