UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF PROFESSIONAL RESPONSIBILITY
WASHINGTON, DC

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,
Complainant,

v. COMPLAINT NO. 2006-1

JOHN M. SYKES, III,
Respondent.

DECISION

This matter arises from a complaint issued on January 19, 2006, by the Director, Office of Professional Responsibility, Department of the Treasury, Internal Revenue Service (OPR), pursuant to 31 C.F.R. 10.60 and 10.91, issued under the authority of 31 U.S.C. 330 (1986), seeking to have Respondent, John M. Sykes, III, an attorney engaged in practice before the Internal Revenue Service, suspended from such practice for a period of one year. The complaint alleges that Respondent failed to exercise due diligence in connection with certain opinions he issued to (b)(3)/26 USC 6103 [1] on or about Date 1 and Date 2, and that he willfully engaged in disreputable conduct within the meaning of 31 C.F.R. Part 10, when he issued those opinions.

Respondent filed a timely answer denying that he engaged in any misconduct and/or that he has engaged in any disreputable conduct and asserting that this proceeding is time-barred under the statute of limitations provided in 28 U.S.C. 2462 because the alleged misconduct occurred more than five years prior to issuance of the complaint.

A hearing was held in Washington, DC, on September 18 through 20, 2007, at which the parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Proposed findings of fact, conclusions of law, and supporting reasons submitted by the parties have been given due consideration. Upon the entire record and my observation of the demeanor of the witnesses, I make the following

Findings of Fact

Respondent is a tax attorney who has been associated with the State #1 office of the law firm of Attorney & Attorney (A&A) since Date 4 and has been a partner in that firm since Date 3. He has an LL.M. degree in tax from NYU Law School and has over 30 years of experience in a practice specializing in the tax aspects of (b)(3)/26 USC 6103. Partner 1, a retired A&A partner who also specialized in the tax aspects of (b)(3)/26 USC 6103 and who worked with

[1] (b)(3)/26 USC 6103

Respondent for many years, described him as one of the brightest tax attorneys he has ever met. Tax Attorney 1, a tax attorney and financial advisor with extensive experience in private practice, Government, and academia, testified that he regarded Respondent "as one of the best tax lawyers I've worked with." In its post-hearing brief, OPR states that "Respondent is an acknowledged expert in the area of the tax law at issue in the underlying case," which gave rise to the complaint in this proceeding. Respondent first became involved with what led to the underlying case when he was part of an A&A team that worked on (b)(3)/26 USC 6103 [2]

(b)(3)/26 USC 6103 were designed by Tax Attorney 1 and the financial advisory firm of Advisory Firm #1 for its client Corporation #1 and involved Corporation #1's (b)(3)/26 USC 6103. In Date 5, Corporation #1 sought the assistance of Advisory Firm #1 (b)(3)/26 USC 6103. Previously, Corporation #1 (b)(3)/26 USC 6103. Under (b)(3)/26 USC 6103 devised by Advisory Firm #1 in (b)(3)/26 USC 6103 In addition to the economic benefits flowing to Corporation #1 and others in these transactions, they were designed to create (b)(3)/26 USC 6103

In order for the transactions to have the desired effects, it was essential that (b)(3)/26 USC 6103 . Among the factors to be considered in determining (b)(3)/26 USC 6103

As the (b)(3)/26 USC 6103 were being formulated in early Date 5, A&A was retained by Advisory Firm #1 to advise it on structuring the transactions and to provide opinions on the (b)(3)/26 USC 6103. The A&A team was under the direction of firm Partner 1[3] and Respondent, at that time an associate attorney of the firm, was part of that team.[4] The credited testimony of Partner 1 and Respondent and the documentation in the record

[2] (b)(3)/26 USC 6103

[3] Partner 1 estimated that, as of Date 5, he had worked on between 50 and 100 tax opinions involving the subject of "(b)(3)/26 USC 6103."

[4] The law firm of Law Firm #3 served as co-counsel and assisted in putting these transactions together.

establishes that the A&A team and its co-counsel sought to identify all of the legal issues likely to be involved and that they conducted extensive legal research and analyses of the tax statutes and common law doctrines reasonably expected to have an impact on (b)(3)/26 USC 6103 before A&A issued any opinions. These included Internal Revenue Code (Code) Sections 269, 446, and 482, and the common law doctrines of business purpose, economic substance, substance- over-form, step transactions and sham transactions.

One of the important factors in the analysis done by A&A was an appraisal of the (b)(3)/26 USC 6103. (b)(3)/26 USC 6103 Partner 1 and Respondent were involved in selecting the appraiser of the (b)(3)/26 USC 6103. After interviewing four appraisal firms, the firm of Appraisal Firm #1 was chosen and Appraiser #1 did the appraisal of the (b)(3)/26 USC 6103. Partner 1 testified that they closely examined all of the appraisal firms and concluded that Appraisal Firm #1 had the needed experience in the (b)(3)/26 USC 6103 area. Respondent testified that he reviewed a draft of Appraiser #1's appraisal to assure that it was internally consistent and that it provided the answers needed to evaluate the tax consequences of (b)(3)/26 USC 6103. He also discussed the appraisal with Appraiser #1 and had him explain any parts that were unclear. Partner 1 testified that because he had not dealt with (b)(3)/26 USC 6103 before he wanted someone else with experience in that area to review the Appraisal Firm #1 appraisal to give him "some level of comfort" that the approach used and the value determined by Appraisal Firm #1 were correct and that its conclusions were reasonable. The firm of Accounting Firm #1, with whom Partner 1 had previously dealt, was selected to review the Appraisal Firm #1 appraisal. Accounting Firm #1 concluded that the Appraisal Firm #1 appraisal followed generally accepted appraisal procedures, the conclusions in the appraisal were reasonable, and that the methodology used to determine (b)(3)/26 USC 6103.[5]

Ultimately, A&A issued five written opinions signed by Partner 1 concerning the federal tax consequences of (b)(3)/26 USC 6103 August Date 5 and July Date 6. Those opinions concluded that (b)(3)/26 USC 6103.

These opinions were issued as "short form" opinions, meaning that they contained a detailed recitation of the facts and conclusions relating to the particular transaction but did not contain a written legal analysis. Partner 1 testified that in his experience clients in (b)(3)/26 USC 6103 preferred to have, and A&A always issued, short form opinions. He said that much of the legal analysis in the firm's [redacted] practice was similar and cumulative and involved a collection of materials in the firm's files which were developed in connection with other (b)(3)/26 USC 6103, sometimes, dating back several years. (b)(3)/26 USC 6103

These (b)(3)/26 USC 6103 opinions were issued at the "more likely than not level," which Partner 1 testified means that there is at least a 51 percent chance that the conclusions in a tax opinion given to a client are correct and that if the case went to court, was properly tried, and all of the facts and law were understood by the tribunal, that is what the result would be. This is contrasted with a "reasonable basis" opinion which has a 25 percent chance that it is correct, a "substantial authority" opinion which has about a 40 percent chance, a "should" opinion which has a 75 to 80 percent chance, and a "will" opinion which has about a 95 percent chance.

[5] Respondent testified that the (b)(3)/26 USC 6103 was simpler and A&A did not feel a need for a review of that appraisal.

The next steps in (b)(3)/26 USC 6103

[6] (b)(3)/26 USC 6103

On (b)(3)/26 USC 6103, the IRS had (b)(3)/26 USC 6103 in which it announced its intention to challenge losses claimed as a result of lease stripping transactions. The notice indicated that new regulations might be issued and also stated that the IRS may apply various specified sections of the Code and corresponding regulations to such transactions, as well as, common law principles, including, the business-purpose doctrine, the substance-over-form doctrine, and the step and sham transaction doctrines, to existing transactions.

A&A had acted as counsel to Advisory Firm #1 on (b)(3)/26 USC 6103 (b)(3)/26 USC 6103 Date 5 and August Date 6. It provided the opinions signed by Partner 1 which were based on the work done in connection with (b)(3)/26 USC 6103. Other counsel for the (b)(3)/26 USC 6103 used these opinions in issuing their own opinions advising the clients concerning the (b)(3)/26 USC 6103 .[7]

The tax opinions authored by the Respondent which led to the complaint in this matter concern the (b)(3)/26 USC 6103 which in Date 3 requested that A&A provide it with opinions as to (b)(3)/26 USC 6103 . Respondent authored and signed those opinions and OPR alleges that in doing so he failed to exercise due diligence and engaged in disreputable conduct.

The opinions authored by Respondent were short form opinions. They opined that (a) (b)(3)/26 USC 6103 (b) (b)(3)/26 USC 6103 and (c) (b)(3)/26 USC 6103 .

In Date 7, (b)(3)/26 USC 6103

[6] (b)(3)/26 USC 6103

[7] The firms were Law Firm #5, Law Firm #4, and Accounting Firm #2.

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103 challenged the IRS's determinations in the U.S. District Court for the District of State #2 and lost. The court held that (b)(3)/26 USC 6103 . The court also held that (b)(3)/26 USC 6103 . Because of that, the court did not reach the question of whether (b)(3)/26 USC 6103 . (Redacted opinions concerning third party.) Following the trial and decision in the district court in the (b)(3)/26 USC 6103 tax case, the Department of Justice, which had represented the IRS in that proceeding, referred this matter to OPR which subsequently issued the complaint against Respondent.

Analysis and Conclusions

While the Respondent admits to having engaged in "limited practice" before the IRS, he does not concede that the matters involved here constitute practice before the IRS or make him subject to the federal statute, 31 C.F.R. U.S.C. 330, and the regulations at 31 C.F.R. Part 10 governing such practice.[8] However, he has not pursued this contention in his post-trial brief. Section 10.2(d) of 31 C.F.R. broadly defines practice before the IRS to include all matters connected to a presentation to the IRS or any of its officers and employees relating to a taxpayer's rights, privileges, or liabilities under the federal tax laws. The ultimate purpose of the [redacted] opinions prepared by Respondent which are the subject matter of this proceeding was to convince the IRS that (b)(3)/26 USC 6103 . I find that the opinions were intended and were reasonably expected to be a part of the (b)(3)/26 USC 6103 and that Respondent's preparation of those opinions constituted practice before the IRS. Consequently, I find that Respondent is subject to the law and regulations governing such practice.

(b)(3)/26 USC 6103

Inasmuch as OPR seeks to suspend Respondent from practice before the IRS for a period of one year, 31 C.F.R. 10.76(a) requires that "an allegation of fact that is necessary for a finding against the practitioner must be proven by clear and convincing evidence in the record." While not defined in Circular No. 230, a generally accepted definition of clear and convincing evidence is that it requires a degree of proof which will produce in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is more than a mere preponderance but less than proof beyond a reasonable doubt. *Jove Engineering, Inc., v. IRS*. 92 F.3d 1539, 1545 (11th Cir. 1996); *Hobson v. Eaton*, 399 F.2d 781, 784 fn. 2 (6th Cir.1968). The allegations

[8] The regulations are contained in what is known as Treasury Department Circular No. 230. The current version of Circular No. 230 was last revised in 2005 and contains the procedural rules applicable to this proceeding. The 1996 version was in effect when Respondent's [redacted] opinions were issued and govern this proceeding.

(b)(3)/26 USC 6103

must be proven to a "high probability." *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1105 (9th Cir. 1992).

The complaint alleges that Respondent failed to exercise due diligence in violation of 31 C.F.R. 10.22(a) and (c) when he authored the five (b)(3)/26 USC 6103 in which he failed to analyze, and advise his clients of, relevant facts, law, and regulations that could have had an effect on (b)(3)/26 USC 6103. Specifically, it alleges that (1) the opinions contained no analysis of (b)(3)/26 USC 6103; (2) the opinions contained no analysis of the (b)(3)/26 USC 6103; (3) the opinions contained no analysis of (b)(3)/26 USC 6103; (4) Respondent did not make sufficient inquiries to determine whether the assumptions contained in the opinions were correct; and (5) Respondent did not make sufficient inquiries to determine whether the (b)(3)/26 USC 6103 and whether (b)(3)/26 USC 6103. The complaint also alleges that when Respondent authored the opinions without performing due diligence he willfully engaged in disreputable conduct within the meaning of 31 C.F.R. 51.

Section 10.22 of 31 C.F.R., Diligence as to accuracy, provides:

> Each attorney, certified public accountant, enrolled agent, or enrolled actuary shall exercise due diligence
>
> (a) In preparing or assisting in the preparation of, approving, and filing returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;
>
> . . . .
>
> (c) In determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the Internal Revenue Service.

Section 10.52 of 31 C.F.R., Violation of regulations, provides:

> A practitioner may be disbarred or suspended from practice before the Internal Revenue Service for any of the following:
>
> (a) Willfully violating any part of the regulations contained in this part.

While the term "willful" is not defined in the regulations, its use in the Treasury laws has consistently been held to mean, in both civil and criminal contexts, the "voluntary, intentional violation of a known legal duty." E.g., *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *Thibodeau v. United States*, 828 F. 2d 1499, 1505 (11th Cir. 1987). Consequently, OPR does not have to show that Respondent acted with malicious intent or bad purpose, only that he purposefully disregarded or was indifferent to his obligations.

OPR has established that Respondent was aware of his client's purpose in (b)(3)/26 USC 6103, that he

was aware of (b)(3)/26 USC 6103 when he authored those opinions, and that he was familiar with the requirements of Treasury Regulation 1-6664-4, which provide standards as to when a taxpayer may rely on the advice of tax advisors as evidence of reasonable cause and good faith for purposes of avoiding substantial understatement of income penalties with respect to tax shelter items. The regulation requires that the advice take into account all relevant facts and circumstances, including the taxpayer's purpose in entering into and structuring the transaction, and must not be based on any unreasonable factual or legal assumptions or representations. OPR asserts that in preparing and issuing the opinions Respondent willfully failed to meet the duty of due diligence owed to its client (b)(3)/26 USC 6103 and to the Internal Revenue Service and by so doing he engaged in disreputable conduct.

Specifically, OPR asserts that using the short form opinions, which contained "facts, assumptions and conclusions without setting forth any analysis," put (b)(3)/26 USC 6103 at risk because they did not show that all relevant information had been taken into account and they did not provide adequate documentation to justify (b)(3)/26 USC 6103 . It asserts that Respondent failed to exercise due diligence because he knew that the IRS had (b)(3)/26 USC 6103 before he issued the opinions, but the opinions he issued did not indicate that (b)(3)/26 USC 6103 . The opinions failed to (b)(3)/26 USC 6103 and did not discuss the various statutes and common law doctrines (b)(3)/26 USC 6103 or how they might (b)(3)/26 USC 6103 . They did not show the due diligence performed in arriving at the conclusions as to (b)(3)/26 USC 6103 . This deprived (b)(3)/26 USC 6103 of the opportunity to make an informed decision whether or not (b)(3)/26 USC 6103

(b)(3)/26 USC 6103

Respondent credibly testified as to the due diligence he performed in connection with the opinions he issued to (b)(3)/26 USC 6103 and introduced numerous documents on which he relied in arriving at his opinions, which were not included a part of those "short form" opinions. These opinions dealt with (b)(3)/26 USC 6103 He said that prior to the issuance of those opinions he needed to consider several things to reach his conclusions as to (b)(3)/26 USC 6103 .

OPR asserts that Respondent failed to exercise due diligence because he failed to make sufficient inquiries concerning the correctness of certain of the assumptions contained in the opinions. In addressing the issue of whether (b)(3)/26 USC 6103 he included two assumptions that had not been contained in the earlier opinions issued by A&A, i.e., "Assumption (S)" which stated that (b)(3)/26 USC 6103 and "Assumption (V)" which stated that "(b)(3)/26 USC 6103 ." However, he did not explain why these assumptions were reasonable and he did not secure such representations from (b)(3)/26 USC 6103 but relied on representations from Advisory Firm #1 which was not a disinterested party but one

with a considerable interest in the outcome of the transactions. It asserts that Respondent failed to reconsider and update the legal analysis underlying the (b)(3)/26 USC 6103 opinions he relied on and that he failed to resolve questions about the reliability of the appraisals done by Appraisal Firm #1 in connection with those opinions.

(b)(3)/26 USC 6103

OPR did not present any witnesses with any direct knowledge of (b)(3)/26 USC 6103 involved here, the interaction between Respondent and his client (b)(3)/26 USC 6103, or the preparation of the [redacted] opinions it alleges constitute disreputable conduct. Rather, it chose to rely on the opinions, which it apparently contends speak for themselves and establish misconduct on Respondent's part. First, OPR asserts that Respondent's use of "short form" opinions with respect to (b)(3)/26 USC 6103 was inappropriate and shows a lack of due diligence on his part, or at least constitutes evidence of a lack of due diligence. The evidence in the record does not support that view. On the contrary, it establishes that use of the short form opinion at that time was the accepted norm.

Respondent testified that prior to making partner at A&A and issuing the opinions in question in Date 3; he had assisted other firm partners in the preparation of dozens of tax opinions, the vast majority of which were short form. No client had ever rejected the use of the short form and he was aware that other members of the tax bar used short form opinions. He knew of no IRS guidelines prohibiting the use of short form opinions until Circular 230 was amended some years after 2000 to require that "covered" opinions be in writing and set forth the reasoning underlying the opinion. Since the amendment, he has not used the short form for the opinions he has issued in order to comply with those requirements.

Respondent also presented the testimony of Larry Langdon, whom I find was qualified as an expert witness. Langdon has extensive tax law experience with the IRS, corporations, private practice, and professional associations. This experience included 22 years as the chief tax officer of Hewlett-Packard Corporation where he had the opportunity and responsibility to review tax opinions prepared by a number of the leading U.S. and international law firms. His IRS experience included serving as its Commissioner of the Large and Midsized Business Division dealing with corporate tax shelter activity. In that position, he was involved in drafting guidelines for practitioners which were issued by the IRS. He established his familiarity with the use of opinions provided to taxpayers by outside counsel and with the published requirements of the IRS with respect to such opinions, including those in Circular 230.

Langdon testified that while, ideally, a taxpayer might prefer to receive a long form opinion detailing all of the facts, all of the possible contingencies, and all of the legal issues, as a practical matter, when A&A provided (b)(3)/26 USC 6103 it was typical and an accepted practice for outside counsel to use the short form. He described the short form opinion as the "gold standard of opinion writing at that point in time." He said that several factors drove tax practitioners to favor the short form, including, the time and expense involved in preparing a long form opinion and the need for reasonably quick guidance as whether to go ahead with a transaction or not. This led the opinion authors to concentrate on the key issues of strategic importance, "rather than in effect writing a law review article about issues that might arise at some later point. He testified that a short form opinion did not fail to meet the requirements in Circular 230 which did not require an opinion to set forth a law firm's legal analysis underlying the opinion. He also testified that he reviewed opinions issued by the law firms of Law Firm #3, Law Firm #4, and Law Firm #5 concerning aspects of (b)(3)/26 USC 6103 in issue here and that those opinions were short form opinions. There is no evidence that any of those opinions were alleged to be inappropriate or inadequate.

Langdon testified that, in addition to the opinions of the above-mentioned law firms, he

(b)(3)/26 USC 6103 reviewed the [redacted] opinions Respondent prepared, background memos and files, draft memos and notes, and valuation reports relating to the transactions. He said that, in his opinion, the quality of the work underlying the [redacted] opinions issued by Respondent to (b)(3)/26 USC 6103 was very thoughtfully done, it did a good job of analyzing the underlying facts, and it met an acceptable standard of legal efficacy for the positions that the [redacted] opinions were supporting, at either the "should" or "more likely than not" level. He said that the [redacted] opinions were "clearly within the top tier, clearly within the top 15, 20 percent of all the opinions" he saw while serving as counsel at Corporation #2.

Partner 1, another experienced tax attorney, testified that he had authored between 50 and 100 short form opinions in his practice before the [redacted] opinions were issued. He said that, in his experience, clients preferred short form opinions which contained a description of the facts, any assumptions that were made, and the conclusions. The detailed legal analysis of a transaction contained in the issuing firm's files was not made a part of the short form opinion; consequently, such an analysis, discussing not only the pros but also the cons of a transaction, would not be accessible by a taxing authority examining the transaction. Technical Advisor #1, an IRS technical advisor for tax shelters, called as a witness by OPR, testified that she was aware that prior to the year 2002, short form opinions were commonly issued by law firms on tax issues and she was not aware of any rules prohibiting their use. The regulations in Circular 230 were revised, effective December 20, 2004, to require that opinions "relate the applicable law (including potentially applicable judicial doctrines) to the relevant facts." 31 C.F.R. 10.35(c)(2). As Respondent's brief points out, such a revision would have been unnecessary if this were already required by the due diligence standard in Circular 230. Moreover, Treasury Reg. 1-6664-4(c), concerning the standards for reliance by a taxpayer on professional advice for penalty protection, states that such advice "does not have to be in any particular form." I find that OPR has failed to establish that Respondent's use of short form opinions was inappropriate or is evidence of a lack of due diligence.[9] (b)(3)/26 USC 6103

It is with this in mind that OPR's other contentions must be considered. OPR contends that Respondent failed to exercise due diligence because he failed to mention in his [redacted] opinions that the (b)(3)/26 USC 6103 and because he was aware of but did not discuss in those opinions (b)(3)/26 USC 6103. This, it asserts, deprived (b)(3)/26 USC 6103 of the opportunity to make an informed decision regarding whether (b)(3)/26 USC 6103 I find there is no factual basis for this assertion in this record. As noted, OPR did not call any representative of (b)(3)/26 USC 6103 as a witness or present any other evidence tending to establish that (b)(3)/26 USC 6103 was not aware that the (b)(3)/26 USC 6103 or that the information available to it was not sufficient to make an informed decision about whether (b)(3)/26 USC 6103. Respondent's credible and uncontradicted testimony was that during his first meeting with representatives of (b)(3)/26 USC 6103 to discuss the possibility of representation, he discussed (b)(3)/26 USC 6103 with Accountant #1, an accountant and tax attorney who served as (b)(3)/26 USC 6103 Tax Director. Aside from this, it is simply unreasonable to assume that (b)(3)/26 USC 6103, which was (b)(3)/26 USC 6103. That knowledge was no

[9] I find that the comments of the judge in the (b)(3)/26 USC 6103 case about Respondent's opinions to be of little persuasive value since there is no indication that she was aware of the due diligence undertaken by Respondent but not a part of the short form opinions.

doubt one of the reasons why [redacted]. Further evidence that [redacted] was made aware of [redacted] is contained in a memo Respondent caused to be sent to Accountant #1, dated [redacted], Date 3, which had an attached copy of a portion of an opinion letter A&A had issued to another taxpayer in [redacted] Date 6, [redacted]."

More importantly, the evidence shows that Respondent was aware [redacted] and had analyzed the statutes and legal doctrines [redacted] before he issued the [redacted] opinions. The documentation in the record and testimony of Respondent and Partner 1 establishes that they and other members of A&A had worked together closely in doing the extensive research and analysis leading to the [redacted] opinions that Partner 1 issued to Advisory Firm #1 in Date 5 and Date 6, which concluded that the [redacted] and that the [redacted]. Neither the extent nor the quality of the due diligence underlying these opinions is questioned here. The evidence shows that in the course of their research and analysis they recognized the possible applicability and considered each of the following statutes and common law doctrines which [redacted] Date 6: Code Sections 269, 446(b), and 482; business purpose doctrine; economic substance doctrine; and substance-over-form doctrine, including the step and sham transaction doctrines.

Although obviously pertinent to the some of the issues Respondent would later address in his [redacted] opinions, OPR dismisses this work as not relevant to whether Respondent engaged in due diligence in preparing those opinions and says that, even if it was relevant, that due diligence "needed to reconsidered and updated to ensure that the legal analysis was still valid at the time of [redacted]." It does not say why. [redacted] The evidence shows that A&A had already considered those statutes and legal doctrines and concluded that they did not apply or, as in the case of the step transaction theory, specifically structured the transactions so that it did not apply. Respondent has also established that [redacted] or required further consideration before he reached the conclusions set forth in the [redacted] opinions. Respondent testified that this was the case, as did an expert witness Expert Witness #1, a tax attorney with over 30 years of experience primarily in the area of [redacted], who said that "the things that defined [redacted]." OPR's witness Technical Advisor #1 also agreed with that proposition. OPR asserts that this argument is "unpersuasive," but it presented no evidence or authority to the contrary.

As a part of its argument that Respondent needed to reconsider the due diligence performed in connection with [redacted] opinions, OPR asserts that Respondent failed to make sufficient inquiries to determine the correctness of two of the assumptions contained in his [redacted] opinions which were not part of the previous opinions. It contends that these assumptions concerning the [redacted] were not reasonable. It asserts that he failed to contact the appropriate parties to confirm that they [redacted], but accepted, without question, the representations of Advisory Firm #1, which had a financial interest in the transactions which it had promoted, as to [redacted]. It also asserts that the appraisal of the [redacted] were based was deficient and that it was unreasonable to rely on it.

I find that the evidence fails to establish that Respondent's reliance on representations of Advisory Firm #1 was unreasonable as matter of law because it had a financial interest in these transactions. On the contrary, the credible and uncontradicted evidence was that Advisory Firm #1 was a leading firm in (b)(3)/26 USC 6103 with a reputation for professionalism and integrity. Expert Witness #1 testified that he was familiar with the firm and its personnel and described it as "absolutely first rate," and having an excellent reputation as a firm that would get a job done right and would have more knowledge about the transactions involved than most of the participating parties. He was asked if he would rely on a representation from Advisory Firm #1 in (b)(3)/26 USC 6103 in which he represented one of the parties and said that he "would rely on their representation regarding financial matters." Partner 1 testified that Advisory Firm #1 was the pre-eminent firm in its field and that he "felt very comfortable relying on any representation they made." He said that Advisory Firm #1's position in (b)(3)/26 USC 6103 was "so exalted" that it could not afford to provide anything but "an accurate and thorough representation." Respondent, likewise, testified that he was aware of Advisory Firm #1's standing in the industry. He said that when he was given the representation that Advisory Firm #1 had provided one of (b)(3)/26 USC 6103 involved in (b)(3)/26 USC 6103 he felt that he could reasonably rely on it in reaching his opinion because it would not make a statement as to a fact or a financial analysis it did not believe it could stand behind. The evidence here indicates that a representation made by Advisory Firm #1 would be at least as reliable as a representation by a party who stood to gain by establishing that it had an expectation of a non-tax benefit from the transaction. The cases cited by OPR as purportedly establishing the unreasonableness of reliance on representations by the promoters of a transaction or their agents are all factually distinguishable from the situation presented here. But in any event, Respondent has shown that he did not than uncritically accept representations from Advisory Firm #1.

Respondent testified that he had reviewed (b)(3)/26 USC 6103 in the record that . For each transaction, he had examined and analyzed (b)(3)/26 USC 6103 and, in turn, that of the (b)(3)/26 USC 6103 and determined that it also had (b)(3)/26 USC 6103 . The transaction he discussed in detail in his testimony involving (b)(3)/26 USC 6103 . He said he was also aware of due diligence (b)(3)/26 USC 6103 which included an opinion obtained fro the law firm of Law Firm #5 concerning the (b)(3)/26 USC 6103 and he drew on his own knowledge of the transactions.

Key to the question of whether the (b)(3)/26 USC 6103 According to Partner 1, the appraisal of that value was "the fundamental factual reference point" from which the tax opinions issued by A&A flowed. OPR contends that A&A did not investigate the appraiser's qualifications and had "reservations" about the appraisal obtained from Appraisal Firm #1. Therefore, Respondent should have done something more to assure that the appraised values were accurate before he issued his opinions. The evidence does not support that contention. In fact, there is no evidence that any of the numerous parties or attorneys involved in these transactions ever questioned the accuracy of the appraisals. (b)(3)/26 USC 6103 Respondent and Partner 1 credibly testified that they interviewed four appraisal firms and according to Partner 1 made an "extensive" examination of their qualifications before selecting Appraisal Firm #1. OPR's contention is apparently based on the fact that after A&A received

and analyzed the Appraisal Firm #1 appraisal it engaged Accounting Firm #1 to review it as well. Partner 1 credibly testified that he did this because he had not used Appraisal Firm #1 before, he had not done [redacted] before, and he wanted assurance that the approach used and the value determined by Appraisal Firm #1 was reasonable. There is no evidence that A&A believed that the Appraisal Firm #1 appraisal was not accurate or that its methodology was flawed in any way. Contrary to the assertion by OPR, it does not appear that A&A placed significant restrictions on Accounting Firm #1's review of the appraisal. It was not seeking a second appraisal, only confirmation that the methodology employed and the conclusions reached were reasonable. That is what it got. It appears that OPR now faults Respondent for not doing the same kind of due diligence that A&A had already done. I find that OPR has failed to prove by clear and convincing evidence that Respondent's use of the assumptions it questions in his [redacted] opinions was unreasonable or amounted to a lack of due diligence on his part.

(b)(3)/26 USC 6103

Conclusions of Law

I find that OPR initiated this disciplinary proceeding based on the fact that Respondent used short form opinions in advising [redacted] concerning [redacted]. It has provided little more than that fact as the evidence in support of its complaint allegations and has failed to prove any of those allegations by clear and convincing evidence, as required by Circular No. 230.[10] Respondent's evidence establishes that use of the short form opinions was an accepted practice at the time they were issued, and more important, that he had done the due diligence necessary to support the conclusions contained in those opinions. Accordingly, I find that OPR has not proved that Respondent failed to meet the requirements of the regulations or that he willfully engaged in disreputable conduct when he issued those [redacted]. I find that the complaint should be dismissed.[11]

On these findings of fact and conclusions of law and on the entire record, I issue the following

ORDER[12]

The complaint is dismissed in it entirety.

Dated, Washington, D.C. January 29, 2009

Richard A. Scully
Administrative Law Judge

[10] Respondent has repeatedly questioned OPR's good faith in bringing this proceeding. However, it appears that if he had been more forthcoming during OPR's investigation of his conduct in preparing [redacted] opinions, this complaint might not have been issued.

[11] Having found that Respondent did not engage in any misconduct, I find it unnecessary to reach the question of whether or not the statute of limitations in 28 U.S.C. 2462 is applicable to this proceeding.

[12] Pursuant to 31 C.F.R. 10.77, either party may appeal this Decision to the Secretary of the Treasury within thirty (30) days of its date of issuance.