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BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE OF THE STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF FINANCE, CONSUMER FINANCE BUREAU, Complainant, vs. WALL & ASSOCIATES, INC., A VIRGINIA CORPORATION, Respondent.	Docket No. 2019-9-10 **ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION OF DIRECTOR'S FINAL ORDER**

The Director of the Department of Finance (the "Director") issued her "Final Order Adopting and Amending Hearing Officer Preliminary Order" (the "Final Order") in this administrative proceeding on August 30, 2022, which found violations of the Idaho Collection Agency Act ("ICAA") and imposed a sanction of an injunction, civil penalties, restoration of fees, and attorney fees and costs. On September 13, 2022, Respondent Wall & Associates, Inc. ("Wall" or "Respondent") filed "Respondent's Motion for Reconsideration of the Director's August 30, 2022 Final Order," pursuant to Idaho Code § 67-5246(4) and IDAPA Rule 04.11.01.740 ("Motion to Reconsider Final Order"). The Director then requested briefing from Complainant Consumer

Finance Bureau, desiring to hear from both parties regarding the issues raised by Wall in the Motion to Reconsider Final Order. On September 22, 2022, Complainant Consumer Finance Bureau filed "Department's Response Memorandum on Review to Director." For the reasons stated below and the reasons previously stated in the Final Order, the Director denies Wall's Motion to Reconsider Final Order, which ends this administrative contested case.

I. ANALYSIS

In the Motion to Reconsider Final Order, Wall asks the Director to reconsider (1) her legal conclusion that the ICAA applies to tax debt counselors like Wall, based on the definition of a debt counselor in the ICAA and based on the provision limiting fees charged by debt counselors, (2) her discretionary decision to restore $45,600 in fees to clients CT and MT and $73,500 in fees to client J, and (3) her discretionary decision to impose a penalty of $162,000. Wall does not make new legal arguments or attempt to submit new evidence. As with the Final Order, the Director has sole authority to resolve all issues in this matter and therefore reviews all issues raised in the Motion to Reconsider Final Order *de novo*. *See* I.C. § 26-2228 (1) & (4), § 26-2244, § 67-5245, and § 67-5246(3).

A. The ICAA Definition of Debt Counselor Applies to Wall in Two Aspects, Not Just One.

The ICAA's definition of a debt counselor contains three alternative definitions (each definition is separated by an "or"). I.C. § 26-2223(7). The Director found that Wall's business activities fit within two of the three alternative definitions. Wall challenges the Director's legal conclusion that:

> Wall's actions related to its Idaho resident clients are also actions that fall within the other definition of a debt counselor as defined in Idaho Code Section 26-2223(7): "engage or offer to engage in this state in the business of providing counseling or other services to debtors in the management of their debts."

(Final Order, p. 24.) Wall argues that its business related to tax debts does not fit within this definition because (1) it only helps with tax debts, no other debts, and (2) it only negotiates the reduction of tax debts and those activities are already covered by the other part of the debt counselor definition, namely "contracting with the debtor to effect the adjustment, compromise, or discharge of any account, note or other indebtedness of the debtor." Wall also argues that this portion of the definition of debt counselor was found inapplicable by the Hearing Officer and not at issue before the Director such that the Director was not allowed to change that legal conclusion. The Director disagrees with and rejects these arguments, as discussed below (and for the reasons already stated in the Final Order).

1. The Issue Was Fully Briefed and Properly Before the Director For De Novo *Review.*

Wall states, "Wall requests reconsideration of this ruling [about Wall's business fitting in the definition of helping a debt with "management of their debts"] on three grounds. First, the issue was not briefed to the Director because the AHO ruled in Wall's favor." (Motion to Reconsider Final Order, p. 3.) Wall says nothing more to support that argument. For this reason alone, the Director rejects that argument as unsupported. One sentence is insufficient to raise an argument. In addition, it is unclear what that one sentence is arguing.

The record shows that the issue was fully briefed to the Hearing Officer, the rules make clear that the Director has full authority to amend any part of the decision of the Hearing Officer, and the Department filed a "Complainant's Notice of Exception" on April 4, 2022, pursuant to Idaho Code § 67-5245 ("The agency head shall allow all parties to file exceptions to the preliminary order ..."), that made clear the Department was challenging the Hearing Officer's legal conclusion on this issue:

> ... the Complainant takes exception to the following ... The hearing officer's conclusion on page 20 of [the Final Order] that Wall's conduct did not fall within

the scope of the second clause of Idaho Code 26-2223(7) ("... providing counseling or other services to debtors in the management of their debts ....").

The issue was therefore ripe for further briefing, prior to resolution by the Director. That Wall failed to brief the issue was Wall's choice or error. Regardless, there is no evidence of any prejudice to Wall. Wall has briefed the issue in its Motion to Reconsider Final Order. But even now, Wall has raised no new substantive arguments; everything was already raised in the briefing before the Hearing Officer, briefing that the Director reviewed prior to issuing the Final Order.

2. *Wall Purports to Provide Services Beyond Negotiating Tax Debt Adjustments With Obligees and These Services Fit Another Aspect of the Debt Counselor Definition.*

The statutory definition of debt counselor is written broadly, with three alternative definitions combined to effect the remedial purposes of capturing all potential debt counseling activities. *See Smith v. Glenns Ferry Highway Dist.*, 166 Idaho 683, 693, 462 P.3d 1147, 1157 (2020) ("[W]e interpret remedial statutes broadly 'to satisfy their remedial purposes.'"). The ICAA requires licensure of debt counselors involved in one or more of the following three types of business practices: taking money from debtors and paying creditors of the debtor, counseling or related services to the debtor for management of debts, and contracting with the debtor to effect the adjustment, compromise, or discharge of their debt. I.C. § 26-2223(7). If any part of the three-part definition is applicable, then Wall falls within the definition of a debt counselor.

Certainly, the vast majority of what Wall does for its clients seems to be helping effect the "adjustment, compromise, or discharge" of tax debts. That is the key part of the definition at issue. However, the statutory definition also covers debt counseling work that is just with the debtor and "management of their debts." Wall's own evidence makes clear that it did more than just acting on behalf of clients to negotiate with third party taxing authorities regarding tax debts. Wall also claims that it counsels with the clients regarding "management" of many other aspects of their tax debts: advising and assisting with lien removal, advising on tax return and amended tax return

filing issues, advising and assisting with currently not collectible status, advising on wage garnishment issues, advising on innocent spouse rule application, advising and assisting with tax levies, advising on the CP 2000 letter, etc. (*See* Yates Declaration, filed August 27, 2021, ¶¶ 3-4; Yates Declaration, filed January 19, 2021, ¶¶ 3-4.)

In sum, Wall's business touches on two aspects of potential debt counselor work covered by the ICAA: negotiating debt "adjustment, compromise, or discharge" with third party obligees and counseling the debtors regarding many aspects of "management of their debts." These two parts of the definition, as applied to Wall, are complimentary and not superfluous or duplicative. Nor does the addition of an "s" on "management of debts" suggest anything other than the fact that the drafters were matching plurals: "providing counseling or other services to debtors in the management of their debts." I.C. § 26-2223(7) (emphasis added). Nor is Wall's business comparable to the business of an accountant; i.e. the Director's finding that aspects of Wall's business fit within the meaning of counseling the debtor regarding the "management of their debts" has no relevance to whether an accountant's business would fit into that meaning.

B. The ICAA Applies to Wall, Regardless of What Lien Rights Attach to Tax Debts.

The ICAA has a provision that limits fees for debt counselors: "Debt counselors … shall not charge or accept as a fee for their services more than twenty percent (20%) of the principal amount of the debtor's unsecured debt at the time of contracting for services for the management of debt." I.C. § 26-2229(3). The ICAA does not define unsecured debt. It does not state that fees are limited to only services related to the management of unsecured debt. As previously stated, the ICAA has a definition of a debt counselor that is broad and does not limit the definition to a specific type of debt or a specific type of obligee. I.C. § 26-2223(7).

Wall argues (an argument previously made multiple times to the Hearing Officer and to the Director) that this one sentence suggests that a debt counselor, otherwise meeting the definition in I.C. § 26-2223(7), who assists debtors who have liens against them based on debts (*e.g.* tax liens, judgment liens, voluntary liens) is no longer covered by the ICAA. Except, the ICAA does not say that. The ICAA could easily have said that if that was the intent of the legislature. Wall is arguing that the legislature was thinking about tax law and lien law (which can change at any time and have many nuances) and was purposely drafting the statute to exclude tax debt by making a reference to unsecured debt, rather than just saying that tax debts and/or tax debt counselors are excluded. That interpretation of Idaho Code § 26-2229(3) requires mental gymnastics.

One simpler interpretation is that the reference to "unsecured debt" in Idaho Code § 26-2229(3) has the common meaning of debt that is not collectible from foreclosure of a lien against a specific, existing, non-exempt asset. Tax debts, like many debts, may acquire lien rights (*e.g.* judgment liens) but those liens do not turn the debt into a secured or partially secured debt unless or until the debtor has non-exempt assets with recoverable equity (i.e. equity greater than the costs of seizure and sale) to which the lien can attach. So, regardless of what lien arises under specific tax law, that lien does not create secured tax debts unless or until the debtor has non-exempt assets and those tax debts would only be considered secured up to the value of the debtor's non-exempt assets with recoverable equity.

Another simpler interpretation of "unsecured debt" would be debt that was not secured by a voluntary lien. Investopedia defines "unsecured debt" in this way: "Unsecured debt refers to loans that are not backed by collateral. … A loan is unsecured if it is not backed by any underlying assets. Examples of unsecured debt include credit cards, medical bills, utility bills, and other instances in which credit was given without any collateral requirement."

https://www.investopedia.com/terms/u/unsecureddebt.asp (last viewed September 29, 2022). Cornell Law School's Legal Information Institute uses a similar definition: "Unsecured debt refers to debt created without any collateral promised to the creditor. In many loans, like mortgages and car loans, the creditor has a right to take the property if payments are not made. Unsecured debt like credit cards or medical bills do not have any connection to property, and the creditors risk losing all their returns if the debtor becomes insolvent." https://www.law.cornell.edu/wex/unsecured_debt (last viewed September 29, 2022). Black's Law Dictionary defines "unsecured debt" as "A debt not supported by collateral or other security." *Black's Law Dictionary*, 489 (10th ed. 2014).

In other words, various obligees can acquire after-the-fact, non-voluntary, lien rights to attempt to recover their unsecured debts, but this does not change the fact that the debt originally arose as an unsecured debt. Tax debts are not initially incurred in connection to specific property or collateral. The tax lien that apparently arises after-the-fact (no matter how instantaneous Wall claims the lien arises) is not specific to any certain asset/collateral and no specific collateral is voluntarily provided by the tax debtor.

In sum, there is no convincing evidence that this one reference to unsecured debt, found in the provision attempting to create limits on fees, suggests that the ICAA does not apply to tax debt counselors like Wall. To the contrary, tax debts are often partially or wholly unsecured debts (*e.g.* the debtors have limited or no non-exempt assets with recoverable equity), based on one common meaning of "unsecured debts." Tax debts are always unsecured debt based on another common meaning of unsecured debt, "debt created without any collateral promised to the creditor." The use of the term "unsecured debt" in I.C. § 26-2229(3) has no relevance to the question of whether Wall fits within the meaning of I.C. § 26-2223(7).

C. The Director Appropriately Exercised Her Discretion to Restore Fees to Certain Clients.

The Director could have exercised her discretion to require Wall to return all its fees, since it earned those fees by violating the ICAA. The Director chose a lesser sanction, to order the restoration of certain fees that the record supported should be returned based, at least in part, on principles of restitution and disgorgement. The Director pointed out the record showing significant outlier charges to certain clients, despite no evidence that such outlier fees were merited. The Director also ordered the restoration of certain fees paid by complaining clients, where Wall's own admissions confirmed that the clients received little or nothing from Wall in return for those fees. Based on the fact that Wall earned all of these fees only by violating Idaho law and based on the evidence in the record relevant to principles of restoration and disgorgement, the Director ordered the restoration of $271,987.50 to eleven harmed Idaho clients.

In its Motion to Reconsider Final Order, Wall challenges the interpretation of the facts relevant to the two highest paying of the Outlier Clients: J (paid $98,000 in fees, Wall ordered to return $73,500) and CT and MT (paid $60,800 in fees, Wall ordered to return $45,600). Wall points out that it helped J to avoid a levy on business and personal assets and to work out a payment plan of $30,000 a year to the IRS, which hopefully will end in ten years if the remaining tax debt is extinguished by the statute of limitation. Wall offers no evidence of how much time, effort, or expertise it took to achieve that result for the client. The IRS tells the public that most resolutions obtained through a third party could be obtained directly by the taxpayer. (See Final Order, pp. 17-18.) Wall provides nothing to suggest that it provided $98,000 in value to J in order to achieve the straightforward result of an agreement not to execute against assets during negotiations and then a payment plan. For example, Wall provides no evidence to suggest whether that result was achieved through: ten hours of work or 10,000 hours; through submitting basic paperwork or through detailed negotiation by highly qualified negotiators; through typical disclosures of assets and

liabilities or through some exceptional and unique fact finding or briefing. Wall provides no explanation for why this result was different than what J would have achieved for himself by following the IRS's public guidelines and tools.

Wall is unable to provide such evidence of its efforts, at least in part, because it apparently keeps few records of its efforts and apparently declines to internally itemize its agents' efforts and work product or track their time. As pointed out by the Department, Wall risks significant overpayment by clients because of Wall's business model of requiring monthly payments that are not tied to the actual time, effort, or expertise expended by Wall. Instead, Wall's business model incentivizes long, drawn-out resolutions and capitalizes on the under-resourced and ofttimes slow-moving IRS. Certainly, a taxpayer can and should pay a reasonable fee for assistance with tax debts. But Wall's fee is tied to the essentially arbitrary factor of time, with no showing at all that it should have taken eight or more years for Wall to achieve this resolution for J.

Similarly, for clients CT and MT, Wall points out that it worked out a good resolution: the IRS stopped its levy while the taxpayer submits information about its ability to pay and the parties negotiate an appropriate payment plan. Wall provides nothing to suggest that it gave $60,800 in value in order to achieve this straightforward result. Wall provides no evidence of how much time, effort, or expertise it took to achieve that result for the client. Wall provides no evidence of how this result has been exceptional or otherwise different than what the IRS offers to any unrepresented taxpayer under similar facts.

In sum, Wall's arguments regarding J and CT and MT further confirm why the Director exercised her discretion to require the restoration of certain fees. Based on the current record, the Director suspects that many more clients of Wall were similarly charged excessive and

unsupportable fees. However, in the exercise of discretion and based on the current record, the Director limits her order to restoring fees of $271,987.50 to eleven harmed Idaho clients.

D. The Director's Civil Penalty Award Is Not Excessive Based on These Facts.

Wall challenges the penalties imposed, claiming they are excessive because the Department "provided no examples of such heavy penalties" and because Wall claims the Department implicitly authorized Wall's actions from 2012 to the present. Wall has previously raised each of those arguments to the Hearing Officer and the Director. In further exercise of her discretion, the Director disagrees with and rejects both of those arguments.

The Director imposed a $162,000 penalty that is well below the maximum penalty of $270,000. A lesser penalty would have suggested that Wall's violations were merely the price of doing business and would have had a reduced deterrent impact. Wall's reference to other enforcement actions from the Department implies that Wall believes its penalty for ten years of violations should be "less than $10,000," which clearly would not act as a deterrent to statutory violations that earned at least $661,339 in fees (through June of 2020) for Wall. In fact, since 2019, the combined impact of the Department's investigation and enforcement complaint and the Hearing Officer's multiple orders have not deterred Wall from continuing to pursue its lucrative business in Idaho without a license.[1] Wall declines to admit what penalty it does believe it should pay for its long-standing and numerous violations.

Wall points out that after the Department's counsel gave it clear instruction in 2012, get licensed or stop its unlicensed debt counseling business, Wall sent an additional letter again

[1] Wall stated in the Motion to Reconsider Final Order, "Wall recognizes the Final Order has been entered and will of course comply with it while pursuing its appeal rights." Wall provides no further explanation regarding what actions it took or is taking to comply with the Final Order entered August 30, 2022. The Director is not aware of any actions taken by Wall to comply with the Final Order. Wall has not applied for a license as a debt counselor under the ICAA.

claiming that it did not need to get licensed. The record indicates that the Department's counsel did not provide further response. Wall claims this meant that it rightfully assumed that the Department was conceding the issue. The facts do not support that assumption.

The Department's counsel stated in his last correspondence: "At this point there is no reason for a continued dialogue." (Final Order, p. 6.) Despite that clear statement, Wall tried to continue the dialogue, repeating its arguments that the Department's counsel had already rejected. Wall knew the Department's clear position: "Wall and Associates needs to either obtain a license or quit doing business as a debt counselor in Idaho." (*Id.*) Wall knew that the Department did not send any communication changing that position, regardless of how many times Wall asked the Department to reconsider. (*Id.*) Therefore, Wall was on notice that it was risking liability under the ICAA if it ignored the Department and its counsel's clear instruction. Yet, Wall continued its unlicensed debt counselor business in Idaho, suggesting that it was not deterred by the risk of liability and was factoring that liability as merely a cost of doing business. Those facts are an aggravating factor in this matter.

II. CONCLUSION

For the reasons stated above and in the Final Order, Respondent's Motion for Reconsideration is Denied.

NOTIFICATION OF RIGHTS

An appeal must be filed within twenty-eight (28) days of an order denying a petition for reconsideration. *See* Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

IT IS SO ORDERED.

DATED this 3rd day of October 2022.

Patricia R. Perkins, Director
Idaho Department of Finance

CERTIFICATE OF SERVICE

I hereby certify that on the 30th of September 2022, I caused to be served an accurate copy of the ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION OF DIRECTOR'S FINAL ORDER upon all parties of record in the proceeding to the following, in the manner indicated below:

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