

**UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY**

**DIRECTOR,
OFFICE OF PROFESSIONAL
RESPONSIBILITY,**

Complainant,

v.

(b)(3)/26 USC 6103,

Respondent.

Complaint No. 2010-19

DECISION AND ORDER ON DEFAULT

The Complaint initiating this matter was issued on November 10, 2010 by Colleen A. Crane, Area Counsel, General Legal Services, Washington, D.C., Attorney for Complainant Karen L. Hawkins in her official capacity as Director of the Office of Professional Responsibility ("OPR"), United States Department of the Treasury, Internal Revenue Service ("IRS").¹ The Complaint was issued pursuant to the rules governing practice before the IRS, 31 C.F.R. Part 10 ("Rules"), promulgated under 31 U.S.C. § 330.² The Complaint charges Respondent in ten counts with violations of the Rules, constituting disreputable conduct sufficient to warrant disbarment from practice.

Specifically, Respondent is charged with (b)(3)/26 USC 6103
(b)(3)/26 USC 6103
(b)(3)/26 USC 6103
, and failure to provide OPR with a response to its letters (b)(3)/26 USC 6103
. To date, no answer to the Complaint has been filed.

On December 20, 2010, Complainant served on Respondent a Motion for Default ("Motion") on the basis of Respondent's failure to file an answer to the Complaint. Complainant's Motion was filed on December 27, 2010. To date, no response to the Motion has been filed.

¹ The regulations governing this proceeding require that a complaint be "signed by the Director of the [OPR] or a person representing the Director of the [OPR] under § 10.69(a)(1)," which further provide that an "attorney or an employee of the [IRS] representing the Director of the [OPR] in a proceeding under this part may sign the complaint ... on behalf of the Director of the [OPR]." 31 C.F.R. §§ 10.62, 10.69(a)(1). Complainant has established that Colleen A. Crane is an IRS attorney and a "designated representative of the Director." Complaint ("Compl.") at 1-2.

² The Rules are published in Treasury Department Circular 230, available online at www.irs.gov.

I. Motion For Default

According to 31 C.F.R. §§ 10.63(a)(2)(i) and 10.63(a)(2)(ii), proof of service of the Complaint by certified mail is made by the "returned post office receipt duly signed by the respondent," or upon mailing by first class mail "[i]f the certified mail is not claimed or accepted by the respondent, or is returned undelivered."³ 31 C.F.R. § 10.63(a)(2)(i)-(ii) (*emphasis added*). On November 10, 2010, Complainant mailed a copy of the Complaint simultaneously by certified mail return receipt requested, and by first class mail, to Respondent at his last known address of record: Redacted, (b)(3)/26 USC 6103. See, Certificate of Service accompanying the Complaint; Compl. ¶ 4; Mot. ¶ 2. On the return receipt for the certified mailing (the "green card") is a signature and printed name that appears to be that of "Redacted," and a date of delivery of November 12, 2010. See, Mot. Ex. B. The Motion states that the Complaint sent by first class mail was not returned as undeliverable. Mot. ¶ 3. Although there is no proof that the Complaint was received by Respondent via certified mail, the certified mail was not claimed or accepted by Respondent, and therefore, service of the Complaint on Respondent was completed upon mailing it by first class mail, pursuant to 31 C.F.R. § 10.63(a)(2)(ii) .

In the Complaint or an accompanying document, OPR must "notify the respondent of the time for answering the complaint," and the name and address of the Administrative Law Judge with whom an answer must be filed and the OPR representative on whom a copy must be served. 31 C.F.R. § 10.62(c). Importantly, OPR must also notify the respondent "that a decision by default may be rendered against the respondent in the event an answer is not filed as required." *Id.*

Accordingly, Complainant stated in a letter accompanying the Complaint, in part:

Your failure to file an answer to this complaint may result in a decision by default being rendered against you.

The Complaint stated as follows:

Pursuant to 31 C.F.R. § 10.62, Respondent's answer to this Complaint must be filed with the Honorable Susan L. Biro, Chief Administrative Law Judge, Office of Administrative Law Judges, U.S. Environmental Protection Agency, Redacted, Washington, D.C. 20460, and a copy served on Colleen Crane, Office of Chief Counsel, General Legal Services, as designated representative of the Director, [OPR], within thirty (30) calendar days from date of service. [address omitted]

³ While Rule 10.63 appears to contemplate that service will be attempted by certified mail initially, and upon that failing, then by regular mail, it does not appear to require the mailing to be performed in series rather than simultaneously. Nor does it appear that seriatim service is more likely than simultaneous service to provide Respondent with his due process right to notice of the proceeding and his opportunity to be heard. 31 C.F.R. § 10.63(a)(2)(1)(i)-(ii).

Compl. at 1-2.

The Rules provide that:

Failure to file an answer within the time prescribed (or within the time for answer as extended by the Administrative Law Judge), constitutes an admission of the allegations of the complaint and a waiver of hearing, and the Administrative Law Judge may make the decision by default without a hearing or further procedure. A decision by default constitutes a decision under § 10.76.

31 C.F.R. § 10.64(d). Thirty days from the date of service of the Complaint, November 10, 2010, was December 10, 2010. As noted above, to date, Respondent has not filed an answer to the Complaint. Pursuant to 31 C.F.R. § 10.64(d), Respondent's failure to file an answer within the time prescribed constitutes an admission of the allegations in the Complaint and a waiver of a hearing on those allegations. To date, Respondent also has not filed any response to the Motion for Default, and therefore "is deemed not to oppose the motion" under 31 C.F.R. § 10.68(b). Thus, a decision by default may be entered against Respondent.

Accordingly I make the following Findings of Fact and Conclusions of Law in Part III, below.

II. Statute of Limitations

The five-year statute of limitations in 28 U.S.C. § 2462 has previously been held to apply to disciplinary proceedings brought under the Rules. *See, Dir. of Practice v. (b)(3)/26 USC 6103*, Complaint No. 2000-19 (AU, Apr. 2, 2001); *Dir. of Practice v. (b)(3)/26 USC 6103*, Complaint No. 2003-50 (AU, Dec. 2, 2003). The statute provides:

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

28 U.S.C. § 2462.

The Court of Appeals for the District of Columbia Circuit has held that administrative proceedings brought by the Federal government for the assessment of penalties do qualify as an "action, suit or proceeding for the enforcement of any civil fine [or] penalty" within the meaning of Section 2462. *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994). In *3M*, the D.C. Circuit concluded that Section 2462 applies to claims of the Environmental Protection Agency when seeking to impose a civil penalty under the Toxic Substances Control Act ("TSCA") in administrative penalty assessment proceedings. "Because assessment proceedings under TSCA seek to impose civil

penalties, they are proceedings for the 'enforcement' of penalties," the court held. 17 F.3d at 1459. The court then expanded this holding to apply to any Federal administrative penalty imposition, explaining:

The provision before us, § 2462, is a general statute of limitations, applicable not just to EPA in TSCA cases, but to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise.

Id. at 1461.

Disbarment or suspension of a professional license has been held to be a "penalty" within the meaning of Section 2462. *See, Johnson v. SEC*, 87 F.3d 484, 488-89 (D.C. Cir. 1996) (holding that the imposition by the Securities and Exchange Commission of a six-month license suspension upon a securities industry supervisor for failing to adequately supervise a subordinate was a "penalty" encompassed by Section 2462); *see also, Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000) (holding that the Federal Deposit Insurance Corporation's removal of a banker from his position and expulsion from the banking industry constituted "penalty" within the meaning of Section 2462). It is concluded that disbarments or suspensions of practitioners under IRS' Rules Applicable to Disciplinary Proceedings regarding Practice Before the Internal Revenue Service at 31 C.F.R. Part 10 are "penalties" within the meaning of Section 2462.

In Count 1, Complainant alleges that Respondent (b)(3)/26 USC 6103

. Compl. ¶¶ 11-13. In Count 2, Complainant alleges that Respondent (b)(3)/26 USC 6103

Compl. ¶¶ 16-18. In Count 3, Complainant alleges that Respondent (b)(3)/26 USC 6103

Compl. ¶¶ 21-23. Because the Complaint was filed on November 15, 2010, all claims in the Complaint that accrued before November 15, 2005, in accordance with the five-year statute of limitations in Section 2462, are barred. Therefore, the claims in Counts 1 through 3, all having accrued more than five years before the Complaint was filed, cannot be grounds upon which to enforce a penalty.

III. Findings of Fact and Conclusions of Law as to Liability

1. Respondent is a certified public accountant who has engaged in practice as an accountant representing taxpayers before the IRS. Compl. ¶¶ 2, 5. Therefore Respondent is a "practitioner" as defined in 31 C.F.R. §§ 10.2(a)(5), 10.3(b).
2. Respondent is subject to the disciplinary authority of the Secretary of the Treasury and the OPR, in accordance with 31 C.F.R. §§ 10.3 and 10.50. Compl. ¶ 3; 31 C.F.R. §§ 10.2(a)(5), 10.50.

3. Respondent's last known address of record with the OPR is Redacted, (b)(3)/26 USC 6103. Compl. ¶ 4.
4. At all times relevant to the Complaint, Respondent (b)(3)/26 USC 6103
[REDACTED]
[REDACTED]. Compl. ¶ 6; (b)(3)/26 USC 6103.
5. In compliance with 31 C.F.R. § 10.60(c), Respondent has been previously advised in writing of the law, facts and conduct warranting the issuance of the Complaint, and has been accorded an opportunity to dispute facts, assert additional facts, and make arguments. Compl. ¶ 9; see, 31 C.F.R. § 10.60(c).
6. For (b)(3)/26 USC 6103, Respondent (b)(3)/26 USC 6103
[REDACTED]
[REDACTED] Compl. ¶ 26; (b)(3)/26 USC 6103. Respondent (b)(3)/26 USC 6103
[REDACTED] Compl. ¶ 27.
Respondent (b)(3)/26 USC 6103, as
alleged in Count 4 of the Complaint. Compl. ¶ 27.
7. For (b)(3)/26 USC 6103, Respondent (b)(3)/26 USC 6103
[REDACTED] Compl. ¶ 26;
(b)(3)/26 USC 6103. Respondent (b)(3)/26 USC 6103
[REDACTED], as alleged in Count 4 of the Complaint. Compl. ¶ 28.
8. For (b)(3)/26 USC 6103, Respondent (b)(3)/26 USC 6103
[REDACTED]
Compl. ¶ 31; (b)(3)/26 USC 6103. Respondent (b)(3)/26 USC 6103
[REDACTED]
Compl. ¶ 32. Respondent (b)(3)/26 USC 6103
[REDACTED], as alleged in Count 5 of the Complaint. Compl. ¶ 32.
9. For (b)(3)/26 USC 6103, Respondent (b)(3)/26 USC 6103
[REDACTED]
Compl. ¶ 35; (b)(3)/26 USC 6103. Respondent (b)(3)/26 USC 6103
[REDACTED]
6103. Compl. ¶ 36. Respondent (b)(3)/26 USC 6103
[REDACTED], as alleged in Count 6 of the Complaint. Compl. ¶ 36.
10. For (b)(3)/26 USC 6103, Respondent (b)(3)/26 USC 6103
[REDACTED]
Compl. ¶ 39; (b)(3)/26 USC 6103. Respondent (b)(3)/26 USC 6103
[REDACTED]
Compl. ¶ 40. Respondent (b)(3)/26 USC 6103
[REDACTED], as alleged in Count 7 of the Complaint Compl. ¶ 40.

11. Respondent's (b)(3)/26 USC 6103
(b)(3)/26 USC 6103, for which Respondent may be censured, suspended, or disbarred from practice before the IRS. Compl. ¶ 29; 31 C.F.R. §§ 10.50, (b)(3)/26 USC 6103.
12. Respondent's (b)(3)/26 USC 6103
(b)(3)/26 USC 6103 for which Respondent may be censured, suspended, or disbarred from practice before the IRS. Compl. ¶ 33, 37, 41; 31 C.F.R. §§ 10.50, (b)(3)/26 USC 6103.
13. On or about April 30, 2007, the Director of OPR wrote to Respondent alleging that (b)(3)/26 USC 6103
(b)(3)/26 USC 6103 Compl. ¶ 43. Respondent was given thirty days to respond (b)(3)/26 USC 6103
(b)(3)/26 USC 6103. *Id.* Respondent was put on notice that failure to respond would result in further allegations for that failure. *Id.* Respondent did not respond (b)(3)/26 USC 6103, as alleged in Count 8 of the Complaint. Compl. ¶ 44.
14. Respondent's failure to respond to the Director's April 30, 2007 letter, (b)(3)/26 USC 6103
(b)(3)/26 USC 6103 to the Director, was willful and constitutes a violation of 31 C.F.R. § 10.20 generally, and more particularly a willful violation of § 10.20(b) (Rev. 2002), for which Respondent may be censured, suspended, or disbarred from practice before the Internal Revenue Service as provided for under 31 C.F.R. § 10.52(a)(1) (Rev. 2004). Compl. ¶ 45, 46.; 31 C.F.R. §§ 10.20(b) (Rev. 2002); 31 C.F.R. § 10.52(a)(1) (Rev. 2004).
15. On or about August 30, 2009, the Director of OPR wrote to Respondent alleging (b)(3)/26 USC 6103
(b)(3)/26 USC 6103 Compl. ¶ 48. Respondent was given thirty days to respond (b)(3)/26 USC 6103
(b)(3)/26 USC 6103. *Id.* Respondent was put on notice that failure to respond would result in further allegations for that failure. *Id.* Respondent did not respond (b)(3)/26 USC 6103, as alleged in Count 9 of the Complaint. Compl. ¶ 49.
16. Respondent's failure to respond to the Director's August 30, 2009 letter, (b)(3)/26 USC 6103
(b)(3)/26 USC 6103, was willful and constitutes a violation of 31 C.F.R. § 10.20(b), for which Respondent may be censured, suspended, or disbarred from practice before the Internal Revenue Service as provided for under 31 C.F.R. § 10.52(a)(1). Compl. ¶ 50, 51; 31 C.F.R. §§ 10.20(b), 10.52(a)(1).

17. On or about January 5, 2010, the Director of OPR wrote to Respondent informing him that he had twenty days to respond (b)(3)/26 USC 6103. Compl. ¶ 53. Respondent was put on notice that failure to respond would result in further allegations for that failure. Id. Respondent received the Director's letter on January 7, 2010. Compl. ¶ 54. Respondent did not respond (b)(3)/26 USC 6103, as alleged in Count 10 of the Complaint. Compl. ¶ 55.
18. Respondent's failure to respond to the Director's January 5, 2010 letter, (b)(3)/26 USC 6103 to the Director, was willful and constitutes a violation of 31 C.F.R. § 10.20(b), for which Respondent may be censured, suspended, or disbarred from practice before the Internal Revenue Service as provided for under 31 C.F.R. § 10.52(a)(1). Compl. ¶ 56, 57; 31 C.F.R. §§ 10.20(b), 10.52(a)(1).

IV. Discussion and Conclusions

It is well established that there exists within federal agencies the power to regulate those who practice before them. Congress authorized the Secretary of the Treasury to regulate the practice of those who represent others before the Department of the Treasury, in 31 U.S.C. § 330. The Secretary of the Treasury has implemented such authority by promulgating regulations at 31 C.F.R. Part 10, which are designed to protect the Department and the public from persons unfit to practice before the IRS. Any practitioner may be disbarred or suspended from practice before the IRS, after notice and an opportunity for a hearing, if the practitioner is shown to be incompetent or disreputable, or refuses to comply with any regulation in 31 C.F.R. Part 10. 31 U.S.C. § 330(b); 31 C.F.R. § 10.50(a).

As to alleged disreputable conduct occurring on or after July 26, 2002 and before September 26, 2007, Section 10.51(f) of the Rules provides:

Incompetence and disreputable conduct for which a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service includes, but is not limited to-

* * *

(f) Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax

31 C.F.R. § 10.51(f) (2002); Circular No. 230 (7-2002). As to alleged disreputable conduct occurring on or after September 26, 2007, Section 10.51(a)(6) provides:

Incompetence and disreputable conduct for which a practitioner may be sanctioned under § 10.50 includes, but is not limited to-

* * *

(6) Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.

31 C.F.R. § 10.51(a)(6); Circular No. 230(4-2008).

The Rules provide at 31 C.F.R. § 10.20(b) as follows in pertinent part:

When a proper and lawful request is made by the Director of the Office of Professional Responsibility, a practitioner must provide the Director of the Office of Professional Responsibility with any information the practitioner has concerning an inquiry by the Director of the Office of Professional Responsibility into an alleged violation of the regulations in this part by any person...unless the practitioner believes in good faith and on reasonable grounds that the information is privileged.

A practitioner may be sanctioned under § 10.50 if the practitioner “willfully violates any of the regulations (other than § 10.33) contained in [31 C.F.R. Part 10].” 31 C.F.R. § 10.52(a)(1); Circular No. 230 (4-2008); see also, 31 C.F.R. § 10.52(a); Circular No. 230 (7-2002).

Respondent is an accountant engaged in practice before the IRS. As such, he

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

. *Owrutsky v.*

Brady, No. 89-202, 1991 U.S. App. LEXIS 2613 (4 Cir. 1991), citing *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

As to the finding that Respondent

(b)(3)/26 USC 6103

(Finding of Fact 7), which is based on some of the allegations in Count 4, the Complaint does not allege that

(b)(3)/26 USC 6103

. See

Compl. ¶¶ 28, 29 There is no support in the Motion of Default or anywhere else in the record for a finding that

(b)(3)/26 USC 6103

conclusion is made herein that Respondent's disreputable conduct.

(b)(3)/26 USC 6103

Therefore no constitutes

As to Respondent's (b)(3)/26 USC 6103, Findings of Fact 6 and 11 support the conclusion that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. (b)(3)/26 USC 6103 from Circular No. 230 (Rev. 7-2002). Regarding Respondent's (b)(3)/26 USC 6103. Findings of Fact 8, 9, 10 and 12 support the conclusion that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. (b)(3)/26 USC 6103 from Circular No. 230 (4-2008). As to the failure to the failure to respond (b)(3)/26 USC 6103, Findings of Fact 13 through 18 support the conclusion that Respondent violated 31 C.F.R. § 10.20(b) and that Respondent willfully violated a regulation for which he may be sanctioned pursuant to 31 C.F.R. § 10.52(a)(1).

For Respondent's disreputable conduct and willful failure to comply with the regulations in Part 10, Respondent may be censured, suspended or disbarred from practice before the IRS. 31 C.F.R. § 10.50. In the Complaint, Complainant requests that Respondent be disbarred. Compl. at 12. The provision of the Rules that addresses decisions by default, 31 C.F.R. § 10.64(d), does not require that the relief requested be granted upon a failure to file an answer, but only that such failure constitutes an admission of all of the allegations of the complaint and a waiver of hearing, and that a decision by default may be made without hearing or further procedure. 31 C.F.R. § 10.64(d). The sanction is to be determined by examining the nature of the violations in relation to the purposes of the regulations along with all relevant circumstances, and by considering the recommendation of the administrative officials charged with the responsibility of achieving the statutory and regulatory purposes, with the appropriate weight. 31 C.F.R. § 10.50(d).

The issue in an IRS disciplinary proceeding is essentially whether the practitioner in question is fit to practice. *Harary v. Blumenthal*, 555 F. 2d 1113, 1116 (2d Cir. 1977). A certified public accountant's failure to file tax returns for three consecutive years has been held to constitute grounds sufficient for disbarment. *Poole v. United States*, No. 84-0300, 1984 U.S. Dist. LEXIS 15351 (D.D.C., June 29, 1984). The court in Poole stated, "willful failure to file tax returns, in violation of Federal revenue laws, in [sic] dishonorable, unprofessional, and adversely reflects on the petitioner's fitness to practice. This is particularly true in a tax system whose very effectiveness depends upon voluntary compliance." 1984 U.S. Dist. LEXIS 15351 at 8. In *Owrutsky v. Brady*, an attorney was disbarred for willful failure to timely file tax returns for six consecutive years, albeit he had no tax liability for any of those years. *Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991).

Practice before the IRS is a privilege, and one cannot partake of that privilege without also taking on the responsibilities of complying with the regulations that govern such practice. Suspension is imposed in furtherance of the IRS' regulatory duty to protect the public interest and the Department by conducting business with responsible persons only. As an accountant and practitioner before the IRS, Respondent's (b)(3)/26 USC 6103 is a display of express disregard for the standards established for the benefit of the IRS and the public. Respondent showed further disregard for the requirements set forth by IRS when he did not respond to

requests from the Director (b)(3)/26 USC 6103
(b)(3)/26 USC 6103, in violation of 31 C.F.R. § 10.20(b). 31 C.F.R. §§ 10.20(b), 10.52(a)(1).

Complainant's request for an order disbarring Respondent from practice before the IRS was predicated upon Complainant's allegations of ten counts of violation, but Counts 1, 2 and 3 have herein been found barred by the statute of limitations in 28 U.S.C. § 2462, and part of Count 4 has not been found to constitute disreputable conduct under 31 C.F.R. (b)(3)/26 USC 6103 (2002). The remaining allegations of violation, upon which Respondent has been found liable, are not supported by a record of evidence, given the Respondent's default. In these circumstances, Respondent's violations of 31 C.F.R. (b)(3)/26 USC 6103 (2002), (b)(3)/26 USC 6103, and 10.20(b) for (b)(3)/26 USC 6103 (b)(3)/26 USC 6103, and willful failure to respond to the Director's requests, as alleged in Counts 4 through 10, warrant an indefinite suspension of Respondent from practice before the IRS. Such a sanction is commensurate with the seriousness of the disreputable conduct found herein, and allows the Director of the Office of Professional Responsibility complete discretion to determine whether or when Respondent may be reinstated.

ORDER

It is hereby **ORDERED** that Respondent (b)(3)/26 USC 6103, be **suspended indefinitely** from practice before the Internal Revenue Service, with reinstatement to practice thereafter at the sole discretion of the Director of the Office of Professional Responsibility.

_____/s/_____
Susan L. Biro
Chief Administrative Law Judge⁴

Dated: February 4, 2011
Washington, D.C.

Pursuant to 31 C.F.R. § 10.77, this Order may be appealed to the Secretary of the Treasury within thirty (30) days from the date of service of this Decision on the parties. The appeal must be filed in duplicate with the Director of the Office of Professional Responsibility and shall include a brief that states the appellant's exceptions to the decision of the Administrative Law Judge and supporting reasons therefor.

⁴ This decision is issued by the Chief Administrative Law Judge of the United States Environmental Protection Agency. The Administrative Law Judges of the Environmental Protection Agency are authorized to hear cases pending before the United States Department of the Treasury, pursuant to an Interagency Agreement dated October 1, 2008.

In the Matter of (b)(3)/26 USC 6103, Respondent Complaint No. 2010-19

CERTIFICATE OF SERVICE

I certify that a true copy of **Decision And Order On Default**, dated February 4, 2011, was sent this day in the following manner to the addressees listed below:

/s/ _____
Maria Whiting-Beale
Staff Assistant

Dated: February 4, 2011

Copy by First Class Regular Mail to:

Colleen A. Crane, Attorney
Internal Revenue Service
Office of Chief Counsel
General Legal Services
Redacted
Redacted
Washington, DC 20224

First Class Regular Mail and Certified Mail Return Receipt To:

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