**UNITED STATES OF AMERICA**
**THE DEPARTMENT OF THE TREASURY**
**WASHINGTON, D.C.**

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| **KAREN L. HAWKINS**, | ) | |
| **DIRECTOR**, | ) | |
| **OFFICE OF PROFESSIONAL** | ) | |
| **RESPONSIBILITY**, | ) | |
| **INTERNAL REVENUE SERVICE** | ) | **Docket No. 12-IRS-0004** |
| | ) | **OPR Complaint No. IRS 2013-00003** |
| Complainant, | ) | |
| | ) | **DECISION and ORDER** |
| v. | ) | **of DISBARMENT** |
| | ) | |
| **CYNTHIA ASHLEY,** | ) | |
| | ) | |
| Respondent. | ) | |

## Introduction

In this case, the Internal Revenue Service's (IRS) Office of Professional Responsibility (OPR) seeks to disbar Cynthia Ashley (Respondent) from practice before the IRS.[1]

Pursuant to 31 C.F.R. §10.50(a), a practitioner may be suspended or disbarred upon proof that such practitioner is either incompetent or disreputable within the meaning of 31 C.F.R. §10.51. In turn, 31 C.F.R. §10.51(a)(6), defines "incompetence and disreputable conduct" as "willfully failing to make a Federal tax return in violation of the Federal tax laws" which require an individual to make a federal tax return before the

[1]The Department of the Treasury and OPR (and this court) have jurisdiction over Respondent per Director, Office of Professional Responsibility v. Ohendalski, Decision on Appeal, complaint No. 2007-10 (2008) (The two jurisdictional prerequisites establishing the Director's authority over a practitioner are: (1) that the practitioner is authorized to practice before the IRS, and (2) that the practitioner has in fact practiced before the IRS.) Here, Respondent is (and has for 20 years) practiced before the IRS. See Finding of Fact 1, infra.

April 15 deadline or within a period of time granted by an extension. 26 U.S.C. §§6012(a), 6072(a), 6081(a); 31 C.F.R. §10.51(d).

**Procedural History**

On December 27, 2012, the OPR filed a Complaint alleging five counts of Respondent's willful, disreputable conduct, as that term is used in 31 C.F.R. §10.51(a)(6), et seq.

In Count 1, the OPR alleged that despite her obligation to do so under law, Respondent failed to file a federal individual income tax return (Form 1040) for tax year 2007 by the required extension date of October 15, 2008.

In Count 2, the OPR alleged that despite her obligation to do so under law, Respondent failed to file a federal individual income tax return (Form 1040) for tax year 2008 by the required extension date of October 15, 2009.

In Count 3, the OPR alleged that despite her obligation to do so under law, Respondent failed to file a federal individual income tax return (Form 1040) for tax year 2009 by the required extension date of October 15, 2010.

In Count 4, the OPR alleged that despite her obligation to do so under law, Respondent failed to file a federal individual income tax return (Form 1040) for tax year 2010 by the required extension date of October 15, 2011.

In Count 5, the OPR alleged that despite her obligation to do so under law, Respondent failed to file a federal individual income tax return (Form 1040) for tax year 2011 by the required extension date of October 15, 2012.

Accordingly, the OPR seeks Respondent's disbarment practice from before the IRS, per the express provisions of 31 C.F.R. §10.50(a).

On December 28, 2012, this case was assigned to the undersigned for adjudication by the Acting Chief Administrative Law Judge for the United States Coast Guard, the Hon. Parlen L. McKenna.[2]

On or about March 21, 2013, Respondent filed her Answer (in the form of a letter)[3] which denied the allegations of the Complaint and specifically pled that "all returns were completed and filed in a timely manner as required by law."

During the course of this litigation, the court convened several telephonic pre-hearing conferences with the parties to establish discovery procedures and deadlines and to establish a time, date and location for a hearing.

On August 7, 2013, the undersigned convened the hearing of this matter at the Mecklenburg County Courthouse in Charlotte, North Carolina.

Both parties presented their respective cases: The OPR presented two witnesses and offered five items of documentary evidence, all of which were admitted; Respondent testified on her own behalf and offered fourteen items of documentary evidence, thirteen of which were admitted. Thereafter, the parties presented their respective closing arguments. [4]

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[2]This decision is issued by an Administrative Law Judge of the United States Coast Guard, Department of Homeland Security. The Judges of the Coast Guard are authorized to hear cases pending before the United States Department of the Treasury, pursuant to Interagency Agreements Between Federal Agencies dated June 6, 2011 and January 15, 2013.

[3]The federal courts grant wide latitude in construing the pleadings and papers of pro se litigants. SEC v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992) (citing Maldonado v. Garza, 579 F.2d 338, 340 (5th Cir. 1978). See also Haines v. Kerner, 404 U.S. 519, 520 (1972) (Allegations set forth in a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers). More generally, "Implicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training." Traguth v. Zuck, 710 F.2d 90, 105 (2d Cir. 1983).

[4] Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __ ). In this case, citations referring to Agency Exhibits are as follows: "OPR" followed by the exhibit number (OPR Ex. 1, etc.); Respondent's Exhibits are as follows: "Resp." followed by the

On August 19, 2013, the undersigned directed the parties to file their proposed Findings of Fact and Conclusions of Law, if any, with one-another and the court by September 6, 2013.[5]

Following the hearing and a thorough review of the entire administrative record, I have determined that Respondent should be **DISBARRED** from practice before the IRS for the reasons provided in this Decision and Order. [6]

## OPR's Authority to Discipline IRS Practitioners

An individual engaging in practice before the IRS, as defined in 31 C.F.R. §§10.2(a)(4) and 10.2(a)(5), is subject to the disciplinary authority of the Secretary of the

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exhibit letter (Resp. Ex. A, etc.); ALJ Exhibits are as follows: "ALJ" followed by the exhibit Roman numeral (ALJ Ex. I, etc.). A list of Exhibits and Witnesses is attached hereto and incorporated herein as Attachment A.

[5]On August 19, 2013, this court entered an Order setting a deadline for the submission of post-hearing briefs. That deadline was 5:00 p.m. (EDT), September 6, 2013. On September 4, 2013, OPR timely filed its "Post-Hearing Brief." Respondent filed her post-hearing brief at/or near 4:50 p.m. (EDT) on September 6, 2013. Only a few hours before the deadline, however, the court, in an abundance of caution for the due process interests of the Respondent, instructed court staff to make inquiry whether Respondent would submit a post-hearing brief on time. At approximately 2:40 p.m. (EDT), the court's staff attorney contacted Respondent to inquire whether she intended to file her brief.

Respondent told the staff attorney that she was "working on her brief," and further told the court's staff attorney that she "did not receive a copy of the transcript." Respondent's brief likewise claims, "Respondent was unaware that transcripts of the hearing were available for reference or for her own records."

Intrigued by Respondent's assertions, the court instructed its staff paralegal to contact Executive Court Reporters, Inc., (Executive) the entity retained by the IRS to report and transcribe the instant proceedings. Executive told the court's staff paralegal that it had contacted Respondent and left a message informing her on how to obtain a copy of the transcript. Executive told this court's paralegal that Respondent never responded to that call or made any effort to obtain a copy of the transcript.

Likewise, Respondent never contacted court staff asking for either a copy of the transcript or for assistance in obtaining one. Nor did Respondent ever contact court staff seeking relief from any previous Order or with a question about court procedure.

Both parties submitted proposed Findings of Fact and Conclusions of Law, to which the court gave due consideration. However, the court elected to enter its own Findings of Fact and Conclusions of Law.

[6]The court acknowledges, with thanks, the research assistance provided by *Redacted*, legal intern, *Redacted, Redacted,* Raleigh, North Carolina.

Treasury and the OPR, in accordance with 31 U.S.C. §330, 31 C.F.R. §§10.1(b) and 10.50(a).

The OPR Director is authorized, per IRS Circular 230 (4-2008) and Delegation Order No. 25-16 (2012), to institute proceedings to suspend or disbar practitioners before the IRS. See 31 C.F.R. §10.50(a). Under 31 C.F.R. §10.50, any sanctions imposed "shall take into account all relevant facts and circumstances." In addition, a monetary penalty may be imposed upon any practitioner who engages in disreputable conduct, but that penalty is not to exceed the gross income derived from the conduct that directly gave rise to the penalty. Id. at (c), (e).

In rendering a decision, the judge must include a statement of findings and conclusions, as well as the reasons or basis for making such findings and conclusions, and an order of censure, suspension, disbarment, monetary penalty, disqualification, or dismissal of the complaint. 31 C.F.R. §10.76(a).

**Incompetence and Disreputable Conduct under Sections 10.51(a)(2) and (a)(10)**

In the instant case, the OPR alleges that Respondent willfully failed to timely file federal individual income taxes for tax years 2007 – 2011. Willful failure to timely file a federal income tax return constitutes disreputable conduct as defined under 31 C.F.R. §10.51(a)(6) and is actionable per the provisions of 31 C.F.R. §10.50(a), et seq. (emphasis added). [7]

Willfulness, as that term is used in 31 C.F.R. §10.51(a)(6), is a voluntary, intentional violation of a known duty. Cheek v. United States, 498 U.S. 192, 201 (1991);

[7]For the rules applicable to violations occurring before July 26, 2002, see Circular No. 230 (7-94); for those occurring thereafter but before September 26, 2007, see Circular No. 230 (7-2002); and for those occurring thereafter, see Circular No. 230 (4-2008). See 31 C.F.R. §10.91 (2007) (practitioners "will be judged by the regulations in effect at the time the conduct occurred").

United States v. Pompino, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346 (1973). Accordingly, "if by congressional fiat it is bad to fail to file an income tax return, then willfulness may be found when the obligation to act is fully known and consciously disregarded." Owrutsky v. Brady, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991) at 2.

**Evidentiary Standard of Proof**

The standard of proof differs depending on the nature of the sanction sought. 31 C.F.R. §10.76(b). Because the OPR, here, seeks Respondent's disbarment, the applicable standard is clear and convincing evidence. Id. The clear and convincing standard has been defined "as evidence of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established, and, as well, as evidence that proves the facts at issue to be highly probable." Jimenez v. Daimler Chrysler Corp., 269 F.3d 439, 450 (4th Cir. 2001) (internal quotation marks, citations omitted); see also Addington v. Texas, 441 U.S. 418 (1979) (explaining that the clear and convincing evidence is an intermediate standard somewhere between proof by a preponderance of the evidence and proof beyond a reasonable doubt).

The Federal Rules of Evidence are not controlling in these proceedings, but the judge may exclude evidence that is irrelevant, immaterial, or unduly repetitious. See 31 C.F.R. §10.73(a). Hence, strict, formal rules of evidence do not apply.

**Findings of Fact**

The following findings of fact were established by clear and convincing evidence, after a thorough review of the pleadings, exhibits, the parties' respective arguments and

briefs. Each exhibit admitted into evidence was considered in rendering this decision, even though every exhibit is not specifically discussed herein. The court finds that:

1. Respondent Cynthia Ashley was awarded a Bachelor's Degree in accounting by the *Redacted*, but is not a Certified Public Accountant. She has engaged in practice before the Internal Revenue Service for the past twenty years. (Tr. at 141 – 142; Resp. Ex. 1).

2. Mr. James Greenway is a revenue officer with the Field Collection Division of the Small Business/Self Employed Division of the Internal Revenue Service based in Atlanta, Georgia. Mr. Greenway was tasked with the investigation of Respondent Cynthia Ashley's tax-paying history for tax years 2007 – 2011. (Tr. at 15 – 16, 18 – 19).

3. Ms. Karen L. Hawkins is the Director of the Internal Revenue Service's (IRS) Office of Professional Responsibility (OPR), an independent office administered by the IRS, and is responsible for oversight of practitioner education, outreach and enforcement of 31 C.F.R. §10.50, et seq. At the time of the hearing, Ms. Hawkins had been employed as Director of OPR for slightly more than four years. (Tr. at 77 – 82).

4. The Internal Revenue Service's Office of Professional Responsibility's mission is to ensure the integrity of the tax administration system and in protecting taxpayers from either unscrupulous or incompetent return preparers or practitioners. 31 U.S.C. §330. (Tr. at 82 – 83, 98).

5. Ms. Karen L. Hawkins issued a "soft" letter dated November 19, 2010, to Respondent Cynthia Ashley. That letter specifically reminded Respondent of her personal obligation to timely make her individual income tax returns and provided guidance on how Respondent could maintain her good standing as a practitioner before the Internal Revenue Service. (Tr. at 90 – 92; OPR Ex. E).

6. Ms. Karen L. Hawkins' November 19, 2010, letter was designed to remind Respondent Cynthia Ashley of her obligations to timely make her individual tax returns. The November 19, 2010, letter was calculated to create a "wakeup call" to Respondent and to remind her that her past tax obligations were then due. (Tr. at 90 – 92).

7. Had Respondent Cynthia Ashley adhered to the requirements of the November 19, 2010 letter, together with 31 C.F.R. Part 10 and IRS Circular 230, and made her returns (albeit late), the Internal Revenue Service's Office of Professional Responsibility would have allowed her to maintain her status as a practitioner in good standing. (Tr. at 91 – 92, 108 – 109; OPR Ex. E).

8. On or about April 11, 2012, Ms. Karen L. Hawkins sent Respondent Cynthia Ashley an "allegation" letter, detailing the years wherein Respondent had failed to make her individual returns and the amounts then due and owing. The April 11, 2012, letter strongly advised Respondent of her tax-filing obligations and also provided clear guidance on what remedial steps Respondent could undertake. The allegation letter provided Respondent with a notice and opportunity to confer with Office of Professional Responsibility attorney-advisors and for Respondent to "present any kind of mitigating evidence or explanations" concerning her conduct. (Tr. at 92 – 93; OPR Ex. F).

9. Respondent Cynthia Ashley willfully failed to make a signed individual federal income tax form for tax year 2007 until on or about March 22, 2013, almost a year after she had received the April 11, 2012 "allegation" letter from Ms. Karen L. Hawkins. (Tr. at 35 – 43, 46; OPR Ex. H).

10. Respondent Cynthia Ashley willfully failed to make a signed individual federal income tax form for tax year 2008 until on or about March 18, 2013, almost a year after she had received the April 11, 2012 "allegation" letter from Ms. Karen L. Hawkins. (Tr. at 48 – 50; OPR Ex. H).

11. Respondent Cynthia Ashley willfully failed to make a signed individual federal income tax form for tax year 2009 until on or about March 22, 2013, almost a year after she had received the April 11, 2012 "allegation" letter from Ms. Karen L. Hawkins. (Tr. at 51 – 55; OPR Ex. H).

12. Respondent Cynthia Ashley willfully failed to make a signed individual federal income tax form for tax year 2010 until on or about March 18, 2013, almost a year after she had received the April 11, 2012 "allegation" letter from Ms. Karen L. Hawkins. (Tr. at 56 – 58; OPR Ex. H).

13. Respondent Cynthia Ashley willfully failed to make a signed individual federal income tax form for tax year 2011 until on or about March 18, 2013, almost a year after she had received the April 11, 2012 "allegation" letter from Ms. Karen L. Hawkins. (Tr. at 58 – 59; OPR Ex. H).

14. From and during tax years 2007 through 2011, Respondent Cynthia Ashley repeatedly failed to respond in a meaningful manner to the Internal Revenue Service's repeated written inquiries why she had failed to timely file her individual federal tax returns in those years. (Tr. at 35 – 60; OPR Ex. H, I).

## Analysis

The OPR's case-in-chief was comprised of five items of documentary evidence and the testimony of two witnesses: Mr. James Greenway, a revenue officer with the

Field Collection Division of the Small Business/Self Employed Division of the IRS, Atlanta, Georgia; and Ms. Karen L. Hawkins, Director of the Office of Professional Responsibility (OPR), IRS, in Washington, DC.[8]

**Count 1: Tax Year 2007[9]**

Initially, Mr. Greenway testified about his familiarity with, and use of, an IRS database called the "Integrated Data Retrieval System" (IDRS) and how that system is a repository of information concerning individual federal taxpayers and the status of their transactions with the IRS. (Tr. at 17 – 18).

Mr. Greenway prepared a spreadsheet for the purposes of organizing and presenting the information he gathered in the IDRS system for the years Respondent was alleged to have failed to file her individual tax returns. (Tr. at 18 – 20; OPR Ex. H).

[8]The court notes with particularity that Respondent was not charged with failure to pay federal income taxes. Neither was she charged with a delinquency in her obligation to pay any back tax, penalty or interest. Rather, the OPR's burden, here, was simply to prove that Respondent willfully failed to make a federal tax return in each of the years alleged. 31 C.F.R. §10.51(a)(6). It is no defense that for some or all of the tax years in question, the IRS filed returns for Respondent or that Respondent eventually filed signed returns or that she was credited with an adjustment from one year to the next or that she may have paid any outstanding taxes, penalties or interest. These events do not constitute a legal defense to the charge of willfully failing to timely make a federal income tax return. Willfulness may be inferred from the facts and circumstances of the case. In Gaunt v. U.S., 184 F.2d 284, 291 (1st Cir. 1951), the court said that in prosecution for willful evasion of federal income taxes, proof of "willfulness" was a question of fact. Direct proof of willfulness is not essential. Rather, willfulness can be inferred from a combination of facts and circumstances.

[9] The court incorporates by reference the following for each tax year addressed herein: 1) That during each tax year referenced in the Complaint, and for the twenty years prior thereto, Respondent Cynthia Ashley was engaged in practice before the IRS, as defined by 31 C.F.R. §10.2(a)(4) as an enrolled agent. Respondent's Answer did not specifically deny paragraph 1 of the Complaint, which specifically alleges her status as an enrolled IRS agent. Hence, the court deems the contents of that paragraph admitted. 2) Respondent Cynthia Ashley was, during each tax year referenced in the Complaint, subject to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility. Respondent's Answer did not specifically deny paragraph 2 of the Complaint, which specifically alleges that she is subject to the disciplinary authority foresaid. Hence, the court deems the contents of that paragraph admitted. 3) That during each tax year referenced in the Complaint, Respondent Cynthia Ashley received gross income sufficient to require her to make a federal individual income tax return (Form 1040) for each such tax year per 26 U.S.C. §§6011, 6012, and 6072.

Mr. Greenway testified that as of March 2, 2009, Respondent had neither been granted an extension, nor had she filed a federal return for tax year 2007. (Tr. at 35 – 37).

On March 2, 2009, the IRS notified Respondent that she had not filed an individual income tax return for tax year 2007. (OPR Ex. H).

Because Respondent did not file a return for tax year 2007, the IRS automatically filed one for her in August, 2010, per the provisions of 26 U.S.C. §6020(b). (Tr. at 37 – 38; OPR Ex. H). Respondent's Exhibit 13 likewise reveals that the IRS prepared a substitute return for her for the 2007 tax year.

Mr. Greenway testified that for tax year 2007, the IRS computed a tax owed by Respondent and formally notified her of that deficiency and her obligation to pay. (Tr. at 40).

The IDRS and Respondent's Exhibit 13 reveal that after at least two attempts to notify Respondent of the deficiency and penalties and interest, Respondent finally signed and returned a return for tax year 2007 on or about March 22, 2013. (Tr. at 35 – 43; OPR Ex. H; Resp. Ex. 13).

The IRS has no record of Respondent having filed a 2007 individual income tax return prior to March 22, 2013. (Tr. at 35 – 46).

The court regards the IRS's attempts to contact Respondent, and her apparent refusal to respond or take appropriate and timely action vis a vis her 2007 return, as evidence of a willful disregard of her obligations to timely file a federal individual income tax return. (Tr. at 35 – 46).

**Count 2: Tax Year 2008**

Mr. Greenway testified that on April 15, 2009 (the day her 2008 taxes were originally due), Respondent requested a six-month extension allowing her until October 15, 2009, to file a return for tax year 2008 (Tr. at 48 – 49; OPR Ex. H).

Mr. Greenway then explained that on July 6, 2010, the IRS identified Respondent as having failed to file her 2008 return by October 15, 2009, despite the fact she had been granted an extension. (Tr. at 49 – 50). Mr. Greenway noted that after July 6, 2010, the IRS sent two letters to Respondent asking why she had not made her return for tax year 2008. (Tr. at 49).

Respondent's evidence reveals that as of December 29, 2010, she had not filed a return for tax year 2008. (Resp. Ex. 13). In fact, Respondent's own evidence indicates that she did not file her 2008 tax return until March 18, 2013. (Tr. at 50; OPR Ex. H; Resp. Ex. 13).

**Count 3: Tax Year 2009**

Mr. Greenway testified that on April 15, 2010, Respondent asked for and was granted a six-month extension to file a return for tax year 2009. (Tr. at 51). Respondent's evidence also supports the same finding. (Resp. Ex. 13).

The evidence also reveals that after October 15, 2010, Respondent had not filed a federal return for tax year 2009; thus, the IRS commenced preparations to file one for her. (Tr. at 51 – 53).

The evidence further reveals that for tax year 2009, the IRS made repeated efforts to contact with Respondent concerning her failure to file. (Tr. at 51 – 54 ). Specifically, the IRS sent Respondent letters on March 3, 2011 and March 22, 2011 asking why she

had failed to file an individual tax return for tax year 2009. (Tr. at 51 – 52). There is no evidence Respondent responded to those inquiries. (Resp. Ex. 13).

Sometime between July 26 and August 15, 2011, the IRS then prepared and filed a substitute tax return, per the provisions of 26 U.S.C. §6020(b), for tax year 2009. (Tr. at 52). Thereafter, the IRS computed that Respondent owed taxes and, on November 3, 2011, sent a Notice of Deficiency to Respondent. (Tr. at 52). Thereafter, on or before April 9, April 30, May 28, 2012, and again on or before October 8, 2012, the IRS sent letters to Respondent asking for payment of her obligations. (Tr. at 53).

On March 22, 2013, the IRS received Respondent's 2009 tax return. (Tr. at 54).

The court regards the IRS's attempts to contact Respondent, and her apparent refusal to take appropriate and timely action vis a vis her 2009 return, as evidence of a willful disregard of her obligations to timely file a federal individual income tax return. (Tr. at 51 – 54). The fact that Respondent's 2009 return ultimately resulted in an excess credit (posted to her 2011 return) is inconsequential relative to her original obligation to timely file her 2009 return. (Tr. at 54 – 55).

**Count 4: Tax Year 2010**

Mr. Greenway testified that on or about May 14, 2012, the IRS sent Respondent a letter asking why she had not filed a return for tax year 2010. (Tr. at 57). The evidence does not reveal whether Respondent ever responded to that letter. Nor is there any evidence that Respondent asked for an extension within which to file. (Tr. at 57).

What is certain, however, is the fact that Respondent did not file a federal individual income tax return for tax year 2010 on or before April 15, 2011. (Tr. at 56 – 58). Nor did she ever seek an extension to file her tax year 2010 return by October 15,

2011. (Tr. at 57). Nevertheless, on April 23, 2012 and on May 14, 2012, the IRS notified Respondent by mail of her failure to file a 2010 federal individual income tax return. (Tr. at 56 – 57).

However, Mr. Greenway testified that the IRS has no record that Respondent filed a 2010 federal individual income tax return before March 18, 2013. (Tr. at 57 – 58; OPR Ex. H). Respondent's own Exhibit 13 supports the same finding.

**Count 5: Tax Year 2011**

Mr. Greenway testified that on April 15, 2012, Respondent requested an extension to file her 2011 tax return. That extension was apparently granted, giving Respondent until October 15, 2012 to file. (Tr. at 58 – 59). The evidence reveals that Respondent did not actually file a signed return, however, until March 18, 2013. (Tr. at 59; OPR Ex. H; Resp. Ex. 13).

**Further Analysis of Testimonies and Evidence**

Mr. Greenway explained his familiarity with, and use of, an IRS database called the Automated Collection System (ACS) which contains a running narrative account of communications between an individual taxpayer and IRS personnel. (Tr. at 20 - 26). A thorough review of Respondent's account within the ACS reflects telephone conversations between Respondent and IRS Personnel. (OPR Ex. H, I). In their totality, those documents reveal Respondent's various efforts to obtain extensions and attempts to explain delays in filing her various returns.[10]

[10]One ACS entry, dated "06/04/2012" is particularly illustrative. That entry reveals Respondent contacted the IRS to communicate her need to carry over "losses from capital gains" (sic) for tax years 2004 and 2005, so that she could recreate her 2006, 2007 and 2009 returns. Respondent represented to the IRS employee that she would "not have any balance due on these returns once ASFR recon is completed." (OPR Ex. H). Query, "Why would an experienced, professional tax representative, with a bachelor's degree in accounting, wait until 2012 to claim a capital loss in tax years 2004 and 2005 in order to reconstitute her returns for tax years 2006, 2007 and 2009?"

Taken as a whole, the administrative record suggest *[sic]* Respondent made concerted efforts to obfuscate or delay, which are probative of her willful disregard of her obligations to timely file her federal individual income tax returns.

The OPR's second witness was Ms. Karen L. Hawkins. Ms. Hawkins is the Director of the OPR, an independent office administered by the IRS. She, and her office, are responsible for oversight of practitioner education, outreach and enforcement of 31 C.F.R. §10.50, et seq. (Tr. at 77 - 79). See also 31 U.S.C. §330. Ms. Hawkins explained that her office is "essentially charged with ensuring the integrity of the tax administration system and in protecting taxpayers from either unscrupulous or incompetent return preparers or practitioners." (Tr. at 98).

Ms. Hawkins testified regarding her issuance of a November 19, 2010, letter to Respondent. (OPR Ex. E). That letter specifically reminded Respondent of her personal obligation to file her individual income tax returns on time and to provide to Respondent how she could maintain her good standing as a practitioner before the IRS.

Interestingly, Ms. Hawkins called the November 19, 2010, letter a "soft letter. It's not anything more than a reminder." (Tr. at 90 - 92). Ms. Hawkins explained that the "soft letter" was an attempt "to create a wakeup call to the taxpayer to remind them that they've got tax obligations due." (Tr. at 91). More importantly, Ms. Hawkins explained that had Respondent simply reviewed the requirements of 31 C.F.R. Part 10 and IRS Circular 230 and filed her returns (albeit late) "we'd be very happy with her." (Tr. at 91 – 92). Ms. Hawkins continued, explaining that had Respondent "made some kind of arrangement with the IRS to deal" with her arrearages "even if she couldn't pay it all,

installment plan, offered a compromise, whatever she needed to do, but if she had filed the returns at that point in time – at any time during the" eighteen months after the "soft" letter was sent "this is the kind of case we could have closed." (Tr. at 108 – 109).

The evidence reveals that despite the "soft" letter, Respondent did not take any meaningful action to ensure her overdue individual tax returns were filed. (OPR Ex. H, I).

Rather, the evidence suggests the IRS was extraordinarily patient; waiting another eighteen months, until April 11, 2012, to send Respondent what Ms. Hawkins termed an "allegation" letter. (Tr. at 92; OPR Ex. F). That letter more strongly advised Respondent of her filing obligations and also provided clear guidance on what steps Respondent could undertake. Ms. Hawkins testified that the "allegation" letter provided Respondent with a notice and opportunity to confer with OPR attorney-advisors and for Respondent to "present any kind of mitigating evidence or explanations" concerning her conduct. (Tr. at 92).

The court cites, with particularity, the care Ms. Hawkins, and her staff, took in creating the "allegation" letter. That document recites, in detail, the years wherein Respondent had failed to file her individual returns and the amounts then due and owing. (Tr. at 92 – 93).

The evidence suggests that despite the April 11, 2012 letter, Respondent took no curative action. In fact, the record reveals that Respondent did not file her federal individual returns for all of the years in question until March, 2013. (OPR Ex. H).

By contrast, Respondent's defense case was comprised of thirteen items of documentary evidence and her own sworn testimony.

Respondent testified that she was awarded a Bachelor's Degree in accounting by the *Redacted*. She is not a Certified Public Accountant. (Tr. at 141 – 142). She has engaged in practice before the IRS for the past twenty years. (Resp. Ex. 1).

Respondent testified that she had, indeed, timely filed her federal individual tax returns for 2007, 2008, 2009, 2010, and 2011. (Tr. at 139). However, the documents she offered in support of her assertion (Resp. Ex. 1 – 13), do not support her contention.

For instance, Respondent's Exhibits 1, 2, 3, 4, 5 6 and 7 are all, ostensibly, photocopies of United States Postal Service (USPS) mailing envelopes containing IRS Forms 1040 for tax years 2000, 2001, 2002, 2003, 2004, 2005, and 2006 respectively. Although the court admitted these documents, the court assigns little probative weight to them, inasmuch as they are largely irrelevant to Counts I – V of the Complaint and because each is unverified.

Likewise, Respondent's Exhibits 8, 9, 10, 11, and 12 are also unverified photocopies of USPS mailing envelopes containing IRS Forms 1040 for tax years 2007, 2008, 2009, 2010, and 2011. The court admitted these documents because they ostensibly relate to the counts charged in the Complaint. However, the court assigns little probative weight to them, inasmuch as each putative copy of the USPS mailing envelope is unverified as the actual envelope used to mail the putative tax return it supposedly contained. The court notes with particularity that Respondent never mailed her tax forms "return receipt requested." (Tr. at 143).

Moreover, Respondent's credibility is undercut by the contents of OPR Exhibits H and I, which reveal Respondent's efforts to obtain extensions and to apply credit balances to subsequent tax year returns. If Respondent had, indeed, filed all of her

individual federal returns timely . . . why would she have ever sought extensions for filing those same returns?

Respondent's assertion that she timely filed all of her individual federal returns for tax years 2007 – 2011 is further undercut by her own suggestions that her returns were missing because – or that her communications with the IRS were thwarted by – computer issues (Tr. at 121); poor mail service (Tr. at 151); inaccessible documents in her attic (Tr. at 121, 151); her inefficient office staff (Tr. at 153, 163); and her divorce proceedings (Tr. at 167, 172 – 173).

The court recognizes the possibility that some of Respondent's forms were "lost in the mail" or missing because of bureaucratic error. Even Ms. Hawkins recognized that possibility. (Tr. at 99). However, the overwhelming, credible evidence of Respondent's failure to timely file her returns for at least five consecutive tax years renders that possibility nearly a mathematical nullity.

**Sanction**

Of the two great certainties in life, only the obligation to pay taxes is fixed on a calendar. Congress has affirmed this immutable truth in statute, if not stone. 26 U.S.C. §§6011, 6012, 6072. Likewise, in United States v. Boyle, 469 U.S. 241 (1985),, the Supreme Court spoke of the inevitability of taxes and the necessity to file a tax return on time:

> Deadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results. The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one with strict filing standards. Any less rigid standard would risk a lax attitude toward filing dates. Prompt payment of taxes is imperative to the Government, which should not have to assume the burden of unnecessary ad hoc determinations.

Id. at 249. (emphasis added).

Here, the evidence is overwhelming that Respondent failed to timely file her individual federal income tax returns for tax years 2007, 2008, 2009, 2010 and 2011.

There is no mitigating evidence, beyond conjecture, that extraneous events (i.e., divorce, lost files, bad support staff, computer issues, unreliable postal service) caused Respondent to fail to file her returns timely. Rather, Respondent's suggestion of these events – coupled with her repeated failures to respond to IRS communications and her attempts at delay and obfuscation (reflected in OPR Ex. H and I) – coupled with her disregard for the fair warnings given to her in OPR Ex. E and F – lead this court to the inevitable conclusion that Respondent willfully failed to timely file her individual federal income tax returns as alleged.

At the same time, the court notes OPR's efforts to encourage Respondent's compliance; particularly Ms. Hawkins' "soft" letter and the "allegation" letter. (OPR Ex. E, F).

Ms. Hawkins' *[sic]* and Mr. Greenway both offered insight that the American tax system is essentially a "voluntary" system is highly reliant upon the "symbiotic" relationship between the IRS and those who prepare and represent taxpayers before the IRS. (Tr. at 47, 97). Inherent in that relationship is an element of professional trust between the parties; compliance with the most basic of IRS rules being uppermost in that relationship.

There can be no doubt that Respondent, as an experienced IRS practitioner, was fully aware she had a legal duty to timely file returns, regardless of her eventual tax

liability. Her failure to file timely for five consecutive years can only be deemed willful. The evidence suggests no alternative.

When determining an appropriate sanction for Respondent's failure to file her individual returns, the court is guided by the principle that "all relevant facts and circumstances" shall be taken into account. 31 C.F.R. §10.50(d), (e). The appropriate sanction for failing to file timely tax returns, of course, varies depending upon the unique circumstances of each case. Yet, the weight of precedent seems to dictate that disbarment is the appropriate sanction in this case.

In Director, Office of Professional Responsibility v. Llorente, Decision on Appeal, Complaint No. 2008-03 (2009), the Secretary said: "I view the willful failure to file a personal Federal income tax return as a serious offense. When confronted by a pattern of willful failure to file personal Federal income tax returns extending over five years, I have uniformly imposed a sanction of disbarment." The same result, disbarment, obtained in Director, Office of Professional Responsibility v. DeLiberty, Decision on Appeal, Complaint No. 2007-08 (2008), where a practitioner had likewise willfully failed to file his individual returns for five consecutive years.

In Director, Office of Professional Responsibility v. Petrillo, Decision on Appeal, Complaint No. 2009-21 (2011), disbarment was deemed an appropriate sanction for a Respondent-attorney who willfully failed to timely file his returns for four years. However, there, Respondent had been previously suspended from practice before the IRS for non-payment of taxes.

By contrast, in Director, Office of Professional Responsibility v. Ohendalski, Decision on Appeal, Complaint No. 2007-10 (2008), the Secretary imposed only a 48

month suspension for a respondent's failure to file returns for four years. Yet in Poole v. United States, No. 84-0300, 194 U.S. Dist. LEXIS 15351 (D.D.C. June 29, 1984), a Certified Public Accountant's failure to file federal individual income tax returns for three consecutive years was held to be sufficient grounds for disbarment.

Read together, the weight of precedential authority clearly suggests that in cases where a practitioner has failed to timely file a federal tax return for five consecutive years, disbarment is the appropriate sanction.[11] A monetary penalty is inappropriate in this case, inasmuch as there was no proof that Respondent derived any income from the conduct alleged in the Complaint. 31 C.F.R. §10.50(c)(2).

## Conclusions of Law

The following conclusions of law are based upon proof established by clear and convincing evidence, made after a thorough review of the pleadings, exhibits, briefs and the parties' arguments. Each exhibit entered into evidence was considered in rendering this decision, even though every exhibit is not specifically discussed herein. The court concludes that:

1. At all material times referenced in the Complaint, and for the twenty years prior thereto, Respondent **CYNTHIA ASHLEY** was engaged in practice before the IRS, as defined by 31 C.F.R. §10.2(a)(4) as an enrolled agent.[12]

[11]OPR asks the court to consider Respondent's alleged failures to file her individual federal tax returns in years prior to 2007 as evidence of aggravation. The court declines the invitation to consider this uncharged misconduct for two reasons: First, evidence of uncharged misconduct (which occurred prior to the events alleged in the five counts of the Complaint) does not constitute appropriate matters in aggravation. Appropriate evidence of aggravation is that which flows from, or is a direct result of, the misconduct alleged. (In this case, appropriate evidence in aggravation might have been proof of the extra effort and expense the IRS actually incurred by filing tax returns for Respondent.) Second, consideration of the uncharged misconduct is unnecessary in this case to support disbarment.

[12] Respondent's Answer did not specifically deny paragraph 1 of the Complaint, which specifically alleges her status as an enrolled IRS agent. Hence, the court deems the contents of that paragraph admitted.

2. Respondent **CYNTHIA ASHLEY** is subject to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility.[13]

3. Respondent **CYNTHIA ASHLEY** received gross income sufficient to require her to timely make a federal individual income tax return (Form 1040) for tax years 2007 – 2011, inclusive. 26 U.S.C. §§6011, 6012, and 6072.

4. Respondent **CYNTHIA ASHLEY** was required by 26 U.S.C. §§6011, 6012, and 6072 to timely make a federal individual income tax return (Form 10410) for tax years 2007, 2008, 2009, 2010 and 2011.

5. As an experienced IRS practitioner, Respondent **CYNTHIA ASHLEY** was fully aware she had a legal duty to timely make her federal individual income tax returns, regardless of her eventual tax liability. Spies v. United States, 317 U.S. 492 (1943).

6. Respondent **CYNTHIA ASHLEY** engaged in incompetent and disreputable conduct within the meaning of 31 C.F.R. §§10.51(a)(2) and 10.51(a)(10) as evidenced by her willful failure to timely make her federal individual income tax returns for tax years 2007, 2008, 2009, 2010, and 2011.

7. Respondent **CYNTHIA ASHLEY's** failure to timely file tax returns for five consecutive years was clearly a voluntary, intentional violation of a known legal duty. Hence, her failure to file her tax returns for five consecutive years was willful as that term is used in 31 C.F.R. §10.51(a)(6). Owrutsky v. Brady, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991).

[13]Respondent's Answer did not specifically deny paragraph 2 of the Complaint, which specifically alleges that she is subject to the disciplinary authority foresaid. Hence, the court deems the contents of that paragraph admitted.

8. The proper sanction for Respondent **CYNTHIA ASHLEY**'s disreputable conduct is disbarment, because the clear and convincing evidence reveals not only her willful failure to timely file her individual federal income tax returns for tax years 2007, 2008, 2009, 2010, and 2011, but that she also engaged in an intentional course of conduct designed to avoid her obligations to timely file said tax returns and to avoid meaningful communication with the IRS over a five-year period.

**WHEREFORE,**

**Order**

**IT IS HEREBY ORDERED**, that Respondent **CYNTHIA ASHLEY** is **DISBARRED** from practice before the IRS.

**IT IS SO ORDERED.**

Done and dated this 9th day of September, 2013
at New Orleans, Louisiana

/s/

**HON. BRUCE TUCKER SMITH**
**Administrative Law Judge**

**Pursuant to 31 C.F.R. § 10.77, this Decision 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 Notice of Appeal must be filed in duplicate with the Director, Office of Professional Responsibility, 1111 Constitution Ave. NW, SE:OPR 7238IR, Washington D.C. 20224, and shall include a brief that states the party's exceptions to this Decision and supporting reasons for any exceptions.**

## ATTACHMENT A: LIST OF WITNESSES AND EXHIBITS

**OPR Witness**

1) Mr. James Greenway
2) Ms. Karen L. Hawkins

**Respondent's Witness**

1) Respondent

**OPR Exhibits**

E) November 19, 2010 letter
F) April 11, 2012 letter
G) Treasury Department Circular No. 230
H) IDRS & ACS summary
I) ACS history

**Respondent's Exhibits**

1) May 2, letter, 2000 Form 1040
2) 2001 Form 1040
3) 2002 Form 1040
4) 2003 Form 1040
5) 2004 Form 1040
6) 2005 Form 1040
7) 2006 Form 1040
8) 2007 Form 1040
9) 2008 Form 1040
10) 2009 Form 1040
11) 2010 Form 1040
12) 2011 Form 1040
13) June 7, 2013 letter and account transcripts
14) NOT ADMITTED USPS envelope and February 28, 2013 letter

## CERTIFICATE OF SERVICE

I hereby certify that I have served the forgoing **DECISION AND ORDER** (12-IRS-0004) upon the following parties and entities in this proceeding as indicated in the manner described below:

Andrew M. Greene, Senior Counsel
Office of Chief Counsel (IRS)
[*Redacted*]
[*Redacted*]
Atlanta, Georgia *Redacted*
Sent via FedEx & Electronically
[*Redacted*]

Ms. Diana Gertscher
Internal Revenue Service
[*Redacted*]
Washington, DC *Redacted*
Sent FedEx & Electronically
[*Redacted*]

Cynthia S. Ashley
[*Redacted*]
Waxhaw, North Carolina *Redacted*]
Sent via FedEx & Electronically
[*Redacted* ]

ALJ Docketing Center
U. S. Coast Guard
U. S. Custom House, [*Redacted*]
*Redacted*]
Baltimore, MD [*Redacted*]
Sent via FedEx & Electronically
[*Redacted*]

Done and dated on this 9th day of September, 2013 at
New Orleans, Louisiana.

/s/
Nicole E. Simmons
Paralegal Specialist to the
Hon. Bruce Tucker Smith