UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY

DIRECTOR,	)	
OFFICE OF PROFESSIONAL	)	
RESPONSIBILITY,	)	
	)	
Complainant,	)	
	)	
v.	)	**Complaint No. 2010-12**
	)	
C. WESLEY CRAFT	)	
	)	
Respondent.	)	

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

I. Procedural Background

This proceeding was initiated on July 6, 2010, by the Complainant, Karen Hawkins, Director of the Office of Professional Responsibility ("OPR") for the Internal Revenue Service, filing a Complaint against Respondent pursuant to 31 C.F.R. § 10.60 and 31 U.S.C. § 330. The Complaint alleges that Respondent is a Certified Public Accountant who engaged in practice before the United States Internal Revenue Service (IRS), and that he failed to timely file a federal income tax return for tax years 2001 through 2007, and failed to pay the tax liabilities, interest and tax penalties for those years. The Complaint therefore charges him with 14 counts of disreputable conduct and requests his disbarment from practice before the IRS.

In response to the Complaint, on August 4, 2010, Respondent, appearing *pro se*, filed a letter which was not a traditional "Answer" that specifically admits or denies each allegation in the Complaint, as called for by the Rules in 31 C.F.R. § 10.68, but which explained reasons for failing to file timely tax returns.

A scheduling order dated August 10, 2010 set the hearing in this matter to commence on Tuesday, September 21, 2010, and set due dates for the parties to submit prehearing memoranda. Complainant timely submitted a Prehearing Memorandum, but Respondent did not, prompting issuance of an Order to Show Cause. After Respondent submitted a response to the show cause order, by Order dated September 10, 2010, this Tribunal rescheduled the hearing in this matter for Wednesday, January 19, 2011, and rescheduled due dates, including setting a deadline of October 15, 2010 for Respondent to file a prehearing memorandum, and a deadline of November 12, 2010 for any dispositive motions.

On October 28, 2010, Respondent submitted a Prehearing Memorandum and a Response to Complainant's Requests for Admission. The Prehearing Memorandum consisted of one page, with the word "None" for "List of Proposed Exhibits," "List of

Proposed Lay Witnesses," and "List of Proposed Expert Witnesses," a blank space for the "List of relevant and Material Non-disputed Facts," and "Atlanta, Georgia" as an agreeable hearing location. No exhibits were attached to the Prehearing Memorandum.

On December 13, 2010, Complainant filed a Motion for Summary Judgment and a Motion for Seeking Permission to File out of Time. By Order dated December 14, 2010, the deadline for Respondent to file a response to these Motions was set for December 29, 2010. To date, no response to either of these Motions has been filed.

On December 23, 2010, Complainant submitted a Motion Seeking a New Hearing Date, because the Complainant, who is also the principal witness, has a scheduling conflict. The Motion represents that Respondent prefers to postpone the hearing by a few weeks, and proposes some mutually agreeable hearing dates.

II. Motion for Leave to File Out of Time

In the Motion Seeking Permission To File Out of Time, Complainant asserts that throughout the past two months, the parties have engaged in numerous settlement discussions, in which Respondent made assertions that Complainant relied upon in good faith believing that this case would be resolved by settlement, and therefore Complainant focused efforts on resolving this case through settlement without the necessity of a motion for summary judgment or a hearing. Complainant asserts further that the possibility of settlement now seems remote, and at a minimum, consideration of the Motion for Summary Judgment would provide opportunity to narrow the issues for hearing, and that this case is ripe for summary adjudication.

The scheduling of the dispositive motion due date on November 12, 2010 allowed sufficient time for full briefing of such motion and responses and a ruling before the hearing on January 19, 2011. The question is whether decreasing that time period by accepting the belated Motion for Summary Judgment, or postponing the hearing, would be prejudicial to any party.

The Motion for Summary Judgment having been received on December 13, 2010, the August 10, 2010 scheduling order would allow Respondent until December 20, 2010 to file a response, but Respondent was given additional time, until December 29, 2010, to respond, which still allows sufficient time for a ruling on the Motion for Summary Judgment without postponing the hearing.

Particularly considering Respondent's minimal participation in this proceeding, the nature of his Prehearing Memorandum, his failure to file any response to the Motion for Summary Judgment, and his lack of legal representation, Respondent is not prejudiced by the belated filing of the Motion for Summary Judgment, by the time period for responding to the Motion for Summary Judgment, or by any postponement of the hearing,

Therefore, good cause has been shown to grant Complainant leave to file the Motion for Summary Judgment out of time.

III. Relevant Statutory and Regulatory Provisions

Section 330(b)(2) of Title 31 of the United States Code provides that "[a]fter notice and opportunity for a proceeding, the Secretary [of the Treasury] may suspend or disbar from practice before the Department [] a representative who ... is disreputable[.]" *See also*, 31 C.F.R. § 10.50. The Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, Enrolled Retirement Plan Agents, and Appraisers before the Internal Revenue Service," codified at 31 C.F.R. Part 10 ("Rules") and known as "Circular 230"[1] provide examples of "disreputable" conduct.

In regard to the violations set forth in Counts 1 and 2 as to tax year 2001, the definition of disreputable conduct in the version of the Rules in effect from June 20, 1994 until July 25, 2002 applies (hereinafter referred to as the "1994 Regulations"). See, 59 Fed. Reg. 31523-29 (June 20, 1994). As to the violations set forth in Counts 3-12 pertaining to tax years 2002-2006, the definition in the regulations in effect for the period July 26, 2002 until September 25, 2007 applies (hereinafter referred to as the "2002 Regulations"). See, 67 Fed. Reg. 48760-80 (July 26, 2002). In regard to the 2007 violation set out in Counts 13 and 14, the definition in the regulations effective beginning September 26,2007 applies (hereinafter referred to as the "2007 Regulations"). *See*, 72 Fed. Reg. 54540-55 (Sept. 26, 2007).

In the 1994 Regulations, Section 10.51 thereof provides in pertinent part:

> Disreputable conduct for which an attorney ... may be disbarred or suspended from practice before the Internal Revenue Service includes, but is not limited to:
>
> * * *
>
> (d) Willfully failing to make Federal tax return in violation of the revenue laws of the United States, or evading, attempting to evade, or participating in any way in evading or attempting to evade any Federal tax or payment thereof ... or concealing assets of himself or another to evade Federal taxes or payment thereof;

31 C.F.R. § 10.51(d) (1994).

In the 2002 Regulations, the subsection above (10.5l(*d*)) was reordered as 10.51(*f*) and revised to provide in pertinent part as follows:

> (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) (2003).

[1] Treasury Department Circular No. 230.

In the 2007 Regulations, subsection 10.51 (f) was recast as 10.51*(a)*(6) and revised to read as follows:

> (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) (2007).

Thus, at all times relevant hereto, disreputable conduct included "willfully" failing to file Federal tax returns and "*evading*" or "*willfully evading*" assessment or payment of Federal taxes.

IV. Standards for Summary Adjudication

The Rules provide that "[e]ither party may move for a summary adjudication upon all or any part of the legal issues in controversy," and that if the non-moving party files no response to a motion, "the non-moving party is deemed to oppose the motion" and therefore the Motion must be determined on its merits. 31 C.F.R. §§ 10.68(a)(2), 10.68(b). The Rules provide further that summary judgment shall be rendered "if the pleadings, depositions, admissions, and any other admissible evidence show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law." 31 C.F.R. § 10.76(a)(2).

A motion for summary adjudication is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). Therefore, federal court rulings on motions under Rule 56 of the FRCP provide guidance for ruling on a motion for summary adjudication in an administrative proceeding. *See Puerto Rico Sewer and Aqueduct Authority v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994) (holding that Rule 56 of the FRCP "is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment."), *cert. denied*, 513 U.S. 1148 (1995).

The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, the non-moving party may not rely merely on allegations or denials in its own pleading; the party opposing summary judgment "must present more than just 'bare assertions, conclusory allegations or suspicions' to show the existence of a genuine issue." *Podobnik v. U. S. Postal Service*. 409 F.3d 584, 594 (3nl Cir. 2005) (quoting *Celotex v. Catrett*, 477 U.S. at 325). If the non-movant "fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by [FRCPJ 56(c), the court may ... consider the fact undisputed for purposes of the motion [or] grant summary judgment if the motion and supporting materials ... show the movant is entitled to it .... " FRCP 56(e). A failure to respond to the motion does not mean that the motion should automatically be granted, but that it may be granted if the undisputed

material facts, as supported by the record, demonstrate entitlement to judgment as a matter of law. Champion v. Artuz, 76 F.3d 483, 486 (2nd Cir. 1996).

In evaluating a motion for summary judgment, the tribunal must view the record in a light most favorable to the non-moving party, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (lst Cir. 1990). The record to be considered by the tribunal includes any material that would be admissible or usable at trial. *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993), citing l0A Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2721, at 40 (2d ed. 1983). Thus, summary judgment is not appropriate where contradictory inferences may be drawn from the evidence or where there are unexplained gaps in materials submitted by the moving party, if pertinent to material issues of fact. *O'Donnell v. United States*, 891 F.2d 1079, 1082 (3rd Cir. 1989).

V. Failure to File Response to Motion

The Rules provide that "[i]f the non-moving party opposes summary adjudication in the moving party's favor, the non-moving party must file a written response within 30 days *unless ordered otherwise by the Administrative Law Judge*." 31 C.F.R. § 10.68(a)(emphasis added). The December 14, 2010 Order set a due date of December 29, 2010 for Respondent to file any response to the Motion for Summary Judgment, and stated as follows:

> **THE RESPONSE MUST BE FAXED OR HAND DELIVERED TO THE UNDERSIGNED, WITH A CERTIFICATE OF SERVICE, ON OR BEFORE THAT DATE.** The Response must include any and all documents, including affidavits and/or sworn statements, that Respondent wishes to have considered in this case**. IF NO RESPONSE IS FILED ON OR BEFORE THAT DATE, THE MOTION FOR SUMMARY JUDGMENT WILL BE DEEMED UNOPPOSED.**

Order Setting Hearing Location and Due Date for Response to Motion for Summary Judgment, dated December 14, 2010 (emphasis in original).

The Motion for Summary Judgment (at 25) states that in telephone discussions with Complainant's counsel, Respondent indicated that he would oppose the Motion. However, no response to the Motion for Summary Judgment, or request for additional time to respond, has been received to date. Accordingly, summary judgment may be granted in favor of Complainant if the undisputed material facts, as supported by the "pleadings, depositions, admissions, and any other admissible evidence show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law." 31 C.F.R. § 10.76(a)(2); *Champion v. Artuz*, 76 F.3d 483, 486 (2nd Cir. 1996).

VI. Liability

The Complaint sets out the alleged violations in 14 counts, with odd numbered counts from 1 to 13 alleging failure to timely file returns for tax years 2001 through 2007, and even numbered counts from 2 to14 alleging failure to pay tax liabilities, interest and tax penalties for years 200 1 through 2007.

A. Complaint's Arguments

Complainant's position is that based on the Complaint, Respondent's response to the Complaint, and Respondent's responses to the Requests for Admissions, there are no genuine disputes of material fact and judgment should be entered as a matter of law that Respondent engaged in disreputable conduct for willful failure to timely file his tax returns and to pay his tax liabilities for 2001 – 2007. Attached to and in support of the Motion are a copy of Respondent's response to the Complaint dated July 31, 2010 ("Answer"), Request for Admission and Respondent's responses thereto ("Admissions"), and a copy of a decision in an IRS disciplinary proceeding, *Director, OPR v. Davis*, Complaint No. 2007-35 (Decision on Appeal, March 10, 2009). Complainant points out that the amounts still outstanding on his tax liabilities and penalties are as follows:

$20,247.30 for the 2001 tax year,
$21,533.88 for the 2002 tax year,
$22,399.38 for the 2003 tax year,
$12,947.50 for the 2004 tax year,
$14,099.71 for the 2005 tax year,
$12,048.86 for the 2006 tax year, and
$11,459.64 for the 2007 tax year.

Complainant does not dispute Respondent's assertions in his Answer that he was dealing with a difficult partnership dissolution between 1998 and 2005 and that he had been diagnosed and treated for several medical problems. However, such circumstances do not justify failure to file tax returns where Respondent continued to prepare tax returns for others and represent clients in tax matters during that time, Complainant argues, citing *inter alia*, *Roberts Metal Fabrication v. United States*, 147 B.R. 965, 968 (1992), *Meyer v. Comm'r*, 85 T.C.M. (CCH) 760 (2003), and *Shaffer v. Comm'r*, 68 T.C.M. (CCH) 1455 (1994). Complainant also argues that Respondent's difficulty securing partnership records does not excuse his failure to file tax returns, citing *Owrutsky v. Brady*, 925 F.2d 1457 (1991).

As to the failure of Respondent to pay his tax liabilities, Complainant asserts that Respondent willfully evaded payment of Federal taxes in violation of 31 C.F.R. § 10.51. According to Complainant, to establish the violation, it must prove that Respondent had a duty to pay Federal taxes, that he failed to pay them when they were due, and that the failures to pay were willful. Motion at 14. Complainant presented the IRS transcripts as attachments to the Complaint, showing the taxes due and owing for 2001 through 2007. Acknowledging that the term "evade" is not defined in the Rules. Complainant asserts that it should be interpreted by its plain meaning. i.e., a dictionary definition, which is "to avoid the performance of." Complainant argues that such a definition is consistent with the civil nature

of this proceeding and the definition applied in the civil tax context, in Section 6672 of the Internal Revenue Code. under which courts have assessed penalties where the defendant knew his tax liability and preferred to pay other creditors over the U.S. Treasury. Motion at 17-18 (citing. inter alia, Jenson v. United States, 23 F.3d 1393 (7th Cir. 1993). Complainant submits that evading tax within the meaning of 31 C.F.R. § 10.51 involves choosing over a meaningful period of time to pay others rather than paying taxes, citing Director, OPR v. Davis, Complaint No. 2007-35 (Decision on Appeal, March 10, 2009). Complainant asserts that Respondent met that criterion in that he admits he has not entered into any type of payment arrangement with IRS for the tax liabilities, but, as indicated in his Answer, used his home as collateral for a loan to his defunct partnership and occasionally employed a bookkeeper and another CPA in his solo practice.

In a footnote, Complainant acknowledges that Respondent's duty to file tax returns for 2001 through 2004 arose more than five years prior to the Complaint, but argues that the five-year Federal statute of limitations at 28 U.S.C. § 2462 should not preclude a finding of disreputable conduct with respect to those tax years. Motion, note 2. Citing to a decision by the appellate tribunal for IRS disciplinary proceedings, *Director, OPR v. Francis,* Complaint No. 2004-09. n. 15 (Decision on Appeal. Feb. 4, 2008), which notes that the statute of limitations, Section 2462, would not apply absent a finding that the primary purpose of a proceeding is penal as opposed to protective, Complainant argues that this proceeding under Circular 230 is remedial rather than penal. As an alternative argument, Complainant asserts that Respondent's lack of filing tax returns was a continuing violation until the tax returns for 2001-2005 were filed on June 25,2007, which is well within the five-year period. Complainant argues that Title 26 Section 6501(a) provides that the statute of limitations applicable to an action by the IRS regarding tax returns does not commence until the return is actually filed, so the IRS may assess tax deficiencies up to three years after the return is filed.

Complainant requests an opportunity to brief the subject of the statute of limitations more fully to the extent that it may be an issue.

B. Discussion and Conclusions

1. Statute of Limitations

Although Respondent did not raise the issue of the statute of limitations, there is case law supporting the proposition that courts should raise *sua sponte* certain jurisdictional statutes of limitation. *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130 (2008).

The statute of limitations 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 Company v. Browner*, 17 F.3d 1453. 1459 (D.C. Cir. 1994)(28 U.S.C. § 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.) 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. *Johnson v. Securities and Exchange Comm'n.* 87 F.3d 484. 488-89 (D.C. Cir. 1996) (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); *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). The D.C. Circuit distinguished a law as "penal" based on the conduct at issue being a wrong to the public rather than a wrong to an individual, and going beyond remedying the damage to a party which was harmed. 87 F.3d at 487-88. Section 2462 has been held to apply to disciplinary proceedings brought under the Rules against tax practitioners. *Director, OPR v. McLucas*, Complaint No. 2000-19 (ALJ, April 2. 200l)(Order granting respondent's motion for summary disposition after finding the complaint barred by 28 V.S.C. § 2462); *Director, OPR v. Carrillo*, Complaint No. 2003-50 (ALJ, Dec. 2, 2003) (Order dismissing complaint because the factual bases for all alleged disreputable conduct occurred more than five years before the action was initiated). 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 28 V.S.C. § 2462. Therefore, Complainant's argument that the statute of limitations does not apply on the basis that the sanction involved in this proceeding is not penal is rejected.

Complainant's argument that Respondent's failure to file tax returns was a continuing violation, so that the five year period began to run only when Respondent filed his tax returns, is not supported by the period of limitations on assessments of taxes, 26 U.S.C. § 6501(a). The latter explicitly provides the date that the statute begins to run: "the amount of any tax imposed .. . shall be assessed within 3 years after the return was filed ... ," whereas the period under Section 2462 begins to run "from the date when the claim first accrued" (26

V.S.C. § 2462 (emphasis added)) which is when the tax return was due and was not filed. In the criminal context of tax evasion under 26 U.S.C. § 7201, the statute of limitations begins to run on the day the tax deficiency was incurred, that is, when the tax return was due, or on a later date of an affirmative act of tax evasion. *United States v. Payne*, 978 F.2d 1177 (10th Cir. 1992), cert. denied. 113 S.Ct. 2441 (1993). It has been held that tax evasion under Section 7201 is not a continuing offense and filing of a tax return is not an element of tax evasion. *United States v. Kirkman*, 7555 F. Supp. 304, 306 (D. Idaho 1991).

Nevertheless, further briefing and a ruling on this issue are deemed unnecessary in this case, because the alleged violations for tax years 2005 through 2007 support the sanction imposed herein below.

2. Failure to timely file tax returns

Respondent has admitted that he did not timely file his tax returns for years 2002 through 2007. Motion, Attachment 2 (Respondent's Response to Requests for Admissions, ¶¶ 3, 6, 11, 16, 22, 26). The Requests for Admissions did not include an inquiry regarding the tax return for 2001, but the Complaint alleged, and Respondent's Answer did not deny, that he failed to timely file a tax return for 2001. The Answer (at p. 2) appears to acknowledge his failure to file timely his tax returns as alleged in the Complaint, as it states, "I know that the problems I was facing ... are not a good excuse for failing to file returns timely." He did not file his tax returns for 2001 through 2005 until on or about June 25, 2007, and did not file his tax returns for 2006 and 2007 until December 4, 2009. Complaint, Exhibits 1-7. Untimely filing of a Federal income tax return has been held to constitute "*failing to make a Federal tax return* in violation of the revenue laws of the United States. *Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991)(italics added). Thus, for seven consecutive years Respondent "fail[ed] to make [a] Federal tax return in violation of the revenue laws of the United States, "within the meaning of 31 C.F.R. § 10.51(d)(1994), 10.51(f) (2003), or 10.51(a)(6)(2007), as applicable. The next question is whether there is a genuine issue of material fact as to whether such non-filing was "willful" within the meaning of 10 C.F.R. § to.51.

According to case law, "wilfully" [sic] means "a voluntary, intentional violation of a known legal duty." *Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (411I Cir. 1991), citing *United States v. Pomponio*, 429 U.S. 10, 12 (1976)," *Director, OPR v. Martin M. Chandler, C.P.A.*, Complaint No. 2006-23, http://www.irs.gov/taxproslactuariesiarticlelO,,id=1 83923,00.html (Decision on Appeal, May 14, 2008).

In this case, Respondent does not dispute that he knew of his duty to file his tax returns. Motion, Attachment 2 (Response to Requests for Admissions). However, his Answer suggests an argument that his non-filing was not "wilful" [sic] on the basis of his personal circumstances, specifically, his health conditions, his partnership's debt, difficulties in obtaining partnership records, and other problems with his business.

The general rule of law is that, to be excused from liability for tax failures, a person's incapacity must be virtually complete, such that they are unable to conduct any work. *Roberts Metal Fabrication v. United States*, 147 B.R. 965, 968 (1992) (to find that an illness qualifies as "reasonable cause" for failure to file, "the illness must be present at the time the return is customarily prepared and must be of such a degree as to render the taxpayer physically or mentally incapable of preparing a return or conducting any business activity and the taxpayer must not conduct other business."); *Meyer v. Comm'r*, 85 T.C.M. (CCH) 760 (2003)(taxpayer had severe health problems and nervous breakdown, took leave of absence from job); *Shaffer v. Comm'r*, 68 T.C.M. (CCH) 1455 (1994)(taxpayer placed on disability retirement); *Director, OPR v. Kaskey*, Complaint No. 2009-26, http://www.irs.gov/taxpros/actuariesiarticlelO,,id =183923,00.html (Decision on Appeal, May 28, 2010)(where respondent prepared returns for other taxpayers, medical conditions did not excuse failure to file tax return).

Despite Respondent's medical problems, he admits that he continued to work during 2004, 2005, 2006 and 2007, and that he opened his own accounting practice in September 2005. Motion, Attachment 2 (Response to Requests for Admissions) ¶ 10, 15, 20, 21, 27. It is undisputed that during these years when he did not timely file his own federal tax returns, Respondent was gainfully employed preparing tax returns for other people and representing clients in tax matters, and made decisions and arrangements regarding the dissolution of his partnership and setting up his own business in 2005. There is no genuine issue of fact that Respondent was mentally and/or physically capable of filing a tax return.

In addition, and with regard to Respondent's assertion as to difficulty in obtaining partnership records, Respondent has chosen not to support, his assertions with any documents or testimony. Respondent has presented no more than "bare assertions, conclusory allegations or suspicions" which are insufficient to show the existence of a genuine issue. *Podobnik v. U. S. Postal Service*, 409 F.3d at 594 (quoting *Celotex v. Catrett*, 477 U.S. at 325). Therefore Respondent has not raised any genuine issue of material fact as to his willfulness in failing to timely file his income tax returns. FRCP 56(e).

Accordingly, Respondent's failures to timely file his federal income tax returns for seven years are found to have been voluntary and intentional violations of a known legal duty and therefore "willful." On such basis, Respondent engaged in disreputable conduct under 10 C.F.R. 10.50, as defined by 10 C.F.R. § 10.51and as alleged in Counts 1, 3, 5, 7, 9, 11, and 13. However, considering that the statute of limitations may bar Counts 1 through 8, Respondent is held liable for disreputable conduct on the basis of failure to timely file income tax returns as alleged in Counts 9, 11 and 13.

3. Failure to pay tax

There is no dispute that Respondent was aware of his obligation to file income tax returns, did not timely file them for tax years 2001-2007, owed income tax for those years, and did not pay his income tax liabilities for those years. Motion, Attachment 2 (Response to Requests for Admissions); Complaint, Exhibits 1-7. The question is whether such failure to

pay income tax constitutes "willfully evading ... any assessment or payment of any Federal tax" within the meaning of 31 C.F.R. § 10.51.

Complainant has not presented, and this Tribunal is not otherwise aware of, any case law directly interpreting the term "evade" as used within § 10.51(a)(6). The cases cited by Complainant interpreting 26 U.S.C. Section 6672 - which refers to evading or willfully failing to pay over employment tax -- do not specifically address the word "evade." *See, e.g., Buffalow v. United States*, 109 F.3d 570, 573 (9th Cir. 1997)(court focuses on the word "willfully" rather than "evade," as in quoting the statute, the court actually omits from its quote the clause containing the word "evade."). Complainant's argument that it must prove merely that Respondent had a duty to pay Federal taxes, that he failed to pay them when due, and that the failures to pay were willful does not seem logical, as it would equate the word "evading" in Section 10.51 with a mere willful failure to pay. Statutes such as 26 U.S.C. § 6672 and the criminal tax evasion provision at 26 U.S.C. § 7201 include evading tax and failure to pay tax as distinct offenses.

There are, however, many cases interpreting other tax law provisions containing the word "evade" or its cognates. Specifically, in the context of criminal felony (in contrast to a misdemeanor) tax evasion, language in 26 U.S.C. § 7201 which is similar to that in 31 C.F.R. § 10.51(a) (6) has been held to require an affirmative act of deception, beyond mere "passive" nonfiling and non-payment. *See e.g., Spies v. United States*, 317 V.S. 492 (1943), *Sansone v. United States*, 380 U.S. 343 (1965). Similar distinctions have been made in certain civil contexts. *See, e.g., First Trust & Sav. Bank v. United States*, 206 F.2d 97, 99 (81h Cir. 1953), *Niedringhaus v. Commissioner*, 99 T.C. 202,210 (T.C. 1992).

However, in civil contexts, some courts have found that a willful (voluntary, conscious and intentional) failure to file and pay taxes over several years, without an affirmative act or commission, can constitute tax evasion. In *United States v. Toti*, 24 F.3d 806, 809 (6th Cir. 1994), cert denied, 513 U.S. 987, a debtor in bankruptcy discharge case who failed to file tax returns and pay taxes over several years was held to have "willfully attempted to evade or defeat" his tax liability within meaning of 11 U.S.C. § 523(a)(1)(C), as his failure to pay was "voluntary, conscious and intentional" where he knew he owed taxes and during at least some years had the ability to pay them. The court stated, "We believe that a plain reading of ["willfully attempted in any manner to evade or defeat such tax"] includes both acts of commission and acts of omission." 24 F.3d at 808. In *United States v. Fretz*, 244 F.3d 1323, 1329-30 (l1th Cir. 2001), the court found that a debtor who failed to file tax returns and to pay taxes for 10 years "willfully attempted in any manner to evade or defeat a tax" within the meaning of 11 U.S.C. § 523(a)(l)(C), and held that such provision "covers attempts to evade or defeat a tax whether accomplished by 'acts of culpable omission or acts of commission." The court appeared to suggest that such failure to file may constitute concealing assets. 244 F.3d at 1325. See also, *Tudisco v. United States*, 183 F.3d 133, 137 (2nd Cir. 1999)(debtor "willfully attempted to evade or defeat" tax within meaning of 11 U.S.C. § 523(a)(l)(C) where he failed to pay taxes, failed to file tax returns for several years and gave false affidavit to employer to establish exemption from tax withholding); In re Bruner, 55 F.3d 195. 200 (5th Cir. 1995)("wilfully attempted to evade or defeat" tax under 11 U.S.C. § 523(a)(1)(C) encompasses "culpable omissions," where debtor

engaged in pattern of failing to report income, file tax returns and pay taxes, and had many cash transactions and shell entity to conceal income and assets). But *see, Howard v. United States*, 167 B.R. 684, 687,1994 Bankr. LEXIS 721, **11-13 (Bankr. M.D. Fla. 1994) (proof of an affirmative act necessary to satisfy the 11 V.S.C. § 523(a)(1)(C) willfulness requirement.).

The plain meaning of "evade" as the dictionary definition "to avoid the performance of" is consistent with omissions, or at least culpable omissions, to act. A more comprehensive general dictionary definition of the word "evade" is as follows, in pertinent part:

> [T]o take refuge in evasion: use craft or stratagem in avoidance: avoid facing up to something.... to manage to avoid the performance of (an obligation): escape from doing or experiencing (something disagreeable): circumvent, dodge ...to avoid answering directly.

Webster's Third New International Dictionary at 786 (2002). The word "evasion" is defined as follows:

> [T]he act of evading, dodging, or circumventing: failure to answer or state one's position directly or candidly.... [T]he act of evading, dodging, or circumventing a law, responsibility, or obligation; *specif*::[sic] the act of failing to pay taxes or of minimizing taxes in violation of law.

Id. at 787. Black's Law Dictionary defines "tax evasion" as "The willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability." Black's Law Dictionary at 1474 (Seventh Edition). Choosing not to file tax returns for several years with knowledge that they are required to be filed is a form of circumventing the tax law, which is illegal and which temporarily eliminates an assessment of, and thus liability for, taxes owed.

Respondent admits that he has not entered into any type of payment arrangement with IRS for the tax liabilities for 2003 through 2007. Motion, Attachment 2 (Response to Requests for Admissions) ¶¶ 9, 14, 19, 25, 30).[sic] The record shows that the IRS issued Notices of Intent to Levy which were received by Respondent on July 31, 2008. Complaint, Exhibits 1-6. Respondent's failure over several years, from 2002 until June 25, 2007, to file income tax returns or to request an extension to file, his complete failure to pay any portion of any taxes owed, and the absence of any assertion or evidence of effort to enter into a payment arrangement with IRS, shows *prima facie* that Respondent has been willfully evading the payment of his tax liabilities. The absence of any explanation for failure to attempt to make any payment arrangement with IRS, and absence of any response to the Motion indicate further that he has not raised any genuine issue of material fact as to whether he willfully evaded payment of his income tax liabilities.

Therefore, Respondent's failures to pay his income tax liabilities, interest and tax penalties for several years are found to constitute "willfully evading [or] attempting to evade ... any assessment or payment of any Federal tax" within the meaning of 31 C.F.R. § 10.51.

On such basis, Respondent is hereby found to have engaged in disreputable conduct under 10 C.F.R. 10.50, as defined by 10 C.F.R. § 10.5 land as alleged in Counts 2, 4, 6,8, 10, 12, and 14. However, considering that the statute of limitations may bar Counts 1 through 8, Respondent is held liable for disreputable conduct on the basis of failure to pay tax liabilities as alleged in Counts 10, 12 and 14.

VII. Penalty

A. Complainant's Arguments

Complainant urges that the sanction proposed by the Director of OPR is entitled to deference. Motion at 20. Complainant argues that the sanction sought, disbarment, is consistent with similar cases, citing *Hubbard v. United States*, Civil Action No. 07-0023 (RMU) (D.D.C., April 24, 2(08) practitioner disbarred for failure to file tax returns for four years). Complainant points out that Respondent's actions were a long-term pattern of serious, willful noncompliance, and that despite his medical problems, his failure to seek a payment arrangement with IRS or an offer-in-compromise is evidence of wanton and utter disregard for the national tax administration system. Motion at 21.

B. Discussion

The issue in a disbarment 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*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir., Feb. 19, 1991), an attorney was disbarred for willful failure to file timely tax returns for six consecutive years, albeit he had no tax liability for any of those years.

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. Respondent's willful failure to timely file tax returns as required by 26 U.S.C. §§ 6011, 6012 and 6072 as a Certified Public Accountant practicing before the IRS, and his failure to pay his tax liabilities or to attempt to enter into a payment arrangement with the IRS, a failure to discharge known obligations over a period of several years, show a disregard for the standards established for the benefit of the IRS and the public.

Summary judgment on the sanction is particularly appropriate given Respondent's minimal participation in this proceeding which not only delayed the progress of this proceeding, but also suggests his lack of interest in contesting the sanction proposed.

In other cases in which a practitioner failed to timely file tax returns over four or more years, disbarment has been held as an appropriate sanction. *E.g., Hubbard v. United States*, 545 F. Supp. 2d 1 (D.D.C. 2008)(disbarment for failure to file individual and business tax returns for 4 years); *Director, OPR v. DeLiberty*, Complaint No. 2007-08 (Decision on Appeal 2008) (Disbarment for failure to file timely tax returns for five years). Lesser sanctions have been imposed for willful failure to file timely tax returns for three or four years. *See, Director, OPR v. Chandler*, Complaint No. 2006-23 (Decision on Appeal 2008)(suspension for 36 months for failure to file timely tax returns for three years); *Director, OPR v. Ohendalski*, Complaint No. 2007-10 (Decision on Appeal 2007)(suspension for 48 months for failure to file timely tax returns for four years). Here, Respondent is held liable for willful failure to file tax returns and to pay taxes thereon for three years rather than the seven years alleged in the Complaint, due to the statute of limitations and the fact that this issue has not been fully briefed upon motion for summary judgment with a *pro se* Respondent. Given these circumstances, a sanction of indefinite suspension from practice before the IRS is commensurate with the seriousness of the disreputable conduct found herein, and allows the Director of CPR full discretion to determine when Respondent may be reinstated

ORDER

It is hereby **ORDERED** that:

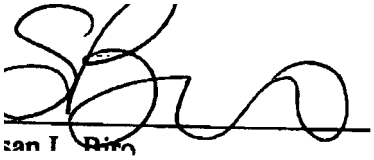
1. Complainant's Motion for Leave to File Out of Time is **GRANTED**;

2. Complainant's Motion for Summary Judgment is **GRANTED**;

3. Respondent is hereby found to have engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.50 as alleged in the Complaint; and therefore,

4. Respondent **C. WESLEY CRAFT**, is hereby **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.

5. Complainant's Motion Seeking a New Hearing Date is **DENIED** as moot.



Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[2]

Dated: January 13 ,2011 [sic]
Washington, D.C.

NOTICE OF APPEAL RIGHTS

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.

[2] The Administrative Law Judges of the United States 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 C. Wesley Craft, Respondent
Complaint No. 2010-12

CERTIFICATE OF SERVICE

I certify that a true copy of **Decision And Order On Motion For Summary Judgment,** dated January 13, 2011, was sent this day in the following manner to the addressees listed below:

Maria Whiting-Beale
Staff Assistant

Dated: January 13, 2011

Copy By First Class regular Mail To:

Charlie W. Priest, Attorney
Internal Revenue Service
Office of Chief Counsel
General Legal Services
Redacted
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Copy By Certified Mail Return Receipt To:

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Dawson, GA 39842