

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF PROFESSIONAL RESPONSIBILITY
WASHINGTON, D.C.

DIRECTOR, OFFICE OF
PROFESSIONAL RESPONSIBILITY
Complainant

v.

Complaint No 2007-35

EDWIN DAVIS, JR.,
Respondent

Wendy Yan, Esq.,
for the Complainant.

Dennis M. Haase, Esq.
for the Respondent, pro se.

DECISION

MICHAEL A. ROSAS, Administrative Law Judge: This matter arises from a complaint issued on July 13, 2007, by the Director, Office of Professional Responsibility, Department of the Treasury, Internal Revenue Service (OPR), pursuant to 31 C.F.R. § 10.60 (also referred to as Section 10.60 of the Treasury Department Circular No. 230).

The complaint seeks to have the Respondent, Edwin Davis, Jr. (the Respondent), a certified public accountant engaged in practice before the Internal Revenue Service (IRS), disbarred from such practice, pursuant to 31 C.F. R. §§ 10.50 and 10.70, for having engaged in disreputable conduct as set forth in 31 C.F. R. § 10.51. Specifically, it is alleged that the Respondent engaged in a pattern and practice of willfully failing to timely file his Federal individual income and employment tax returns for tax years 2001 through 2005 as required by 26 U.S.C. §§ 6011, 6012 and 6072. In his answer, filed December 7, 2007, the Respondent denied the material allegations in the complaint. He contends that his failures to file and timely file his tax returns and meet his tax obligations were not willful because he entered into an installment agreement with the Internal Revenue Service.

On November 26, 2007, a hearing was held before me in New York, New York, at which the parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Closing arguments were made at the conclusion of the hearing, and the parties submitted proposed findings and conclusions of law and supporting reasons.

Upon the entire record, and based on my observation of the demeanor of the witnesses, I make the following:

FINDING OF FACT

The Respondent, Edwin Davis, Jr., has been a self-employed certified public accountant, licensed by the State of New Jersey since 1985. During the period of 2001-2005, he did business as Edwin Davis, Jr., PC and employed one part-time employee. His address of record is Address 1, South Orange, New Jersey. (Tr. 86, 108-109, 116-117.)¹

As a certified public accountant engaged in practice before the Internal Revenue Service, as defined by 31 CFR. §10.2(d), the Respondent is subject to the disciplinary authority of the Secretary of the Treasury and the Director of the Office of Professional Responsibility. (C. Exh. 4, 7.)

The Respondent was required to timely file Federal individual income tax returns (Form 1040) for tax years 2001 through 2005, as well Federal withholding tax return Form 941 for each quarter during that period. The Respondent, however, failed to timely file his Form 1040 for tax years 2001 through 2003, failed to file his Form 1040 for tax years 2004 and 2005, failed to timely file his Federal withholding tax return Form 941 for each quarter from 2001 to 2005, and failed to pay either his Form 1040 individual income taxes or Form 941 employment taxes. The Respondent was aware of his requirement to file, timely file, and pay his 1040 personal individual income taxes and 941 employment taxes for tax years 2001-2005, but failed to do so. The Respondent's failure to file or timely file his individual income tax returns and timely pay the applicable taxes during that period was willful. (Tr. 108-110, 117; C. Exh. 10-19.)

As of February 2007, the Respondent owed more than \$19,000 in personal and employment taxes to the Internal Revenue Service. During the 2001-2005 period, the Respondent prepared several hundred individual and corporate income tax returns for clients. He also appeared before the Internal Revenue Service on behalf of clients. (Tr. 77-79, 101-102; C. Exh. 20.)

On April 21, 2005, the Respondent met with the Internal Revenue Service's assigned revenue officer, Michael Bernheimer. (Tr. 21-22, 25; C. Exh. 9, p. 4.) After being informed that he was delinquent on his returns and taxes, the Respondent requested an installment agreement. Bernheimer informed the Respondent that he was ineligible for an installment agreement because he was not in full compliance with his tax filing and payment obligations. (Tr. 28-30, 80.)²

¹ "Tr." refers to transcript pages, "C. Exh." refers to Complainant's exhibits, and "R. Exh." refers to the Respondent's exhibits.

² I found Bernheimer credible and credit his testimony that he never agreed that he or anyone else connected with the Internal Revenue Service would be sending the Respondent an installment agreement. (Tr. 38-40.)

On May 17, 2005, the Respondent provided Bernheimer with Form 941 returns for the fourth quarters of 2003 and 2004, and Form 1040 for 2001 through 2003. Bernheimer explained to the Respondent, however, that he still had not filed a Form 941 return for the second quarter of 2005, which became due July 31, 2005. In addition, as of April 20, 2006, the Respondent still had not filed Form 941 returns for the first quarter of 2001, and the second quarter of 2005 through the first quarter of 2006. Bernheimer gave the Respondent a deadline of May 19, 2006 to file the delinquent returns. The Respondent did not, however, file the outstanding Form 941 returns by that date. Nor did he contact Bernheimer to explain why he missed the deadline. As a result, on May 24, 2006, Bernheimer issued levies to collect the Respondent's unpaid tax liabilities. In response, the Respondent, on May 26, 2006 filed the delinquent Form 941 returns and Bernheimer released the levies. (C. Exh. 9, pp. 9, 20, 49,53.) As of May 2006, however, the Respondent still had not filed his 2004 and Form 1040 with the Internal Revenue Service. (C. Exh. 13-14.)

On October 16, 2006, the Complainant informed the Respondent that he willfully failed to timely file Forms 1040 for 2001 through 2003, willfully failed to file his Forms 1040 for 2004 and 2005, willfully failed to timely file Forms 941 for all quarters of 2001 through 2005, willfully failed to pay his 1040 taxes for 2001 through 2005, willfully failed to timely pay his Form 941 taxes for all quarters of 2004, and willfully failed to pay his Form 941 taxes for all quarters in 2001-2003 and 2005. (C. Exh. 1.)³

The Respondent failed to respond to the Complainant's letter. As a result, the Complainant forwarded his case to the Internal Revenue Service's Office of Chief Counsel for litigation. On May 8, 2007, the Office of Chief Counsel informed the Respondent by certified mail, return receipt requested, that it was considering a proceeding to disbar him from practice before the Internal Revenue Service. The letter was returned as unclaimed. However, the Office of Chief Counsel resent the letter on June 7, 2007 by first class mail. This time, the letter was not returned. (Tr. 63; C. Exh. 2-3.) On July 13, 2007, the Office of Chief Counsel commenced the instant proceeding seeking the Respondent's disbarment from practice before the Internal Revenue Service. (C. Exh. 4.) The Respondent, in its answer and at trial, asserted that the failure to file, timely file and pay income and employment taxes for the period of 2001-2005 were not willful because he entered into an installment agreement with the Internal Revenue Service. As explained above, that defense lacks merit.

ANALYSIS AND DISCUSSION

The Respondent is a certified public accountant who has engaged in practice before the Internal Revenue Service. As such, he is subject to the disciplinary authority of the Secretary of the Treasury and the Director or Acting Director of OPR. 31 U.S.C. §

³ I found Bernheimer credible on this point as well and did not credit the Respondent's assertion that he gave Bernheimer his late 2004 and 2005 Forms 1040. There was no evidence offered by the Respondent [as] to accuracy of [his] history, which corroborated Bernheimer's version of the filings or nonfilings. (Tr. 76-77,91-96; Exh. 9, 13-14.)

330(a)(1). The Respondent was required to file a Federal income tax return for tax years 2001 through 2005. Those returns were due on or before April 15 of the following calendar year. He did not, however, file his Form 1040 returns for 2001-2003 until May 17, 2005, and still has not filed Form 1040 returns for 2004 and 2005. Moreover, the Respondent has failed to pay his Form 1040 taxes for 2001 through 2005. The Respondent also failed to timely file his Form 941 for all quarters of 2001 through 2005, failed to pay Form 941 taxes from 2001 through 2003, failed to timely pay his Form 941 taxes for all quarters of 2004. The Respondent's failures to file, timely file and pay Forms 1040 and 941 taxes were willful.

In conclusion, the clear and convincing evidence establishes that the Respondent's aforementioned failures were willful. The Respondent's assertion that his failure to file, timely file and pay income and employment taxes for the period of 2001-2005 were not willful, because he entered into an installment agreement with the Internal Revenue Service, lacks merit. I credited Bernheimer's testimony, as corroborated by Internal Revenue Services records, that he never agreed to an installment agreement with Davis. Accordingly, the Respondent's willful failure to file and timely file tax returns, and pay the corresponding taxes constitutes disreputable conduct for which he may be suspended from practice before the Internal Revenue Service pursuant to 31 C.F.R. § 10.51 (f) (2002) and 31 C.F.R. § 10.51(f) (2005).

SANCTION

The complaint seeks to have the Respondent disbarred from practice before the IRS because of his failure to comply with his Federal income tax obligations from 2001 through 2005. The Director's decision is entitled to substantial deference and I concur with his determination as to the sanction sought - disbarment from practicing before the Internal Revenue Service.

The Respondent, a CPA for approximately 23 years, was aware of his obligations to file his individual and employment tax returns. He completed many individual and corporate tax returns during the period of 2001-2005, but chose not to file them for himself. The allegations against the Respondent are serious in nature and it is important to deter similar conduct by other certified professional accountants. Accordingly, I find that, under all the circumstances, disbarment from practicing before the IRS is appropriate.

I find that the allegations against the Respondent have been proven by clear and convincing evidence in the record, the standard provided in 31 C.F.R. § 10.50 to support the sanction of debarment from practicing law before the IRS.

CONCLUSIONS OF LAW

1. The Respondent. Edwin Davis, Jr., is a certified public accountant who has practiced before the Internal Revenue Service and is subject to the disciplinary authority of the Secretary of the Treasury and the Director, Office of Professional Responsibility.

2. 31 C.F.R. §10.51 (f) (2002) provides that willfully failing to make a Federal income tax return is grounds for discipline.

2. The Respondent violated the provisions of 31 C.F.R. §10.51 (f) (2002) and § 10.51 (f) (2005) by engaging in a pattern and practice of willfully failing to file and timely file his Federal individual income tax returns, and pay the corresponding individual and employment taxes for tax years 2001 through 2005. That violation has been proven by clear and convincing evidence in the record.

3. Upon the foregoing findings of fact and conclusions of law, and the entire record, pursuant to 31 C.F.R. §10.76, I issue the following:

ORDER⁴

The Respondent, Edwin Davis, Jr., is disbarred from practice before the Internal Revenue Service.

Dated at Washington, D.C. February 20, 2008

Michael A. Rosas
Administrative Law Judge

⁴ Pursuant to 31 C.F.R. §10.77, either party may appeal this Decision to the Secretary of the Treasury within thirty (30) days from the date of issuance of this Decision.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision was sent by first class mail on this 21st day of February, 2008, to each of the following:

Wendy Yan, Esq.
Department of the Treasury
Internal Revenue Service
Office of Chief Counsel
Associate Chief Counsel General legal Services
33 Maiden Lane, 14th Floor
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Office of Professional Responsibility
Internal Revenue Service
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Washington, DC 20224

Secretary, Division of Judges
National Labor Relations Board

CERTIFICATE OF RECORD

I, Michael A. Rosas, Administrative Law Judge, hereby certify that the attached documents consisting of the following:

1. One volume of the transcript of the hearing held on November 26, 2007.
2. Complainant Exhibits:
 - 1- Letter, dated October 16, 2006, from Stephen A. Whitlock to the Respondent.
 - 2 - Letter, dated May 8, 2007, Heather A. Southwell, Esq. to the Respondent.
 - 3 - Letter, dated June 7, 2007, from Heather A. Southwell, Esq. to the Respondent.
 - 4 - Letter, dated July 13, 2007, from Heather A. Southwell, Esq. to Chief Judge Robert A. Giannasi.
 - 5 - Letter, dated September 12, 2007, from Heather A. Southwell, Esq. to Chief Judge Robert A. Giannasi.
 - 6 - Letter, dated September 17, 2007, from the Respondent to Chief Judge Robert A. Giannasi.
 - 8 - Letter, dated October 4, 2007, from Heather A. Southwell, Esq. to Chief Judge Robert A. Giannasi.
 - 10 - Certified copy of transcripts, dated October 25, 2007, reflecting assessments, payments and other specified matters for the 2001 tax year for the Respondent.
 - 11- Certified copy of transcripts, dated October 25, 2007, reflecting assessments, payments and other specified matters for the 2002 tax year for the Respondent.
 - 12- Certified copy of transcripts, dated October 25, 2007, reflecting assessments, payments and other specified matters for the 2003 tax year for the Respondent.
 - 13- Certified copy of transcripts, dated October 25, 2007, reflecting assessments, payments and other specified matters for the 2004 tax year for the Respondent.
 - 14- Certified copy of transcripts, dated October 25, 2007, reflecting assessments, payments and other specified matters for the 2005 tax year for the Respondent.
 - 15- Certified copy of transcripts, dated October 25, 2007, reflecting assessments, payments and other specified matters during the 2001 tax year for the Respondent.

16- Certified copy of transcripts, dated October 25, 2007, reflecting assessments, payments and other specified matters during the 2002 tax year for the Respondent.

17- Certified copy of transcripts, dated October 25, 2007, reflecting assessments, payments and other specified matters during the 2003 tax year for the Respondent.

18- Certified copy of transcripts, dated October 25, 2007, reflecting assessments, payments and other specified matters during the 2004 tax year for the Respondent.

19- Certified copy of transcripts, dated October 25, 2007, reflecting assessments, payments and other specified matters during the 2005 tax year for the Respondent.

20- Payoff Calculator for the Respondent, run November 19, 2007.

3. Respondent's Exhibits

1- Copy of Form 940-EZ for tax year 2001.

2- Copy of Form 941 for tax year 2001.

3- Copy of Form 1120S for tax year 2001.

4. Copy of Form 1040 for tax year 2001