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

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| **DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,** | ) | |
| **Complainant,** | ) | |
| | ) | **Complaint No. 2009-31** |
| **v.** | ) | |
| **EDGAR H. GEE, JR.,** | ) | |
| **Respondent.** | ) | |

# INITIAL DECISION AND ORDER

**DATED:** March 28, 2011

**JUDGE:** The Honorable Susan L. Biro[1]
Chief Administrative Law Judge
U.S. Environmental Protection Agency

**APPEARANCES:**

For Complainant: Robert M. Finer, Esq., Senior Counsel
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[1] This decision is issued by the Chief Administrative Law Judge of the United States Environmental Protection Agency. The Administrative Law Judges of the Environmental Protection Agency are authorized to hear cases pending before the United States Department of the Treasury, pursuant to an Interagency Agreement effective October 1, 2008.

## I. PROCEDURAL HISTORY

On December 9, 2009, Karen Hawkins, the Director of the Office of Professional Responsibility ("OPR" or "Complainant") of the Internal Revenue Service ("IRS") issued a disciplinary Complaint under 31 C.F.R. § 10.60 against Respondent Edgar H. Gee, Jr., a certified public accountant. The Complaint alleges in nine counts that Respondent's willful failure to timely pay his individual federal income taxes for calendar years 1997 through 2005 constitutes engagement in disreputable conduct warranting his disbarment from practice before the IRS pursuant to 31 C.F.R. §§ 10.50, 10.51, and 10.70.

On January 4, 2010, Respondent filed a Response to the Complaint and, with leave of this Tribunal, filed a "First Amendment" thereto on or about February 12, 2010 ("Amended Response"). In his Amended Response, Respondent asserted that while "tax payers are normally required to timely pay their tax[es] ... there are exceptions due to extenuating circumstances." Amended Response at ¶¶1-3, 6, 8, 11, 12, 14 and 16. Included within the Amended Response was a narrative statement in which Mr. Gee alleged that there is an "offer in compromise" process of which taxpayers can avail themselves when they have encountered financial difficulties that result in the inability to fully pay their due liabilities, and that the IRS has "seriously and cavalierly breached" this process "in their zeal to catch this well known practitioner in the independent contractor arena." *Id*. at "Conclusion." Respondent further alleged that IRS' position "throughout this case has been arbitrary, capricious and without sound basis in fact or law" and that the Agency has engaged in an "abuse of due process" and acted in "bad faith." *Id*. Additionally, Mr. Gee claimed that he "meets or has already met the multiple guidelines for resolution," that he is "compliant for years 2006, 2007, 2008 and 2009," and that the punishment sought here far exceeds the IRS' "own published guidelines and statements." *Id*.

Thereafter the parties submitted prehearing memoranda along with proposed evidence. On July 13, 2010, a hearing was held in this matter in Knoxville, Tennessee. At hearing, Complainant presented the testimony of four witnesses: Respondent, Janet Green, Rachel May, and Karen Hawkins. Respondent offered his own testimony as well as that of Douglas E. Warren.[2] Complainant's Exhibits 1 through 7 and Respondent's Exhibits 1 through 4, 5 (¶¶ 1-13 only), and 6 through 14, were all admitted into evidence at hearing (hereinafter cited as "C's Ex. __" or "R's Ex. __").

The transcript of the hearing was received by the undersigned on August 6, 2010.[3] Complainant filed a Post-Hearing Brief on September 20, 2010 and Respondent submitted his Post-Hearing Brief on October 4, 2010. On October 8, 2010, Complainant

[2] Mr. Warren, along with Michael J. Knight, originally served as Respondent's representatives in this proceeding but were replaced prior to hearing by counsel Willis Jackson, Esq.

[3] Citation to the transcript of the hearing will be in the following form: "Tr. _".

advised this Tribunal that it would not be filing a post-hearing reply brief, and thus, the record closed with the filing of the Respondent's Post-Hearing Brief on October 4, 2010.

## II. FACTUAL BACKGROUND

Since 1974, Respondent Edgar H. Gee. Jr. has been a licensed certified public accountant ("CPA"), authorized to practice before the IRS. Tr. 9. 242. For the majority of his career, he has been self-employed, operating as a solo practitioner. Tr. 243. Each year he prepares approximately one hundred tax returns for clients and handles two to three IRS collection cases. Tr. 10, 264, 266. Respondent touted at the hearing that he was the "first person" to beat the IRS in a "big independent contractor case," involving four million dollars in payroll taxes. Tr. 244-246; *see Smoky Mountain Secrets, Inc. v. United States*, 910 F. Supp. 1316 (E.D. Tenn. 1995). Since then, he has held himself out as having a special expertise in the classification of workers as independent contractors rather than employees for tax purposes. Tr. 243-46. Due to such expertise, referrals come to him from around the country, and at any given point he is serving as a consultant on four to six tax audit cases relating to independent contractors. Tr. 246-49. Respondent explained that he provides these consulting services through "Independent Contractor Services Inc.," a corporate entity he established for such purpose in 2007. Tr. 250-51. Through two other corporate entities he created around the same time, "Educational Services, Inc." and "Edutainment, Inc.," Mr. Gee provides his services to accounting groups as a paid professional speaker on taxes, tax law, and IRS procedures and practices. Tr. 251-52. Further, under the aegis of a fourth corporation, "Professional Edge, Inc.," Mr. Gee provides consulting services to businesses on tax and non-tax matters, including business planning, organization and pensions. Tr. 252-53.

Respondent filed on behalf of himself and his wife Federal individual income tax returns for the nine calendar years at issue here (1997-2005); however, he did not pay the income taxes shown as due thereon. C's Ex. 7. The record evidences that prior to 2006, the IRS did not aggressively pursue Respondent in regard to his tax delinquencies, although it did reflect in its records accruing interest on the balances due and penalties for "not pre-paying tax" and "late payment of tax." C's Ex. 6; Tr. 12, 66, 97-98, 128-29. However, in March or April of 2006, the matter of Mr. Gee's outstanding taxes dating from 1995 to 2004 was assigned to Revenue Officer Janet Green. Tr. 97-98. Promptly thereafter, Ms. Green notified Mr. Gee of the Government's intent to levy to collect the taxes owed. Tr. 98. At his request, Ms. Green met with Mr. Gee, who advised her regarding the circumstances surrounding his non-payment and suggested possibilities for resolution. Tr. 99-101. Unhappy with Ms. Green's indication that she intended to proceed with filing a tax lien, during the meeting, Mr. Gee requested to speak to Ms. Green's manager, Kathy Thacker. Tr. 102. When such discussion did not result in an amicable resolution, on April 12, 2006, the IRS filed a Notice of Federal Tax Lien pursuant to 26 U.S.C. § 6321. C's Ex. 1 at 3-4; Tr. 107. In response, Respondent exercised his right under 26 U.S.C. § 6320(b) to a hearing on the appropriateness of the lien before the IRS Office of Appeals and submitted a statement in support thereof on May 12, 2006. C's Ex. 1; Tr. 107.

A hearing was held upon Respondent's appeal on October 16, 2006. C's Ex. 1 at 5; Tr. 71. On December 13, 2006, the IRS Appeals Office issued a Notice of Determination that sustained the imposition of the tax lien against Mr. Gee. C's Ex. 1; Tr. 82. 108-110. In support thereof, the Determination Notice observed that Mr. Gee had a "long history of non-compliance with paying taxes," owed in excess of $312,000 "plus accruals" for taxes due from 1995 through 2005, and was not current on his estimated tax payments for 2006. C's Ex. 1. It also notified Mr. Gee of his right to appeal the adverse findings therein in U.S. Tax Court. *Id.* Mr. Gee did not exercise such appeal rights, and in February 2007, his case was returned to the "originating IRS office for action consistent with the determination." Tr. 110.

Thereafter, Ms. Green prepared an additional Notice of Final Intent to Levy for 2005 taxes which were then also outstanding, and began levy action. Tr. 110. Mr. Gee again attempted to "work out" an amicable resolution of his outstanding tax liabilities with the IRS. C's Ex. 4. In support thereof, Mr. Gee submitted to the government three certified "Collection Information Wage Statement for Wage Earners and Self-Employed Individuals" ("CIS") disclosing his income and expenses as well as his assets and liabilities. C's Ex. 2 and R's Ex. 2 (CIS dated 3/11/08); R's Ex. 5 (CIS dated 5/20/2009): R's Ex. 1 (CIS dated 12/31/09); Tr. 28-30. In response thereto, Ms. Green issued summonses for Mr. Gee's bank and other records. Tr. 114- 15. Such documents revealed that Mr. Gee was funneling income through corporate entities not identified on his CIS forms. R's Exs. 1, 3, 4; Tr. 115-117.

On April 13, 2007, Ms. Green referred Respondent to OPR under section 10.51(f) of Circular 230, representing that Mr. Gee "has made very little effort towards paying his personal income taxes in over ten years." C's Ex. 4; Tr. 111-12. Thereafter, in an unsuccessful effort to amicably resolve the disciplinary matter, Respondent submitted a series of narrative statements to OPR relaying detailed accounts of the factual circumstances surrounding his tax defaults, his "genuine bona fide effort(s) to work out an offer in compromise or installment payment arrangement" with the IRS, and the impact the IRS' collection efforts have had on his practice. R's Ex. 6, 9. Not persuaded by his submissions, on December 9, 2009, OPR filed a disciplinary Complaint initiating this proceeding seeking Mr. Gee's disbarment from practice before the IRS pursuant to 31 C.F.R. §§ 10.50, 10.51, and 10.70.

At hearing held in this matter in July 2010, Mr. Gee reported that the issue of his outstanding tax liabilities for the years prior to 2005 remains unresolved, and a tax delinquency in excess of $450,000, including interest and penalty, still exists. Tr.20. However, Respondent declared he was in compliance with his tax obligations for tax years 2006 through 2009. R's Ex. 1 at 6.

## III. RELEVANT STATUTES, REGULATIONS AND STANDARDS

At all times relevant hereto, Section 330(b) of Title 31 of the United States Code has provided in pertinent part:

> After notice and opportunity for a proceeding, the Secretary [of the Treasury] may suspend or disbar from practice before the Department [] a representative who-
>
> * * *
>
> (2) is disreputable[.]

31 U.S.C. § 330(b)(2) (1997-2010).

The term "disreputable" is not defined in the statute but examples of disreputable conduct are included in the set of regulations promulgated in connection therewith, known as "Circular 230," set forth at 31 C.F. R. Part 10 (§§ 10.0-10.93). Those regulations, initially enacted in 1936, have been amended from time to time. In regard to the violations at issue in Counts 1 through 5 of the Complaint, relating to the tax years 1997-2001, the definition of disreputable conduct in the version of Circular No. 230 in effect from June 20, 1994 until July 25, 2002 applies (referred to herein as the "1994 Regulations"). See 59 Fed. Reg. 31523-01 (June 20, 1994). As to the violations at issue in Counts 6 through 9, pertaining to tax years 2002-2005, the definition in the regulations in effect for the period from July 26, 2002 until September 25, 2007 applies (referred to herein as the "2002 Regulations"). See 67 Fed. Reg. 48760-01 (July 26, 2002). The regulations currently in effect have been since September 26, 2007. See 72 Fed. Reg. 54540-01 (Sept. 26, 2007).

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

> Disreputable conduct for which [a] ... certified public accountant ... may be disbarred or suspended from practice before the Internal Revenue Service includes, but is not limited to:
>
> * * *
>
> (d) Willfully failing: to make a 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 (1994) (italics added), as it appears in Circular No. 230 (Rev. 7-94) at 24.

In the 2002 Regulations, the subsection above (10.51 (*d*)) was redesignated to 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(1) (2003) (italics added)[4]

For determining the penalty for engaging in disreputable conduct, the regulations currently provide that "[t]he sanctions imposed ... shall take into account all relevant facts and circumstances." 31 C.F.R. § 10.50(d) (2007) (italics added). The regulations, however, do not provide any guidance as to what facts and circumstances are relevant or any standards for determining when it would be appropriate to impose one particular sanction (censure, suspension or disbarment) rather than another.

Finally, as to the standard of proof required in disciplinary cases, the applicable regulation states in pertinent part:

> If the sanction is a monetary penalty, disbarment or a suspension of six months or longer duration, an allegation of fact that is necessary for a finding against the practitioner must be proven by clear and convincing evidence in the record.

31 C.F.R. § 10.76 (2007).

## IV. THE PARTIES' POSITIONS

### A. Complainant's Position

Complainant's Post-Hearing Brief ("C's Brief") proclaims that OPR has presented clear and convincing evidence that Respondent has "willfully evaded, attempted to evade, or participated in any way in evading or attempting to evade the payment of a Federal tax." C's Brief at 3-4. In support of this declaration, OPR begins by first asserting that it is not required to prove Respondent engaged in an "affirmative act" of the type required in criminal tax evasion cases, in order to establish he evaded payment of federal tax in this disciplinary proceeding. In support of this conclusion, Complainant makes the following three points.

First, noting that there is no indication that the drafters of the regulations intended otherwise, OPR claims therefore that the "plain meaning" of the term "evasion" applies. C's Brief at 7. Quoting from Webster's Ninth New Collegiate Dictionary 429 (1988 ed.), Complainant informs that such meaning is "synonymous with 'avoid the performance' of paying taxes and does not require the taking of any affirmative acts in furtherance of that tax avoidance." C's Brief at 6-7. Additionally, OPR offers that the elimination of the language "concealing or attempting to conceal assets in order to evade the payment of federal taxes" found in the original 1936 version of Circular 230, from later editions thereof, supports the conclusion that the drafters of the revisions eliminated any

[4] The revisions to the Regulations issued in the Federal Register on July 26, 2002 do not appear in the printed edition for 2002 of the Code of Federal Regulations. See 31 C.F.R. § 10.1 *et seq*. (2002). They first appear in the 2003 edition.

requirement to show an affirmative action in order to prove "evasion" under Circular 230. C's Brief at 8.

Second, observing that "'evasion' is not exclusively a criminal concept under the Internal Revenue Code," and "Circular No. 230 is not a criminal statute," OPR argues that "there is no reason to adopt the criminal law definition of 'evade' here." C's Brief at 8-10, citing Tax Code §§ 6662, 6707A, 7454(a), and 6672(a). Instead, Complainant suggests this Tribunal "use as a model the ample case authority decided under IRC [Internal Revenue Code Title 26, Section] 6672 with respect to the trust fund recovery penalty." C's Brief at 9. Interpreting the language of that section, which imposes a civil penalty upon any person who "willfully attempts in any manner to evade or defeat" taxes, OPR advises. courts have held that a "responsible person is subject to the penalty merely for knowing of the liability and voluntarily and consciously preferring other creditors over the United States Treasury ... even in circumstances in which the responsible person was attempting to rescue a faltering business." C's Brief at 9-10 (*citing Jenson v. United States*, 23 F.3d 1393, 1395 (8th Cir. 1994). *United States v. Running*, 7 F.3d 1293 (7th Cir. 1993), *United States v. Carrigan*, 31 F.3d 130 (3d Cir. 1994), and *Buffalow v. United States*, 109 F.3d 570 (9th Cir. 1997)).

Third, OPR posits that "[g]iven the congressional propensity to use 'avoid,' 'defeat,' and 'evade' interchangeably in civil contexts," there is ample support for concluding that Congress did not consider 'evasion' to be an exclusively criminal concept." C's Brief 10. "'Evading' payment is, simply 'avoiding' payment, similar to 'defeating' the collection of a tax, without further elaboration necessary," OPR claims. *Id*. As such, to evade a tax as prohibited by section 10.51, a "practitioner need only willfully fail to pay a tax known to be owed, including choosing to pay others in lieu of taxes owed to the United States." *Id*. It adds as a caveat, however, that "[b]y necessity, this failure to pay must occur over a meaningful period of time, not be an isolated instance that is otherwise identified in a vacuum." *Id*., (citing *Director, OPR v. Davis, CPA*, Complaint No. 2007-35 (Decision on Appeal, Mar. 10, 2009) (accessible at: http://www.irs.gov/pub/irs-utl/edavis_appeal_decision_second_redacted-posted.pdf).

Next, moving on to the term "willfulness," OPR argues that the "appropriate standard to apply ... is whether the Respondent's failure to pay his Federal taxes was knowingly done." C's Brief at 11. Noting again the lack of a statutory or regulatory definition, and after consulting "outside authorities" to which it does not cite, OPR further decrees that "the standard for determining willfulness under Circular 230 is very low." *Id.* In support thereof, Complainant attempts to disavow as controlling authority the decision of the Treasury's Appellate Authority in *Director, OPR v. Banister*, No. 2003-002 (Decision on Appeal, June 25, 2004) (accessible at: http://www.irs.gov/pub/irs-utl/banistcr_appeal_decision.pdf), which adopted for use in disciplinary cases the definition of willfulness traditionally employed in criminal tax cases. C's Brief in 11. OPR notes that recently the Appellate Authority "publically questioned" the appropriateness of using the criminal standard in the context of a civil disciplinary proceeding, and avers that thus there is "no published or otherwise articulated Treasury standard for willfulness," suggesting the standard remains a matter for this Tribunal to

decide. C's Brief at 11-12, citing *Director v. Kilduff*, No. 2008-12 (Decision on Appeal, Jan. 20, 2010) (accessible at: http://www.irs.gov/pub/irs-utl/kilduff.pdf).

As an aid to analyzing the appropriate willfulness standard, OPR refers the Tribunal to the Supreme Court's decision in *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007), interpreting the meaning of "willfully" in the context of the Fair Credit Reporting Act. C's Brief at 12. In *Safeco*, the High Court noted that the term carried different meanings depending on whether the context was civil or criminal, and that in civil cases the term was given a broader interpretation and included both "knowing" and "reckless" violations. *Id*. at 12 (citing *Safeco*, 551 U.S. at 57-58). With that guidance in mind, OPR observes that the statute (31 U.S.C. § 330) providing for disbarment of a representative who is "disreputable" does not require that such disreputableness be taken with a willful state of mind; noting that such mental state is applicable only in regard to an alternative ground for disbarment, specifically misleading or threatening a client. C's Brief at 13. The absence of such mental state from the statute, OPR claims, is "completely understandable," given that it relates to neither civil nor criminal liability, but to professional ethics and the regulation of representatives before the Agency. *Id*. As such, Complainant suggests, a specific mental state is not a prerequisite to a finding of practitioner misconduct, but rather is considered in determining the severity of the sanction, analogizing such cases to attorney disciplinary proceedings under which a violation is "made out by a showing that the lawyer knowingly and without coercion committed the acts charged" without requiring evidence of a specific intent to violate a known code provision or an improper motive. C's Brief at 14. (citing Charles Wolfram, *Modern Legal Ethics* (1986)). Thus, if a practitioner intended the acts that committed the misconduct, it was "willfully" done, OPR states. *Id*.

Finally, addressing the applicability of the above discussed standards to the facts of this case, OPR claims "the evidence proves that the Respondent willfully evaded payment of his taxes for the years in question." C's Brief at 14 (citing Tr. 20). Citing hearing testimony, it notes that Respondent has acknowledged having unpaid federal tax obligations for the years 1997 to 2005 exceeding $450,000. C's Brief at 14 (citing Tr. 20). Further, OPR alleges that "despite his protestations to the contrary, the Respondent made a sufficient income to both comfortably support his family and to timely pay his federal taxes," citing his yearly taxable income reported and tax due as shown on his returns. C's Brief at 14-15. Mr. Gee's attributions of inability to pay his taxes to the birth of his grandchild in March 1996 and the loss of his biggest client in late 1996 are characterized by Complainant as a "story [that] simply cannot be believed." C's Brief at 15-16 (citing Tr. 39, 256; R's Exs. 5, 6, 9). Citing testimony at hearing, OPR charges that Respondent began his "multi-year pattern of not paying his taxes" in 1995, when his taxable income was "quite sizable," and before either of the events he cites as causing his inability to pay had occurred. C's Brief at 15-16 (citing Tr. 20, 98). Further, Complainant implies, neither of the events should have caused Mr. Gee to become "financially unable" to pay his taxes in that Respondent testified that his grandson was born without medical complications, his daughter was covered by health insurance, and his taxable income in 1997, the year after he lost his biggest client, was greater than his taxable income the year before. C's Brief at 16 (citing Tr. 256; R's Ex. 14).

OPR asserts that Mr. Gee's significant credit card debt and other expenditures evidence that his inability to pay his taxes was voluntarily incurred, representing a conscious choice he made to forego paying his taxes in order to use his money to make "his life and his family's life as comfortable as possible." C's Brief at 16 (citing Tr. 52). His claim that he was just trying to survive and had no luxuries in life is belied by his expenditures of his disposable income on non-necessities, including the acquisition of two new or relatively new cars, a time share vacation condo, cable television with premium channels, country club membership, and sporting event tickets, as well as his provision of six to seven years of support and tuition to an adult daughter so as to allow her to obtain an advanced degree, the maintenance of a non-working spouse, the retention of his home's equity and his significant contributions to charity. C's Brief at 16-18. Such personal choices in his life, which contributed to his allegedly dire financial situation, OPR insists, also disprove Mr. Gee's claims that he intended to pay his taxes and that "if we had been able to pay, we would have tried to pay something." C's Brief at 16-19 (citing Tr. 23,25-27). Such actions prove that from 1997 to 2005, Mr. Gee "evaded" payment of his federal taxes. C's Brief at 19.

Even if, assuming arguendo that the term "evade," as used in Section 10.51, requires proof of affirmative acts as in the criminal context, OPR submits that it has met its burden of proof, in the form of the "materially false" Collection Information Statements Respondent submitted to IRS collection agents. C's Brief at 20. As proof of such falsity, Complainant asserts that neither Respondent's March 2008, May 2009 or December 31, 2009 Statements reference Respondent's time-share condo, his four corporate entities, or his corporate checking accounts into which he made deposits of income. C's Brief at 20 (citing C's Ex. 2; R's Exs. 2, 4; Tr. 80, 213). Additionally, Respondent's testimony at hearing in regard to his corporate entities was less than forthright, OPR suggests, noting that he initially testified that he practices as a "sole proprietorship CPA" and stated "I'm not incorporated," failing to mention his various corporate entities. C's Brief at 21. Finally, OPR proclaims that it is also "very significant" that Mr. Gee was able to fully pay his tax obligations in 2006 through 2009 without using his home equity and despite the alleged severe damage caused him by the IRS' collection activities. C's Brief at 21 (citing Tr. 27-86). From this, Complainant surmises, Respondent "always had the assets to pay the IRS"; he simply did not have the desire. C's Brief at 21. As such, OPR argues, he clearly willfully evaded the payment of taxes and took affirmative acts in support thereof. *Id*. at 22.

**B. <u>Respondent's Position</u>**

As expected, Respondent's Post-Hearing Brief (“R's Brief”) takes the contrary position, arguing that the evidence presented proves that he has not "willfully evaded" any tax obligation. R's Brief at 3. In support thereof, Respondent argues that to find the common meaning of evasion, a legal term, one should not look to a collegiate dictionary, as OPR did, but to a legal dictionary. R's Brief at 4. Citing just such a dictionary, Respondent states that the term "tax evasion" means "[t]he willful attempt to defeat or circumvent the tax law to illegally reduce one's tax liability." R's Brief at 4 (quoting

Black's Law Dictionary (9th ed.)). Further, contrary to OPR's claim, "evasion" and "avoidance" are not interchangeable terms, Respondent argues, noting that tax avoidance is legal. R's Brief at 4.

Additionally, Respondent asserts that in the recent *Kilduff* case cited by OPR, the Treasury's appellate authority applied the criminal standard set forth in Banister, and thus any language in the decision to the contrary is "mere dicta." *Id*. The criminal section of the tax code applying to evasion (26 U.S.C. § 1701 et seq.) "provides definitions and guidance as to both the word evade and the word willful," Respondent points out, citing in support thereof "a learned treatise, Docstoc.com/doc Section 7201," a copy of which Respondent attaches to his Brief as Exhibit 1. R's Brief at 4-5. The government must prove both willfulness and an attempt to evade, Mr. Gee implores, and proclaims that it is "substantially certain" that he "did not willfully not pay[,] [h]e was simply unable." *Id*. at 5. Further, he asserts that it is "absolutely certain" that he did not attempt to evade, noting that he "never changed addresses, he never [hid] funds or concealed assets and in fact was at all times available to the Internal Revenue Service for their scrutiny." *Id*.

Moreover, OPR's claim that Respondent chose to live an extravagant lifestyle over payment of his federal taxes is "simply not the facts." R's Brief at 5. Both his testimony and "the Government's own discovery," Mr. Gee asserts, has shown that he "lives in a modest home with a number of dependents," "drives an economical older car and has no extravagance." *Id*. He notes that he reasonably explained that he maintained his football tickets and membership in several tennis clubs in "efforts to generate business to increase his income so he can pay his federal tax liability." *Id.*

## V. DISCUSSION OF THE STANDARD OF LIABILITY

As indicated above, as to Counts 1-5, the particular disreputable conduct charged is "evading" payment of federal tax. 31 C.F.R. § 10.51 (d) (1994). As to Counts 6-9, the conduct at issue is *"willfully evading"* payment of federal tax. 31 C.F.R. § 10.51(f) (2003).

Neither Circular 230 in particular, nor the IRS Code or its regulations in general, define the terms "evading" or "willfully," or any cognate thereof, although such terms, together or separately, are liberally used throughout the statute and regulations in both civil and criminal contexts. See, e.g., 26 C.F.R. § 1.269-1 (b) ("The phrase '*evasion* or avoidance' [as used in 26 U.S.C § 269 et al.] is not limited to cases involving criminal penalties, or civil penalties for fraud"); United States Code Title 26 (also known as the "Internal Revenue Code" ("IRC")) § 547(g) ("No deficiency dividend deduction shall be allowed…if…the deficiency is due to fraud with intent to evade tax, or to *willful* failure to file an income tax return within the time prescribed by law"); IRC § 860 (same); IRC § 936 (tax credit not available if "is due in whole or in part to fraud with intent to evade tax or *willful* neglect"); IRC § 6501 ("In case of a *willful* attempt in any manner to defeat or evade tax imposed by this title ... the tax may be assessed ... at any time"); IRC § 6531(2) (period of limitation shall be 6 years "for the offense of *willfully* attempting in any

manner to evade or defeat any tax or the payment thereof"); IRC § 6653 ("Any person. .. who- (1) *willfully* fails to pay any tax, .. or (2) *willfully* attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for a penalty of 50 percent of the total amount of the underpayment of the tax"); IRC § 6672 (a) ("Any person ... who *willfully* fails to collect such tax, .. and pay over such tax, or *willfully* attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded"); IRC § 7201 ("Any person who *willfully* attempts in any manner to evade or defeat any tax , . , shall, , , be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 . , . or imprisoned not more than 5 years"); IRC § 7202 ("Any person ... who *willfully* fails to collect or truthfully account for and pay over such tax shall ... be guilty of a felony and ... shall be fined not more than $10,000, or imprisoned not more than 5 years"); IRC § 7203 ("Any person ... who *willfully* fails to pay such estimated tax or tax, make such return .. , at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and ... fined not more than $25,000…or imprisoned not more than 1 year"); IRC § 7204 ("any person ... who *willfully* furnishes a false or fraudulent statement ... shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both") (italics added in all instances).

Therefore, to determine the meaning of the terms it is necessary to employ the well established rules of statutory construction. *Lewis v. Atlas Van Lines, Inc*., 542 F.3d 403, 409 (3d Cir. 2008) ("[t]he basic tenets of statutory construction apply to construction of regulations and 'our starting point on any question concerning the application of a regulation is its particular written text'") (quoting *Pa. Fed'n. of Sportsmen's Clubs. Inc. v. Kempthorne*, 497 F.3d 337, 351 (3d Cir. 2007)); 1A Singer, Statutory Construction, § 31:6 (6th ed. 2003) (general rules of interpretation apply to regulations). One cardinal rule of statutory construction is that in the absence of the provision of a definition, "the words of the regulation shall be given their common meaning." *Dudds v. Comm'r*, 1986 Tax Ct. Memo LEXIS 437 "10 (T.C. 1986) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). However, contrary to OPR's suggestion, in such context "common meaning" does not necessarily mean the definition in general public usage, as reflected in a collegiate dictionary. Rather, as Respondent suggests in its Brief, where a word in a statute is a legal term, the word is presumed to have been used in its legal sense, that is, as it has been judicially interpreted. 2A Singer, Statutory Construction, § 47:30 (6th ed. 2003) (citing, *inter alia, Standard Oil Co. of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962) ("knowingly").

## A. Willfully

As the Supreme Court has repeatedly recognized, "willfully" is a "word of many meanings whose construction is often dependent on the context in which it appears." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) (quoting Bryan v. United States, 524 U.S. 184, 191 (1998)) (internal quotation marks omitted). In the particular context of

criminal cases arising from the failure to pay taxes (under IRC §§ 7201-7204), "willfulness" is generally pithily defined as "a voluntary, intentional violation of a known legal duty." *See, e.g., United States v. Phipps*, 595 F.3d 243, 247 (5th Cir. 2010) (citing Cheek v. United States, 498 U.S. 192, 199-200 (1991)); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973). To act "willfully" is to act voluntarily, purposefully, deliberately and intentionally, as distinguished from accidentally, inadvertently, or negligently. *United Slates v. Merrill*, 639 F.2d 254, 256 n.2 (5th Cir. 1981); *Jefferson v. United States*, 546 F.3d 477, 481 (7th Cir. 2008). A taxpayer with a "justifiable excuse" for his non-payment cannot be found to have acted "willfully." *United States v. Masat*, 948 F.2d 923, 931 n.15 (5th Cir. 1991) (upholding the district court's jury instruction that read, "Defendant's conduct is not 'willful' if he acted through negligence, even gross negligence, inadvertence, justifiable excuse or mistake, or due to his good faith misunderstanding of the requirements of the law.") (italics added). Moreover, a taxpayer's good or evil motive is not relevant in determining whether his act was "willful." *United States v. Pomponio*, 429 U.S. at 12; *United States v. Tucker*, 686 F.2d 230. 232 (5th Cir. 1982).

Federal Courts have held that there are three elements that establish a taxpayer "willfully" failed to pay his taxes:

> (1) he commits such a violation for the purpose of depriving the government of taxes and revenues imposed by and derived from the income tax laws; (2) it is the legal duty of such person to make such payments to the government; and (3) such person knows it is his legal duty to make such payments.

*Masat.* 948 F.2d at 931 n.15; see also Cheek, 498 U.S. at 201. In *OPR v. Banister*, the IRS Appellate Authority explicitly addressed the issue of the meaning of "willfulness" in disciplinary cases, stating:

> Treasury Circular 230 itself does not define the term ·'willful." Absent such a regulatory definition, it is appropriate to ascribe a meaning to the term that comports with that given the term in the case law interpreting the criminal provisions of the Internal Revenue Code of 1986, which in some respects punish like conduct.

*OPR v. Banister*, Complaint No. 2003-02, at 40 (Decision on Appeal, June 25, 2004) (accessible at http://www.irs.gov/pub/irs-utllbanister_appeal_decision.pdf). Observing that "the leading United States Supreme Court decisions defin[e] 'willful' conduct within the meaning of §§7201-7207 of the Internal Revenue Code of 1986," as "a voluntary, intentional violation of a known legal duty," the Appellate Authority adopted and applied such definition to the disciplinary case before it, finding clear and convincing evidence that the Respondent CPA's violative conduct was “willful.” Banister at 41-42, 44, 49 (citing *United States v. Pomponio*, 429 U.S. 10 (1976); *United States v. Bishop*, 412 U.S. 246 (1973); *Cheek v. United States*, 498 U.S. 192 (1991)).

After issuing *Banister*, the IRS Appellate Authority followed and reaffirmed its holding therein as to the meaning of "willful" under Circular 230 in decisions issued in 2008 and 2009. See OPR v. Chandler, Complaint No. 2006-23, at 3-4 (Decision on Appeal, Apr. 2008) ("In the absence of a regulatory definition of 'willfulness,' I have adopted the case precedents under the criminal provisions of the Internal Revenue Code to interpret the term 'willful' for Treasury Circular 230 purposes.") (accessible at http://www.irs.gov/publirsutl/chanldler_opr_appeal_doa_redacted.pdf); *OPR v. Davis*, Complaint No. 2007-35, at 3 (Decision on Appeal, Mar. 10, 2009) ("I have had many occasions to interpret the term 'willful' in Treasury Circular 230 proceedings…the term 'willful' merely means a voluntary, intentional violation of a known duty.") (accessible at http://www.irs.gov/pub/irsutl/edavis_appeal_decision_second_redacted_posted.pdf). As such, said definition constitutes binding appellate authority in the present case. *Klein v. United States*, 94 F. Supp. 2d 838, 849 (D. Mich. 2000) ("Binding appellate court decisions are those that assert clear legal principles (or, in some cases, factual findings) that are intended to have force beyond the facts of the specific case presented."); *Chandler at 7* ("This [Decision] constitutes Final Agency Action in this proceeding.").

In its Brief, OPR acknowledges the *Banister* decision, stating that "[t]he Treasury Appellate Authority at one point adopted a definition of willfulness that was questionably imported from the standard employed by the courts in criminal tax cases." C's Brief at 11. However, it goes on to assert that "the currently serving appellate authority has publicly questioned the rationale of the Banister decision" and then on *this basis alone* claim that "[g]iven that there is, currently, no published or otherwise articulated Treasury standard for willfulness, we submit that this is a matter for the Court to decide."[5] C's Brief at 11.

The case upon which OPR bases its claim that the standard is still a "matter for the court to decide" is *Director v. Kilduff*, Complaint No. 2008-12 (Decision on Appeal, Jan. 20, 2010), (accessible at hup://www.irs.gov/pub/irs-utl/kilduff.pdf). In that case, the "current" IRS Appellate Authority, consistent with *Banister*, applied the criminal standard of "willfulness," i.e., "a voluntary, intentional violation of a known duty," to the case before it, finding the tax practitioner's failure to file or timely tax returns constituted a violation of Section 10.51(f). *Id*. at 5. However, it also quipped: "I question whether the criminal standard is the appropriate standard to apply in the context of a civil proceeding to determine whether disciplinary action should be taken for professional misconduct," and "I invite the parties in future cases to brief what the appropriate definition should be under Treasury Circular 230." *Kilduff* at 5; see also *OPR v. Gonzales*, Complaint 2007-28, (Decision on Appeal, Dec. 9, 2009) (accessible at hllp://www.irs.gov/pub/irs-utl/jgonzales_appeal_decision_-_redacted.pdf).

Contrary to OPR's assertion, the Appellate Authority's quips in *Kilduff* do not affect the controlling authority of *Banister* and make the issue open for a *de novo* ruling by this Tribunal. As Respondent notes, such quips are no more than dicta, that is,

[5] The Appellate Authority in *Banister*, *Chandler* and *Davis* was David P.F. O'Connor and the Appellate Authority in *Kilduff* and *Gonzales* was Ronald D. Pinsky. *Banister* at 104; *Chandler* at 7; *Davis* at 7; *Kilduff* at 7; *Gonzales* at 8.

"judicial comment[s] made while delivering a judicial opinion, but one[s] that [are] unnecessary to the decision in the case and therefore not precedential[.]" *Bullock v. USF Group Benefits Plan*, 2008 U.S. Dist. LEXIS 65109, *16 n.4 (D. Tenn. 2008) (quoting *Asmo v. Keane, Inc.*, 471 F.3d 588, 599 (6th Cir. 2006) (Griffin, J., dissenting)) (citations omitted). As such, the holding in Banister remains the Appellate Authority's standard on the applicable definition of "willfulness."[6]

Therefore, it is concluded that the term "willfully" as used in Section 10.50(d) (of the 2002 Regulations) means "a voluntary, intentional violation of a known legal duty," the proof of which in the context of this case would be clear and convincing evidence establishing that Respondent (1) had a legal duty make income tax payments to the government; (2) knew he had such legal duty; and (3) voluntarily and intentionally violated such legal duty.

**B. <u>Evading</u>**

> The legal dictionary definition of the term "evasion" is-
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> An act of eluding, dodging, or avoiding or avoidance by artifice. [] A subtle endeavoring to set aside the truth or to escape the punishment of law. Tax "evasion" is to be distinguished from tax "avoidance," the former meaning the illegal nonpayment of taxes due, the latter referring to the legal reduction or nonpayment of taxes through allowable deductions, exemptions, etc.

Black's Law Dictionary 497 (5th ed. 1979) (citation omitted). *See* also Black's Law Dictionary 1509 (9th ed. 2009) ("tax evasion…The willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability…Also termed *tax fraud*."); *Niedringhaus v. Comm'r*, 99 T.C. 202, 210 (T.C. 1992) ("Fraud is defined as an intentional wrongdoing designed to evade tax believed to be owing.") (citing *Powell v. Granquist*, 252 F.2d 56 (9th Cir. 1958)).

In the field of tax law, the term "evasion" carries with it a certain gravitas, consistent with malfeasance, rather than mere nonfeasance, as well as a concomitant

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[6] Interestingly, a very recent (Nov. 17, 2010), post-*Kilduff* and *Gonzales* IRS Advisory, OPR Subgroup Report, recommended that Circular 230 be amended to explicitly adopt the criminal definition of "willful," stating that "[t]his high standard of 'willful' is appropriate given the quasi-penal nature of Circular 230, the vagueness of key requirements (such as the 'due diligence' requirement), and the overall complexity of the tax code and regulations." OPR Subgroup Report (Nov. 17, 2010) (accessible at: http://www.irs.govltaxpros/article /0"id=231506, 00.html). See also, Jonathan G. Blattmacher, *et al.*, The Circular 230 Deskbook, 4-182-3 (Apr. 2010 ed.) (describing the scope of prohibited conduct under Section 10.51(d) as "somewhat uncertain," that the term "willfully" may be contrasted with the term "knowingly" also used therein, and "may or may not mean something different").

aggravated penalty. *First Trust & Sav. Bank v. United States*, 206 F.2d 97, 99 (8th Cir. 1953) ("Congress distinguishes between the taxpayer who is guilty or [sic] mere passive failure to perform his duty in respect to a tax owing by him and the taxpayer who is guilty of affirmative attempt or practice of fraud to evade such tax."). For example, under criminal tax law, a person who is "required…to pay any estimated tax or tax …who willfully fails to pay such estimated tax or tax…at the time or times required by law or regulations, shall…be guilty of a *misdemeanor*." 26 U.S.C. § 7203 (italics added). However, a person who "willfully attempts in any manner to evade or defeat any tax ... shall…be guilty of a felony." 26 U.S.C. § 7201 (italics added). Similarly, on the civil side, the mere "failure ... to pay the amount shown as tax on any return ... on or before the date prescribed for payment of such tax" may result in the imposition of a monetary penalty of "0.5 percent for each…month not exceeding 25 percent in the aggregate." 26 U.S.C. § 6651 (a)(2). See also 26 U.S.C. §§ 6654, 6655 (unpaid estimated tax). But, "[i]f any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to *fraud*." 26 U.S.C. § 6663(a) (italics added).

Consistent with these distinctions, different standards of proof have been established. Proving a "willful" failure to pay income taxes, as indicated above, only requires the government to show that: (l) a tax was due and owing; (2) the taxpayer did not pay the tax within the required time; and (3) the failure to pay was willful (i.e. voluntary and intentional). In re *Wray*, 433 F.3d 376, 378 (4th Cir. 2005). However, proving "willful tax evasion" requires proof of: (1) the existence of a tax deficiency; (2) willfulness; and (3) an affirmative act constituting evasion or attempted evasion of the tax. *See Sansone v. United States*, 380 U.S. 343, 351 (1965) (stating that the difference between violation of § 7201 and violation of § 7203 is that the former requires affirmative act to evade tax, while latter only requires willful omission); *accord United States v. Nolen*, 472 F.3d 362, 379 (5th Cir. 2006). These differences strongly suggest that the drafters' usage of the term "evasion" in Section 10.51 in regard to the failure to pay tax was indicative of an intent to encompass only acts of malfeasance, not nonfeasance, thus requiring proof of an "affirmative act" thereof.

Additionally, it is observed that both the 1994 and 2002 Regulations use the term "evasion" in Section 10.51 when defining disreputable conduct involving the *failure to pay tax, but not* with regard to the *failure to file*:

> Willfully failing to make a 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 ....
>
> 31 C.F.R. 10.51(d)(1994)(italics added).
>
> 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, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.

31 C.F.R. 10.51 (f) (2003) (italics added).

It is an elementary rule of construction that "courts do not construe different terms within a statute to embody the same meaning," and that when the legislature uses certain language in one part of a statute and different language in another, the court assumes that different meanings were intended. 2A Sutherland Statutory Construction § 46.06 (4th ed. 1984). As such, Section 10.51 cannot be interpreted so as to give the same meaning to the terms "failing" and "evading," as suggested in OPR's Brief. Moreover, as it must be assumed that different meanings were intended by the use of the different terms, it is appropriate to give such different terms the different meanings given to them in related legislation, that is, in the criminal and civil tax penalty statutes. 3A Sutherland Statutory Construction § 66.3 (4th ed. 1984) ("It must be remembered that a strong presumption exists that the legislature, in enacting a statute, has full knowledge of existing legislation on the same subject matter."). Thus, applying the well established rules of construction to the Regulations' interpretation further supports the conclusion that the term "evading" in Section 10.51 in the various editions of the Regulations does not simply mean merely passively failing, i.e., not paying, one's lawful tax liability, due to, for example, a good faith misunderstanding of the law. Rather, the term "evading," as used in the regulations was intended to encompass only acts of malfeasance, proof of which would be an affirmative attempt, act or practice intended to conceal, mislead, or otherwise prevent the collection of taxes lawfully due.[7] *Niedringhaus v. Comm'r*, 99 T.C. 202, 210 (T.C. 1992) (to meet burden under 50% "fraud" penalty provision of IRC § 6653 for "willfully attempt[ing] in any manner to evade or defeat any [stamp] tax or the payment thereof' the government must prove the defendant "intended to evade taxes known to be owing by conduct intended to conceal, mislead, or otherwise prevent the collection of taxes.").

Therefore, it is hereby concluded that for Respondent to be found to have engaged in disreputable conduct under Section 10.51(d) or 10.51(f) relating to evading federal tax, OPR must prove by clear and convincing evidence that Respondent engaged in conduct intended to conceal, mislead, or otherwise prevent the collection of the taxes.

## VI. RESPONDENT'S LIABILITY

As indicated above, to find that Respondent *willfully* evaded the payment of federal tax, within the meaning of Section 10.51(f) of the 2002 Regulations, there must

[7] It is noted that in Director, *OPR v. Settles*, Complaint No. 2004-11 (Initial Decision on Appeal, Oct. 5. 2007), the Appellate Authority suggested that a finding of willfully failing to pay taxes is sufficient to establish "evasion." The present case, however, does not turn on whether an affirmative act is required in order to prove "evasion." As discussed below, the evidence shows affirmative acts of evasion.

be clear and convincing proof that Respondent: (1) had a legal duty make income tax payments to the government; (2) knew he had such legal duty; and (3) voluntarily and intentionally violated his legal duty.

In this proceeding, Mr. Gee admitted that he was "required by federal law to pay federal individual income taxes for tax years 1997 to 2005." C's Ex. 5; Tr. 13; *see also* I.R.C. §§ 1, 6012, 6072, 6151 (requiring payment of such tax "at the time and place fixed for filing the return determined without regard to any extension of time for filing the return," which is "on or before the 15th day of April following the close of the calendar year"). Additionally, there is no dispute that for each of the years in issue, and for previous years, Respondent, an experienced CPA, annually prepared and filed with the IRS a federal individual income tax return in which he self-,reported owing federal income taxes. C's Exs. 1, 6; Tr. 113-14. As such, the evidence clearly and convincingly establishes that Respondent (1) had a duty to pay his federal income taxes for the nine years at issue (1997-2005) by April 15th of the following year, and (2) *knew* he had such legal duty.

With regard to the third element of proof required to find Respondent acted "willfully," i.e., that he "voluntarily and intentionally violated his legal duty," Respondent stipulated that he "did not pay *any* federal individual income tax for tax years 1997 to 2005."[8] C's Ex. 5 (italics added); Tr. 11-12. As such, there is no genuine dispute regarding the fact that Respondent did not fulfill his legal duty to pay his taxes. What is

[8] Mr. Gee, through counsel, entered into the stipulation prior to hearing. C's Ex. 5. At the hearing, however, Mr. Gee testified, "[t]echnically that's not correct. Some taxes were paid for one of those years ... the year [2001] that the Service audited my return and I paid a few hundred dollars extra money [and] ... we had an overpayment a couple of years ago and that overpayment was applied to one of those earlier years, '97." Tr. 12-13; see also Tr. 14-19. He testified further, "[o]ur income was so low during the last few years we actually qualified for a stimulus payment [and] [t]he IRS took that stimulus payment, as well, and applied it to these earlier years." Tr. 27. The evidence appears to support the accuracy of such testimony and indicates the following as to his reported income, reported taxes due, payments credited thereto, and balance remaining as to the years at issue (*see* C's Ex. 6; Tr. 15, 17-19):

| Tax Year | Adjusted Gross Income | Taxable Income | Income Tax Due | Tax Paid | Acct Balance as of 11/30/09 (includes interest and penalties) |
|---|---|---|---|---|---|
| 1997 | $99,776 | $80,158 | $28,026 | $714 12/8/08-Credit transferred in from 1040 2007 12 | $0 (Balance due of $37,180.21 written off 7/27/09) |

(note Continued net page…)

vigorously disputed in this proceeding, however, is whether such transgression was "voluntary and intentional." Tr. 25. Mr. Gee denies that it was, claiming, "[i]t has always been my intent to pay my taxes," "if we had been able to pay, we would have tried to pay something" but "[during this period we were unable to pay anything." Tr. 12, 21, 23, 25-27, 230, 238-39, 254-255. OPR's position, as expressed at hearing by its Director, Karen Hawkins, based upon her thirty years of private tax practice experience, was that Mr. Gee did not fail to pay his taxes because of an "inability to pay." Tr. 162. Rather, Ms. Hawkins opined, he "was somebody who was just gaming the system." Tr. 177. Mr. Gee "thought it was perfectly okay to borrow from the rest of the United States taxpaying public in order to put his daughters [sic] through private schools and support his lifestyle," Ms. Hawkins remarked. Tr. 168.

It is well established that absent "exceptional circumstances," financial incapacity does not excuse payment of tax, and that evidence of non-necessity expenditures of income confutes claims of financial incapacity. *See e.g., United States v. Tucker*, 686 F.2d 230 (5th Cir. 1982) (Absent exceptional circumstances, mere unavailability of liquid assets on the tax due date does not excuse willful failure to pay taxes under IRC § 7203); *United States v. Ausmus*, 774 F.2d 722 (6th Cir. 1985); United States v. Lewis, 671 F.2d 1025, 1028 (7th Cir. 1982) (making tax payments a "lower priority" to wage payments does not establish inability to pay). See also *United States v. Evangelista*, 122 F.3d 112, 119 (2d Cir. 1997) (prima facie defense of financial inability to pay taxes not established where despite financial hardships, defendants found sufficient resources to make mortgage payments, pay for their children's weddings and college tuitions, and lease a luxury automobile)[9]

| | | | | | |
|---|---|---|---|---|---|
| 1998 | $59,094 | $39,900 | $14,961 | $6,689<br>4/15/09- Credit transferred in from 1040 2007 12 | $29,393 |
| 1999 | $76,070 | $55,848 | $18,618+ $601 add'l tax assessed by examination on 11/19/01 | $689<br>10/2/01- Advance payment of tax owed | $42,038 |
| 2000 | $84,849 | $71,336 | $22,943 | $600<br>12/3/01- Tax Relief credit | $48,783 |
| 2001 | $111,371 | $94,432 | $33,399 | $0 | $64,546 |
| 2002 | $83,638 | $66,788 | $24,601 | $400<br>12/01/03- Tax relief credit | $42,051 |
| 2003 | $80,798 | $62,148 | $20,703 | $0 | $35,517 |
| 2004 | $103,364 | $79,112 | $27,232 | $0 | $44,652 |
| 2005 | $113,123 | $91,789 | $29,717 | $10,000<br>2/1/07- Payment | $32,778 |
| Totals | **$812,083** | **$641,511** | **$220,801** | **$19,093** | **$339,758** |

In the *Tucker* case, the defendant, like Respondent here, regularly filed his income tax returns for a number of years but consistently failed to pay his reported tax liabilities. 686 F.2d at 231. Evidence adduced at trial revealed that Tucker had spent considerable sums during these years on luxuries including travel, jewelry, a boat, a new car for his son, club dues, and payments to his girlfriend. *Id*. at 232. In response to Tucker's assertion that his failure to pay was not "willful" because he lacked liquid assets to pay his taxes when due, the Fifth Circuit stated:

> This argument borders on the ridiculous. Every United States citizen has an obligation to pay his income tax when it comes due. *A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time.* As a general rule, financial ability to pay the tax when it comes due is not a prerequisite to criminal liability under § 7203. Otherwise, a recalcitrant taxpayer could simply dissipate his liquid assets at or near the time when his taxes come due and thereby evade criminal liability.

Tucker, 686 F.2d at 233 (italics added).

In *United States v. Ausmus*, 774 F.2d 722, 725 (6th Cir. 1985), the Sixth Circuit, which encompasses the State of Tennessee where Respondent resides, under similar circumstances,[10] followed the holding in Tucker-

> We adopt the rationale of the Tucker court and reject the language in *Andros* and *Goodman*. [[11]] Otherwise, a recalcitrant taxpayer could spend his money as fast as

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[9] The courts in theses case make no effort to define “exceptional circumstances” with any degree of certainty, reflecting the expectation that such issue must be addressed on a case-by-case basis. *Pearl Brewing Co. v. Jos. Shiltz Brewing Co.*, 415 F. Supp. 1122, 1137 (S.D. Tex. 1976) (noting similarly with regard to what qualifies as "exceptional circumstances". under Fed. R. Civ. P.26(b)(4)(B)). At the hearing, Ms. Green suggested that medical and health related events and expenses or natural disasters are accepted by the IRS as exceptional circumstances that may establish inability to pay tax. Tr. 137-38.

[10] The evidence adduced in Ausmus showed that the defendant had yearly disposable incomes of approximately $7,900, $23,800, and $23,600, did not pay his taxes, and spent money on rent, clothes, entertainment, tires, flowers, supporting his fiancée, and sending one of his sons to college. Nevertheless, like Respondent here, the defendant in Ausmus took the position that his failure to pay was not "willful" because he "intended to pay the taxes when he got the money." Ausmus, 774 F.2d at 723-24.

[11] The court in *United States v. Andros*, 484 F.2d 531 (9th Cir. 1973), in dicta, suggested a taxpayer may not be found guilty under IRC § 7203 unless he possesses sufficient funds to meet his tax liabilities on the tax due date. This dicta and Ninth Circuit cases consistent therewith were overruled in *United States v. Easterday*, 539 F.3d 1176, 1181 (9th Cir. 2008), which stated that allowing a defendant to claim his failure to pay taxes was not

> he earns it and evade criminal liability while not paying taxes as long as his bank balance is zero when the taxpayer's taxes are due. We note that the Ninth Circuit appears to have retreated from its dicta in Andros. In this case, defendant admitted that he spent money on luxuries including entertainment, new clothes, and support for his fiancée. Furthermore, the United States introduced evidence that defendant earned sufficient disposable income in the respective years so that defendant could have paid his taxes. Defendant, however, chose to spend his disposable income on other things.[[12]]

*Ausmus*, 774 F.2d at 725 (footnote omitted); *see also United States v. Blanchard*, 618 F.3d 562, 571 (6th Cir. 2010) (the Government is not required to show that a defendant had sufficient funds to meet his unpaid tax obligations to prove willful failure to pay taxes). While it is recognized that these cases arise in the context of criminal prosecutions, the rationale and holdings seem equally applicable here.

OPR introduced in this case Respondent's IRS Account Transcripts for calendar years 1997-2005, which Mr. Gee stipulated "accurately reflect his adjusted gross income and taxable income for the respective tax year[s]." C's Ex. 5. The Transcripts indicate that Mr. Gee had an accumulated adjusted gross income for the nine years of $812,083 and an accumulated taxable income of $641,511.[13]C's Ex. 6; see footnote 14, *infra*. Mr. Gee calculated his federal tax due on his nine returns as totaling $220,801, toward which he basically paid nothing. *Id*.

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willful on the grounds that the money was otherwise spent is "inconsistent with common sense." In *United States v. Goodman*, 190 F. Supp. 847, 856 (N.D. Ill. 1961), a district court held that a taxpayer had no obligation to give the government preference as a creditor in order to timely pay his taxes. It does give give give [sic] the government preference as a creditor in order to timely pay his taxes. It does not appear that this holding has been subsequently followed by any other court.

[12] The tax code does not define the term "disposable income," but under the bankruptcy code the term is defined as current monthly income "less amounts reasonably necessary to be expended ... for the maintenance and support of the debtor or a dependent of the debtor; ... charitable contributions [up to 15% of gross income]; [and] "if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation and operation of such business." 11 U.S.C. § 1325(b).

[13] "Gross Income" means "all income from whatever source derived." "Adjusted Gross Income" is gross income minus certain expenses such as those incurred by the self-employed to generate income (i.e. net business income) and higher education expenses. "Taxable income," is gross income minus allowable deductions, such as the standard or itemized deductions accounting for mortgage interest, sales tax, medical expenses, and charitable contributions paid, and is the net amount upon which a graduated tax is imposed. 26 U.S.C. §§ 1.61-63.

Mr. Gee asserts that his non-payment of those taxes was not a choice he made. Rather, he states, he was incapable of paying his taxes for those years as a result of "three things" -a "triple whammy that occurred in 1996" (Tr. 28), "[a]ll of which were completely beyond my control" Tr. 25, 28, 90. Those three things were: (1) the loss of income from his biggest client; (2) the costs of relocating and maintaining a new office; and (3) the expenses relating to the birth of his grandson. Specifically, Mr. Gee testified at hearing that for many years his primary client was Smoky Mountain Secrets ("SMS"), which paid him $30,000-$50,000 in fees annually, accounting for about "a third" of his total income. Tr. 228, 256; *see* also R's Ex. 14. In addition, the company provided him with office space in its building at "nominal rent" and included him and his family in the company's health insurance plan, paying a portion of the cost thereof. Tr. 228, 256-57. However, "at the end of 1996," the business unexpectedly closed and sold its building. R's Ex. 14; Tr. 68, 228. As a result, Mr. Gee testified, he suddenly lost the income from his primary client, lost his subsidized group health insurance coverage, and had to incur the cost of obtaining and maintaining alternative office space at a rate of $600-800 a month, plus parking. Tr. 228-29; R's Ex. 14.

"[A]t the same time" these business events occurred, Mr. Gee recalled, his daughter gave birth to his first grandchild "without the benefit of any income or support from the father whatsoever." R's Ex. 5; Tr. 34, 39. "(felt like it was my obligation and responsibility to help them," Respondent explained, so "we wind up paying all the medical bills for our daughter, our grandson," and all their living expenses over the ensuing years. Tr. 256, 229-30; R's Ex. 5. The only other alternative option, Mr. Gee suggested, would have been for his daughter and grandson go on welfare, live in the "projects," and become "wards of the state," as he claimed some government officials repeatedly encouraged him do. Tr. 42, 229. Taking on these additional family responsibilities at the same time as his income declined caused his family to suffer severe financial distress, Mr. Gee asserted. Specifically, he testified that during this period:

> We could not pay our bills. We were not paying everybody else to exclusion of the IRS. We had trouble paying anybody anything. We were late on a lot of payments. Our credit got destroyed during this time period. We went to extraordinary lengths to try to get money to pay.

Tr. 26. He testified further: "We were just trying to survive…I don't consider that I had any luxuries. Any money that we spent during that time period was a desperate attempt to try to generate income any way we could." Tr. 23, 25-26, 27; *see* also Tr. 86-87,256.

Unfortunately for Respondent, the evidence of record does not buttress his claim of "exceptional circumstances" creating an "inability to pay" during the period at issue.

First and foremost, the evidence adduced at hearing does not support Mr. Gee's claim of a significant downturn in his financial circumstances as a result of the loss of his client at the end of 1996. Revenue Officer Green testified at hearing that Mr. Gee's reported adjusted gross income (AGI) for 1996 was $96,991. Tr. 114. In 1997, *the year following the loss of his client*, his AGI was $99,776*, approximately $3,000 more than*

*the year before*. C's Ex. 6. Moreover, it also has to be noted that while Mr. Gee's cost of operating his business after 1996 may have increased due to the need to pay an additional $600-$800 per month, plus parking, for an office, he was able to deduct such business expense from his gross income, to reach his AGI and taxable income. Tr. 239. Thus, his actual gross income in 1997 had to have been substantially higher to account for his increased business expenses and still result in a higher AGI than in 1996. It also appears that such a business expense was not an excessive burden in relation to his business income, in that Mr. Gee's AGIs in the ensuing nine years remained, on average, still quite substantial, over $90,000 per annum or $7,500 a month. C's Ex. 6.

Second, the record shows that prior to 1996, even when his AGI was substantially higher, Mr. Gee did not pay his income taxes in full. Tr. 19-20, 68. Specifically, evidence adduced at hearing revealed that in 1995 his AGI was $126,247, yet he failed to pay his income taxes for that year in full. Tr. 19-20, 68, 98, 114, 255; C's Exs. 1, 4, 5. It is noted that those taxes were due at the latest on or before April 15, 1996, which was some eight months were before Mr. Gee lost the income from his primary client. This Tribunal offered Mr. Gee an opportunity at hearing to explain his failure to pay his 1995 taxes in full, but Mr. Gee offered nothing apart from the subsequent loss of his client at the end of the following year. Tr.255-56.

Third, with regard to the birth of his grandson, it is noted that the child was born in March of 1996, some nine months *before* Mr. Gee lost his client and the associated income. Tr. 39. Further, Respondent admitted at hearing that his grandson was born healthy, without medical complications, and that at the time of the birth his daughter, who was then 18, was still covered by health insurance. Tr. 34, 39, 256; R's Ex. 14. Thus, while there may have been some out of pocket medical expenses for his daughter and grandson after birth, those medical expenses could not have been excessive.

Fourth, the record does not reflect that during this period Respondent had any other extraordinary but necessary living expenses. To the contrary, Mr. Gee's other essential living expenses appear quite modest. The testimony at hearing indicated that at all times he and his family have resided in the house he purchased in 1980 for $55,000. Tr. 30. His 2008 Information Statement indicated that his housing and utilities cost at that time was approximately $1,200 a month and his food, clothing and miscellaneous expenses (housekeeping supplies, personal care items) totaled $850, less than the $1370 reported on the form as the National Standard for a family of four. Tr. 30; C's Ex. 2; R's Ex. 1. In fact, his total monthly living expenses as reported in March 2008, including vehicle ownership and operating costs (but not taxes) was $3,128. C's Ex. 2. Thus, even if his living expenses during the earlier relevant years were a bit higher, due to supporting his new grandchild, it appears clear that Mr. Gee still should have had sufficient disposable income to pay all those living expenses plus all or a substantial portion of his taxes out of his monthly income, even in 1998, the year his AGI was only $59,000, but certainly in 2001, 2004 and 2005 when his income was over $100,000.[14] It is noted that

[14] The records do show that Mr. Gee's income decreased significantly in 1998 to an AGI of $59,094, but it subsequently rebounded upward to $76,070 in 1999, $84,849 in

this finding is consistent with those made in 2005 by the IRS Appeals Office and 2006 by Revenue Officer Green, after more detailed review of Mr. Gee's expenses.[15] C's Ex. 1; Tr. 99-100.

Fifth, while Mr. Gee repeatedly proclaimed his poverty during the years at issue, there was a dearth of testimony regarding any significant changes in his assets or cutbacks in his lifestyle made after 1996 in response to his purported financial crisis. Tr. 240. To the contrary, the record shows that during those nine years, Mr. Gee continued to own his home and retain untouched the equity therein of at least $30-40,000, along with his shares of Prudential stock which at some point were worth $5,000. Tr. 35-37; C's Ex. 2. The record shows that his spouse was not employed during any of the years at issue, but the record does not show that she was unemployable or that he encouraged her to make efforts to find employment. Tr. 32-33. He continued paying for cable television with premium channels such as Cinemax, HBO, Showtime, etc. (Tr. 58-59), a country club membership at approximately $100 per month (Tr. 62, 240), membership for himself and his wife in two racquetball clubs costing up to several hundred dollars a month (Tr. 59-62, 240), and membership in the Rotary Club at a cost of over $500 per year (Tr. 62-63, 240). He purchased tickets and a parking pass to University of Tennessee football games for himself, his wife and "clients and prospective clients." Tr. 63-64, 67, 240-41. Mr. Gee at hearing alleged that many of these expenses, such as the club memberships and game tickets, were "ordinary and necessary" business expenses, representing "opportunit[ies] to generate business, pure and simple." Tr. 61, 67, 221-23, 240-41. However, the veracity of such claim was undermined somewhat by his admission that many of these expenses never actually generated any business for him during the relevant period, yet he retained them year after year, nevertheless. Tr.67.

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2000 and $111,371 in 2001, and then dipped again to $83,638 in 2002, $80,798 in 2003, and rose once more to $103,364 in 2004, and to $113,123 in 2005. Such movement in income is not unusual for self-employed persons, subject to the whims of the economy, and should not have been unusual for Mr. Gee, as the Affidavit of his primary client indicated that the fees it paid to Mr. Gee varied by as much as $20,000, going from $30,000 to $50,000 a year. See R's Ex. 14 (Affidavit of Charles H. Allen).

[15] Ms. Green testified at hearing that she looked at Mr. Gee's reasonable and necessary living expenses at the time of his meeting with her in 2006 in response to his claim of inability to pay and the specific assertion that he was "supporting two households," and found no evidence of an inability to pay. Tr. 99-100, 112. Subsequently, in October 2006, the IRS Appeals Office reviewed the asset statements and other financial information Mr. Gee had provided to it, and concluded that in 2005, with a reported AGI of $113,000, Respondent's "average monthly income exceed[ed] [his] allowable living expense by between $3,000-$4,000," and that his "current monthly tax expense would be about $2,300," suggesting that Mr. Gee had the resources to pay his then outstanding tax liability. C's Ex. 1; *see also* Tr. 132-33.

In addition, evidence adduced at hearing revealed that over the nine years, Respondent expanded his income in other ways inconsistent with someone claiming to be in a financial crisis so severe he could pay nothing in taxes. Tr. 23 ("During this period we were unable to pay anything. We were trying to survive."). For example, in 2003, when he was six years behind on his taxes, Mr. Gee bought a one-week timeshare in a two bedroom condo from the Hilton Company on which he made monthly payments of $300-$350 continuously for four years, until October of 2007. Tr. 52-58, 236. In addition, between 1999 and 2003, Mr. Gee purchased and paid for three new or fairly new automobiles for himself, his wife and his daughter. Tr. 30-31,64 (in 1999-2000 purchased a 1998 Ford Explorer, and in 2003 purchased a 2002 Nissan Maxima and a 2003 Honda Pilot), 47, 64; C's Ex I; R's Ex. 2. Mr. Gee further admitted at hearing that during the nine years when he claimed he was financially unable to pay his income taxes, he consistently made substantial annual charity contributions ranging from $1,613 to $4,585. Tr. 70-71. Most significantly, consistently and continuously during this entire period of alleged financial crisis, Mr. Gee paid all the tuition, books, living expenses and other costs so that his daughter could be a full-time student and successively obtain her associate's, bachelor's and master's degrees in nursing. Tr. 41, 44-48 (Tr. 47: "We paid everything"); R's Ex. 5.[16] Mr. Gee acknowledged that he never required his daughter to seek out loans for school, seek support from the father of her child. nor obtain employment. When asked to explain such an expenditure at the time he could not pay his taxes, Mr. Gee testified that he decided "it was better for her to go to college, get a degree, [and] for us to take care of her and the grandson," so she would "have a future after I was gone." Tr. 41-43. 47, 84. Respondent claimed in his representation to the IRS that paying for such education expenses was not in lieu of paying taxes, but it was in lieu of paying for health insurance for his family. R's Ex. 4.

Finally, and most telling as to what Respondent's actual intent was regarding paying his taxes over the nine years, the evidence shows that although he is a tax practitioner, Mr. Gee never made any estimated tax payments or otherwise made arrangements to pay any portion of his income taxes, even when his AGI was over $100,000 (i.e., higher than it was in 1996), nor did he ever contact the IRS in a straightforward attempt to work a plan for resolution. The only time Mr. Gee made any contribution towards his outstanding taxes prior to being contacted by Ms. Green in 2006, was in connection with an audit of his 1999 return in 2001, at which point he paid a nominal amount of approximately $700. C's Ex. 6; R's Ex. 6; Tr. 88. Mr. Gee stated that he did not raise with the IRS during the audit his then-current multi-year tax debt and neither did the IRS auditor. Tr. 73-74. As Respondent commented in a submission to OPR, had the issue been raised at the time, it "could have been dealt with ... at a fraction of the costs." R's Ex. 6.

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[16] Mr. Gee asserted that he could not recall if the university his daughter attended (Lincoln Memorial University) was public or private (Tr. 45) or how much he paid in tuition (Tr. 46), but stated "she was in the Nursing Program there, whatever the tuition was is what it was and we paid it." Tr. 46. Mr. Gee testified that after obtaining her Masters' Degree a "[c]oup1e of years ago," his daughter became employed as a Nurse Practitioner, but continues to reside with him. Tr. 49-50.

In support of his position that one can fail to pay for many years and still not evidence an intent to not pay his taxes, Mr. Gee cites *Mitchell v. IRS* (In re *Mitchell*), 2009 Bankr. LEXIS 2901, *30-31 (Bankr. M.D. Ga. May 13, 2009), *aff'd, United States v. Mitchell*, 2009 U.S. Dist. LEXIS 114894 (M.D. Ga. Dec. 9, 2009). In *Mitchell*, the Bankruptcy Court determined that the debtor was entitled to have his tax debt discharged in bankruptcy and found that there was insufficient evidence that the "debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." *Id.*; 11 U.S.C. § 523(a)(l)(C), While the debtor in that case, in lieu of paying taxes from 1998-2002, expended his funds on discretionary purchases similar to those of Mr. Gee here, including a car, time-shares, cable television, college tuition, and charitable contributions, he did so under significantly different circumstances. *Mitchell* at *15-19. Specifically, as the court noted in that case, the debtor underwent divorce and was, in fact, required to maintain the cost of two separate households. He also suffered debilitating health problems, requiring hospitalization, and he filed for bankruptcy. Further, by virtue of his divorce proceedings he was prohibited from selling certain investment assets. *Id.* at *3-7. Moreover, the court there noted that "once his business began improving to the extent he believed he had the resources to deal with his tax debt, on his own initiative, he took steps to approach the IRS." *Id.* at 8. Based upon such evidence, the court found inconclusive evidence of a "fraudulent intent" on the part of the debtor, noting that the testimonial explanations provided by the debtor and his wife were "credible" and "consistent with other witnesses and the documentary evidence," and that their demeanor was sincere. *Id.* at *26-27.

Complainant cites in its Brief to *OPR v. Davis*, Complaint No. 2007-35 (Decision on Appeal, Mar. 10, 2009), a recent disciplinary case wherein the IRS Appellate Authority found that the Respondent's failure to pay taxes was not "voluntary" or "willful." The respondent in that case was charged with "willfully failing to file" and "willfully failing to pay" his income tax liabilities and employment taxes for 2001 through 2005. *Id*. at 2. The Appellate Authority noted that the Agency had the burden of proof and sustained it regarding the charges of willfully failing to file, upon which the practitioner was disbarred. However, it found such burden had not been met with regard to failing to pay-

> A review of the evidence in this case reflects that R-A [Respondent], while a C.P.A., was a man who throughout the five years at issue, had earned an average of only $21,272.00 per year from the S Corp. and his accounting practice, had considered abandoning his practice to pursue a career as a screenwriter, had no meaningful accumulation of liquid assets (personally or in the S Corp), had three minor children that relied on him for support ... and with respect to which he was in arrears in meeting child support obligations, and generally seemed a person who was experiencing a personal and professional meltdown. In my judgment, those facts do not reflect circumstances that suggest, let alone prove, that his payment failures were "voluntary" and "willful." On this record, I do not find those failures to constitute "disreputable conduct." Treasury Circular 230 should not be construed in a manner that adds to the weapons in the IRS' arsenal of

> forced collection tools against practitioners, or that dooms practitioners to some equivalent of a Federal debtors' prison. I think sustaining the Category 2 and Category 4 [failure to pay] Offenses on this record would risk those results, and I refuse to do so.

*Davis* at 5-6 (footnotes omitted).

It is obvious that the facts of this case are nothing like those of either *Mitchell* or *Davis.* Respondent does not present a history of divorce, health issues, a legal injunction against selling investments, and a bankruptcy filing, to justify his non-payment, as did the debtor in *Mitchell*. Nor does he present a history of subsistence earnings, child support obligations, and emotional disintegration presented in *Davis.* To the contrary, the facts here reflect a solo practitioner who has been fairly successfully earning a reasonable living in Tennessee, who ceased paying his taxes in 1995, without actual explanation therefor, and continued failing to pay on an on-going basis thereafter regardless of his income. Despite experiencing a subsequent downturn in income, he continued his expenditures as before. Further, he assumed financial responsibility for his adult daughter (and his grandson), providing her not merely with the necessities of life, but years of advanced education not burdened by loans, child care expenses, or a job.[17] Tr.45-50. Finally, unlike the debtors in *Mitchell,* Mr. Gee's testimony in this case was neither credible nor supported by the documentary evidence, but liberally sprinkled with hyperbole, half-truths, convenient memory lapses, and outrageous claims, and his demeanor was not sincere. See. e.g., Tr. 45-46, 59, 6575-78, 86-87, 92.[18]

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[17] Mr. Gee testified that during the relevant time period his wife "had a full time job taking care of our grandson." Tr.33. He also testified that his daughter "worked a little bit part time some of the time," but that he paid "everything, all the medical bills and everything." Tr. 47-48.

[18] Compare R's Ex. 6 at 3 (Respondent calls his efforts to pay taxes owed "Herculean"); Tr. 87 (Respondent claims "substantial effort" made to pay taxes before 2006); and C's Ex. 6 (nominal payment of approximately $700 made in 2001 and a payment of $10,000 made in 2007); Tr. 88,177-78; C's Ex. 1 at 3 (one estimated tax payment of $6,500 was made on April 17, 2006, for tax year 2006, which is not a tax year at issue here); Tr. 36-37 (Respondent admits he made no efforts to liquidate stock owned to help pay debt to IRS). See also Tr. 87 (when asked if he could not get an internet connection without buying the premium cable package, Respondent answered, "You can, but it would be more expensive."). Compare R's Ex. 5at ¶4 ("[i]n a matter of a few days he lost 60% of my annual revenues and the use of space which housed my office") and Tr. 256 ("We wound up…about a third or about forty (40) percent less money than we had had in the past"). See also Tr. 63-64 (Respondent claimed, "I don't remember" when asked about the cost of tickets to University of Tennessee games Respondent has been attending since "the late seventies, [or] since 1980"); Tr. 12 (when asked which years he had not paid taxes between 1997 through 2005, Respondent, a CPA, answered, "Oh I wouldn't remember the specific year."); Tr. 56-62 (Respondent's vague recollection about the 2009 foreclosure of his time-share property, and the fee amount of his current memberships to

As was noted by the Bankruptcy Court in *Foto v. Foto* (In re *Foto*), 258 B.R. 567, 579, 2000 Bankr. LEXIS 1696 (Bankr. S.D.N.Y. 2000):

> [I]t is not for this Court in this adversary proceeding to dictate lifestyle choices for [the debtor] or to decide which creditors [the debtor] should pay with the funds that are available to him. But the Court does have an obligation to decide the statutory issue here in controversy, which is whether [the debtor] has sustained his burden of proving that he "does not have the ability to pay" the Distributive Award. The fact that a debtor has chosen to spend his money in a particular way does not necessarily mean that he "does not have the ability to pay"…it may simply mean that he has chosen not to do so. But such choices do not bind the Bankruptcy Court in its determination of the debtor's "ability to pay" from income "not reasonably necessary" for the debtor's support.

Similarly, it is not for this Tribunal to judge Respondent's lifestyle choices. The only issue here is whether OPR has offered clear and convincing proof of Respondent's ability to pay (some or all) of his income taxes during the period at issue, 1997-2005. Based upon the totality of the evidence I find that OPR has carried such burden, and that Respondent has not rebutted such proof with sufficient evidence of "exceptional circumstances" making him financially incapable of paying any portion of his taxes due for the nine years at issue. As such, it is hereby found based upon clear and convincing evidence that Respondent's failure to pay his taxes was "willful," i.e. voluntary and intentional.

Nevertheless, as indicated above, merely finding that Respondent acted "willfully" is insufficient to establish his liability for the violations alleged here. In order to hold Respondent liable under Section 10.51(d) and/or 10.51(f), it must also be established by clear and convincing evidence that Respondent "evaded," that is, that he engaged in an affirmative attempt, act or practice to avoid paying taxes lawfully due.[19] *Niedringhaus v. Comm'r*, 99 T.C. 202, 210 (T.C. 1992). At all times, Mr. Gee has firmly denied ever doing anything to "evade" paying his taxes, making misrepresentations, or acting unprofessionally. Tr. 233, 238, 230.

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the Knoxville Racquet Club, the Cedar Bluff Racquet Club and the Beaver Brook Country Club).

[19] It should be noted that Section 10.51(d) of the 1994 Regulations covers "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. § I0.51 (d) (1994) (italics added). However, the 2002 Regulations cover "*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) (italics added).

Case law establishes that affirmative acts constituting "evasion" include making false statements to a Treasury representative and concealment of assets from revenue agents seeking to collect taxes. *See United States v. Beacon Brass Co*., 344 U.S. 43 (1952) (willful attempt to evade or defeat taxes may be committed by making false statements to Treasury representative)*; United States v. Newman*, 468 F.2d 791 (5th Cir. 1972) (false statements to Treasury agents denying any income constitutes attempt to evade tax); *United States v. Mollet*, 290 F.2d 273 (2d Cir. 1961 ) (concealment of assets from revenue agents seeking to collect withholding tax constituted affirmative attempt to evade collection); *United States v. Huebner*, 48 F.3d 376 (9th Cir. 1994) (scheme to file bankruptcy petitions containing false statements of extent of indebtedness constitutes tax evasion even though effect was to postpone, rather than avoid, assessment); *United States v. Frederickson*, 846 F.2d 517 (8th Cir. 1988) (denials of received income and false statements to IRS agents supported conviction for tax evasion); *United States v. Hook*, 781 F.2d 1166 (6th Cir. 1986) (concealment of assets, alone, can constitute indictable offense under Section 7201, even though tax return that was filed was not fraudulent).

A review of the evidence of record suggests OPR is correct in its claim that Mr. Gee did not identify on the CIS (IRS Form 433-A) he submitted to the IRS in March 2008, May 2009, and December 2009 the existence of his time-share condo or his four corporate entities (or the corporate bank accounts). C's Ex. 2 and R's Ex. 2 (CIS dated 3/11/08); R's Ex. 5 (CIS dated 5/20/2009); R's Ex. 1 (CIS dated 12/31/09).

As to the time-share, Mr. Gee explained at hearing that he did not report the time-share on the March 2008 and later CIS forms because he made payments on it only until October 2007, and that it was foreclosed upon by court order in July 2009. Tr.56-58. On that basis, he said he did not consider that he "owned it" at the time he completed the various CIS forms. *Id.* Thus, while it is true that technically Respondent retained a legal interest in the time-share as of March 2008, and thus it should have been reported on the CIS he submitted at that time, his explanation for his failure to do so seems reasonable and not deemed an act of evasion.

On the other hand, far more significant is Mr. Gee's failure to report his corporate entities on the certified CIS forms, each of which explicitly requested Mr. Gee to identify "all corporations…in which the individual is an officer, director, owner, member, or otherwise has a financial interest." R's Exs. 1, 2, 5; Tr. 28, 74, 76. Initially at hearing, when asked to explain why the corporations were not identified on the 2008 and 2009 CIS forms, Mr. Gee stated "I don't believe at the time we had any interest in any corporate entities. I mean, I operate as a sole proprietorship." Tr. 74. However, upon further questioning, Mr. Gee admitted that at least two (if not all) of the corporations were formed in April 2007, and that he was the sole shareholder of them. Tr. 74-75, 77-80. Furthermore, at a later point, he explained that he formed the corporations to market his own personal services, contrary to his earlier claim that he operates only as a "sole proprietorship." Tr. 80. Subsequently, Mr. Gee averred that he omitted the corporations from the CIS forms because he took the inquiry to only cover "publicly held companies or companies that have value," and that "[t]he entities have no value." Tr. 76. Nevertheless, he went on to acknowledge that he filed Form 1120s for tax year 2008 for

two of the corporations, reporting for one, Educational Services Incorporated, a gross income of $51,169, deductions of $47,100, and a yearly net income of approximately $4,000; and for the other, Professional Edge, $35,457 in gross income, $34,015 in deductions, and about $1,400 in net income. Tr. 77-79, 250, 263-64. When then asked why he did not identify at least the net income he received from the corporations on his CIS forms, Mr. Gee stated "I viewed the entity as not having anything to do with my personal, you know, situation. These are separate ... entities, separate corporations." Tr. 77-78. However, both Ms. Green and Ms. May credibly testified that the bank account records for the corporations obtained upon summons indicated that Mr. Gee "was depositing checks made out to him[self] into these corporate entities" and "paying his bills with them," that is, "personal expenses" such as utility bills and credit card bills. Tr. 116-119, 151-52, 155. Further, in her testimony, Ms. May suggested that around the same time, Mr. Gee allowed his regular checking account (reported on the CIS form) to go "pretty much dormant" for six months, indicating that another account was being used. Tr. 152-53.

All in all, taking into account his demeanor and testimony, Mr. Gee's purported rationale for his omission of information as to any and all of his corporate entities on the CIS forms seems insufficient, contrived and fallacious, especially coming from a very experienced CPA with tax collection experience. As Ms. Hawkins credibly opined:

> [A]ny practitioner worth their salt knows that [the CIS form is] not just asking for only public company holdings ... [and] that if you list them the IRS is going to give you a second financial statement called a 433 B and they're going to make you fill it out for every one of those corporations so they can see where you put your assets. That omission on that financial statement is a very serious omission.

Tr. 212-13. Thus, by not disclosing the corporate entities on his CIS forms, Mr. Gee was concealing from the IRS assets in which he clearly had a financial interest and which perhaps could have been used by the IRS to assess and/or collect taxes. As such, I agree with OPR that such omissions constitute affirmative acts of evasion.[20]

In addition, the record contains other evidence suggesting that Mr. Gee engaged in other evasive acts, as follows:

First, as detailed above, during the nine years in question Respondent actively disposed of literally all of his earned income, paying *nothing* in taxes, and creating no assets which could be accessed by the IRS to cover the taxes owed. Tr. 192, 211. *Lacheen v. IRS* (In re *Lacheen*), 365 B.R. 475, 486 (Bankr. E.D. Pa. 2007) ("evidence

[20] Testimony given by Mr. Gee at hearing also indicated that he had failed to identify on the CIS forms a joint checking account he and his wife maintained at the time at Suntrust. Tr. 38. Mr. Gee's explanation for the omission was that the account was his wife's and "may have had a hundred dollars ($100.00) in it, or may not have even had any in it. I don't know." *Id*. There is no evidence in the record that this joint account contained any assets of significance and as such, its omission is not deemed to be an act of evasion.

establish[ing] the existence of disposable income during the relevant tax years, [and] its depletion without reservation for payment of taxes when due, is probative of a willful evasion of taxes"); *United States v. Jacobs* (*In re Jacobs*), 2006 U.S. Dist. LEXIS 67135, *36 (M.D. Fla. 2006) ("lavish spending in the face of mounting tax debt also demonstrates conduct designed to evade or defeat a tax").

Second, during the nine years at issue, Respondent routinely requested two extensions of time (i.e., until October 15th of the following calendar year) to submit his individual income tax return, while making no tax payments. C's Ex. 6. It has been held that such "pattern over many years evidences affirmative acts…to evade both the assessment of the taxes as well as their payment," even where the extensions were granted and accurate returns were filed. *Jacobs* at *34-35; *In re Hassan*, 301 B.R. 614, 624 (S.D. Fla. 2003) (holding that filing late tax returns is relevant evidence to determine whether a debt is dischargeable pursuant to § 523(a)(1)(C)); *Lacheen* at 486 ("the routine practice of applying for extensions that are automatically granted further evidences an avoidance of the payment obligation since no payment accompanied the extension request as required").

Third, although he was self-employed, during the nine years at issue Respondent did not file quarterly estimated tax returns nor pay quarterly estimated taxes. At hearing, Mr. Gee claimed, "There's no statutory requirement to pay estimated taxes. We would just pay all of our taxes when we filed our return," which implies that he had a choice by law as to when to pay. Tr. 255. Mr. Gee's opinion in this regard seems in direct contradiction to IRC § 6654, which explicitly provides that "[t]here *shall* be 4 required installments for each taxable year," the amount of each of which "*shall* be 25 percent of the required annual payment." 26 U.S.C. § 6654(c), (d) (emphasis added).[21] *See also* 26 C.F.R. § 1.6654-5; C's Ex. 6 (Account Transcripts indicating "penalty for not pre-paying tax"); Tr. 138-41. Moreover, his opinion makes no sense in the context here, where he did not pay his taxes when they came due at the time he filed his return. Tr. 255. In *Lacheen*, the court characterized "failing to make estimated payments toward anticipated tax liabilities and failing to pay taxes due when concurrently seeking the automatic filing extension" as a "manipulation of the voluntary tax system," noting that-

> the government relies primarily upon employers to collect income and Social Security taxes from their employees. Employers collect these taxes through the customary withholding mechanism. However, in the case of a self-employed individual ... withholding is inapposite. Such persons must use the estimated tax procedure, which simulates withholding by requiring taxpayers to remit payments to the IRS throughout the year. [] The purpose of these alternate "escrowing" procedures is to ensure that taxpayers will not exhaust their income before the tax thereon becomes due. Courts have found that the failure to make voluntary

[21] The word "shall" has long been held to impose a mandatory, rather than discretionary, obligation. *Farmer's & Merchants' Bank v. Fed. Reserve Bank*, 262 U.S. 649, 662-63 (1923).

> payments toward tax liabilities by submitting to employer withholding tax procedures is evidence of an intention not to pay taxes. [] While these taxpayers accomplished this end by submitting false W-4 forms to their employers so as to appear to be exempt from the required withholding, a self-assessed taxpayer who simply does not pay or underpays based on his assessment of what he can afford is no less culpable. [] When the failure to pay the withholding or estimated tax is combined with an improper use of the filing extension procedure, evidence of intended tax avoidance is stronger.

*Lacheen*. 365 B.R. at 48 (citations omitted) (quoting In re *Ripley*, 926 F.2d 440, 446 (5th Cir. 1991)). *See also Evans Cooperage Co. v. United States*, 1983 U.S. App. LEXIS 24734, *10-11 (5th Cir. 1983) ("The legislative purpose of the estimated tax provisions is to accelerate the collection of income taxes and to alleviate the pressures associated with extensive short-term Government borrowing.") (citing S.Rep. No. 1622, 83d Cong., 2d Sess. at 137-140 ([1954] 3 U.S. Code Congo & Ad. News 4621, 4771, 4774)).

Fourth, Mr. Gee consistently failed to timely file his returns despite the extensions granted. As noted above, during the nine years, Mr. Gee routinely requested two extensions of time to file his return, in April and August of the filing year. C's Ex. 6. Such extensions gave him until October 15th of the filing year to submit his return, six months after the April 15th deadline. Nevertheless, every year Mr. Gee failed to file by that deadline. His IRS Account Transcripts reflect that he did not file his 1997-2005 returns until mid-late November/early December of the filing year. *Id.* Furthermore, the returns Mr. Gee filed were misleading. Tr. 190. As Mr. Gee acknowledged at hearing, on his yearly tax returns he routinely adjusted his gross income downwards for one-half of the self-employment tax, and submitted a form SE in support thereof. Tr. 50-51. While that may not seem significant at first glance, at hearing, Ms. Hawkins explained that figures on the SE form are reported by the IRS to the Social Security Administration which uses them to figure benefits under the Social Security program for self-employed individuals. Tr. 166. Mr. Gee, she stated, knowingly reported $140,000 in self-employment tax, which he did not pay, and which has been wrongly credited towards his future Social Security withdrawals upon retirement. Tr. 166-67. As a cash based taxpayer, Ms. Hawkins advised, Mr. Gee was limited to taking deductions in the year when they are actually paid. *Id.*; Tr. 141-42, 143-44. *Landi v. United States*, 316 B.R. 363, 370 (M.D. Fla. 2004) (noting as evidence of evasion that taxpayers improperly claimed a credit for taxes purportedly withheld, but not paid over to the IRS by their corporation).

Fifth, Respondent was not forthright in his representations to the IRS Appeals Office. In the Notice of Determination, the IRS Appeals Office states:

> During a telephone call with you [Respondent] on September 11, 2006…you also stated you would file your Form 1040 for 2005 and pay any tax due on it at the hearing along with your current 2006 estimated income tax payments. You did not pay your 2005 tax liability or bring your 2006 estimated income tax payments

> current at your hearing [held on October 16, 2006] nor did you provide a copy of your 2005 Form 1040 *which you indicated had been filed but not paid.*

C's Ex. I at 6 (italics added). Respondent's Tax Account Transcript reflects that Respondent did not actually file his Form 1040 for 2005 until *November 20, 2006*. C's Ex. 6 at 27. Thus, the representation Mr. Gee made to the Appeals Office at the hearing regarding said filing having already been made was false.

"In the income tax area, badges of fraud include significant understatements of income made repeatedly; failure to file tax returns; repeatedly filing returns late; implausible or inconsistent behavior by the taxpayer; and failure to cooperate with federal tax authorities." *Berzon v. United States*, 145 Bankr. 247, 250 (Bankr. N.D. Ill. 1992). The record in this case suggests that Respondent engaged in a series of acts to avoid the timely assessment and/or payment of tax, including non-filing, late-filing, improper reporting, false statements, and dissipation of assets.

Therefore, based upon the foregoing, it is hereby found that clear and convincing evidence establishes the following:

> A -With regard to tax years 1997-2001 (Counts 1-5), Respondent engaged in disreputable conduct by "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" within the meaning of 31 C.F.R. § 10.51 (d) (1994): and
>
> B -With regard to tax years 2002-2005 (Counts 6-9), Respondent engaged in disreputable conduct by "willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax" within the meaning of 31 C.F.R. § 10.51(1) (2003).
>
> As such, Respondent is held liable on all counts of the Complaint.

## VII. PENALTY DISCUSSION

### A. Positions of the Parties

Complainant requests that Respondent be disbarred. C's Brief at 22. Citing the opinion of Karen Hawkins, OPR asserts that Mr. Gee is not fit to practice before the IRS. *Id*. at 23; Tr. 160. Ms. Hawkins' opinion was based primarily upon concerns regarding Respondent's representation of other taxpayers in tax collection matters on the basis that, in regard to himself, Respondent submitted false collection statements, failed to work in a good faith and forthright manner to resolve his tax liabilities, ignored his Federal tax obligations in favor of excessive discretionary spending, and deducted self-employment taxes that he never paid. C's Brief at 23; Tr. 162-63. Ms. Hawkins opined that these acts

adversely reflect on Mr. Gee's integrity in that they improperly decreased his tax liability and improperly inflated his entitlement to Social Security benefits. C's Brief at 23. Further, Ms. Hawkins noted that Mr. Gee has shown no remorse, nor offered any persuasive evidence of actual personal (health or situational) or financial distress, or made an effort to comply with his outstanding tax obligations. C's Brief at 24.

Respondent in his Post-Hearing Brief asserts that no sanction is warranted, noting that OPR has not cited a single case where sanctions have been imposed for mere non-payment. R's Brief at 5. Mr. Gee asserts that imposing disbarment in such circumstances:

> would create an entirely new and dangerous precedent for the right to practice before the IRS. In fact, this could be taken so far as to say the conviction of a simple traffic offense was disreputable and as such would disqualify one for practice before the Service. This example may seem absurd but to follow the Government's reasoning, when no other Court ever has, would certainly open Pandora's Box for substantial and significant abuse.

R's Brief at 5-6.

Further, in contradiction of Ms. Hawkins' claim that Mr. Gee interacted with the IRS in bad faith, Respondent's counsel in Respondent's Brief asserts, "It is hard to imagine that one could go further in an effort to negotiate in good faith," as his offer involved "basically… ceding them all of his assets," including all of the equity in his home, as well as monthly scheduled payments. R's Brief at 6 (citing Tr. 65-73, 90-93, 233-235).

**B. <u>Discussion</u>**

In regard to determining the appropriate sanction to be imposed upon Respondent for the violative conduct found, the IRS regulations provide that "[t]he sanction imposed ... shall take into account *all relevant facts and circumstances*." 31 C.F.R. § 10.50(d) (2007) (italics added). However, as noted initially, the regulations do not provide any guidance as to what facts and circumstances are "relevant" or any standards for determining when it would be appropriate to impose one particular sanction (censure, suspension or disbarment) rather than another.

As such, it is appropriate to seek guidance on such matters from the standards applicable to sanctions imposed elsewhere upon accounting or comparable licensed professionals. *See e.g.. Gurry v. Bd. of Pub. Accountancy*, 474 N.E.2d 1085, 1088 (Mass. 1985) (noting court decisions involving the medical board can provide guidance as to disciplinary cases involving accountants). For example, Ohio's Accountancy Board Manual provides that in determining the penalty to be imposed in professional disciplinary cases brought against accountants, the Board shall consider as aggravating circumstances: that the violation was knowingly committed and/or was premeditated; history of prior discipline; financial damage caused; failure to comply with a final

adjudication order; failure to comply with a notice to appear; failure to comply with continuing education requirements; lack of cooperation with the Board's investigation; misappropriation of entrusted funds or other breach of fiduciary responsibility; duration of violation; that the licensee knew or should have known that his or her actions could harm his or her clients or others; and personal gain. And, Ohio's Accountancy Board Manual provides the following mitigating circumstances: cooperation with Accountancy Board investigation, other law enforcement or regulatory agencies, and/or the injured parties; passage of time since misconduct occurred with no recurrence; convincing proof of rehabilitation as well as other relevant considerations; recognition wrongdoing and corrective action to prevent recurrence; restitution; and the relative degree of culpability of the licensee. *See* Accountancy Board of Ohio Enforcement & Disciplinary Policy Manual, December 2009, pp. 64, 76-77 (accessible at: http://www.acc.ohio.gov/aboem.pdf).[22]

In addition, some federal regulatory agencies also have established standards for revoking accounting professionals' authority to appear before them. For example, in enjoining a CPA from appearing before it, the Securities and Exchange Commission considers whether there is "a reasonable and substantial likelihood" that if not enjoined the CPA will violate securities laws in the future. *SEC v. Pros Int'I, Inc*., 994 F.2d 767, 769 (10th Cir. 1993); *SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984). In reaching such a determination, the SEC has found consideration of the following factors relevant: "1. the egregiousness of the violations, 2. the isolated or repeated nature of the violations, 3. the degree of scienter involved, 4. the sincerity of the defendant's assurances, if any, against future violations, 5. the defendant's recognition of the wrongful nature of his conduct, 6. the likelihood that the defendant's occupation will present opportunities (or lack thereof) for future violations, and 7. the defendant's age and health." *Id.*

However, the most comprehensive set of comparable standards appears to be those of the American Bar Association entitled Standards for Imposing Lawyer Sanctions ("ABA Standards"). See ABA Standards (as approved February 1986 and as amended February 1992) (accessible at: http://www.abanet.orglcpr/regulationlstandards_sanctions.pdf). Various states have adopted the ABA Standards and courts frequently rely upon such standards in determining the appropriate sanction to be imposed in disciplinary cases. See e.g., *In re Lemmons*, 522 S.E.2d 650, 651 (Ga. 1999) (citing ABA Standards (1991 ed.) in disciplinary case involving lawyer/CPA).

Section 3.0 of the ABA Standards provide that in imposing a sanction in a disciplinary case, a court should generally consider the factors of: the duty violated, the violator's mental state, the potential or actual injury caused by the misconduct, and the existence of aggravating and mitigating factors. ABA Standard Section 3.0(a)-(d). Further, Section 9.22 of the ABA Standards identify as aggravating factors to be considered: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of

[22] A similar manual or set of guidelines for Tennessee accountants did not appear available through the Tennessee State Board of Accountancy website.

misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; (j) indifference to making restitution; and (k) illegal conduct, including that involving the use of controlled substances. The mitigating factors, set forth in Section 9.32 of the ABA Standards, include: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical disability; (i) mental disability or chemical dependency including alcoholism or drug abuse…; (j) delay in disciplinary proceedings; (k) imposition of other penalties or sanctions; (l) remorse; and (m) remoteness of prior offenses.

Additionally, the ABA standards advise that:

> Disbarment is generally appropriate when: (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interferences with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ABA Standard 5.11. Suspension, on the other hand, "is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice." ABA Standard 5.12. Reprimand "is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." ABA Standard 5.13.

There are a number of aggravating circumstances at play in this case, including dishonest or selfish motive, a pattern of misconduct, multiple offenses, bad faith, submission of false statements, refusal to acknowledge the wrongful nature of one's conduct, substantial experience in the practice, and indifference to restitution. Specifically, the record reflects that over a period of nine consecutive years, Respondent, a very experienced CPA, chose to expend his total gross income on himself and family, allocating nothing for the payment of his federal income taxes. As a result, he and his family were able to have a standard of living significantly above others earning a

comparable gross income[23] He also submitted incomplete or false statements to the IRS, including omitting information as to his corporations, through which he may have been funneling significant amounts of income. Additionally, he was not forthright in his dealings with the IRS Appeals Board. Moreover, in this proceeding, Mr. Gee stridently maintained the rightfulness of his conduct, stating at hearing "I do not feel like I'm in violation of any provision of Circular 230 at all, period." Tr. 238; *see also* Tr. 167-68. Finally, through the date of hearing, it appears that Respondent made no payments towards his outstanding tax liabilities for the nine years at issue, except a nominal payment of approximately $700 in 2001 and a payment of $10,000 in 2007. C's Ex. 6; Tr. 88, 177-78; *see also* C's Ex. 1 at 3 (stating Respondent also made one estimated tax payment of $6,500 on April 17, 2006, for tax year 2006, which is not a tax year at issue here). The magnitude of his delinquency, accounting for interest and penalties, is now likely approximately $300,000.[24] C's Ex. 6.

On the other hand, there are also a number of mitigating factors at play in this case, including the absence of a prior disciplinary record, personal problems, and current compliance. Specifically, the record shows that Respondent has not been previously sanctioned by the IRS for misconduct, despite his long career. Further, Mr. Gee testified with regard to experiencing personal issues involving the loss of his primary client and his grandson's birth. Also, since 2006, Respondent has been compliant with his tax obligations. Tr. 27, 233; R's Exs. 1, 9. Moreover, Respondent is nearly sixty years old, and represents that he has no retirement funds. R's Ex. 9.

In addition, Respondent claims that he has already been sanctioned for his conduct. Specifically, Mr. Gee testified at hearing that the IRS, by virtue of its "own conscious willful actions," including imposing a tax lien on his assets, had "basically destroyed me personally, as an individual," "destroyed my practice, they've destroyed my life, they've destroyed my marriage ... I have almost no hope of surviving." Tr. 92, 236-237. Specifically, he claimed that he lost 40% of his clients as a result of the levies sent to them by Ms. Green. Tr. 236; R's Ex. 1. As a result, Respondent proclaimed, "My income is less than half of what it used to be. I'm living a substance [sic] existence and that is - to me, that is already punishment in the extreme." Tr. 92. "I no longer have the ability to borrow any money. My credit is absolutely destroyed. I cannot even begin to make the offer that they turned down a few years ago." Tr. 233. Mr. Gee suggested that if further sanctions are imposed, "[i]t will destroy the remnant that's left of my life and my practice." Tr.93. "I'll be absolutely destroyed. I will not have the ability to earn income or provide for my family or myself." Tr. 236-37; R's Ex. 1.

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[23] Testimony at hearing indicated that Tennessee has no state income tax. Tr. 142. Thus, for the nine years at issue, Mr. Gee paid essentially no income tax at all on the money he earned, an outcome that is offensive to honest taxpayers.

[24] Exhibit 6 and testimony at hearing indicated that due to the statute of limitations the IRS may no longer be allowed to collect on the taxes owed from 1995-98. C's Ex. 6; Tr. 113. As such, Mr. Gee's delay in paying his outstanding taxes has worked in his favor. Tr.136-137.

While no doubt Mr. Gee's expressed concerns for his future are real, upon consideration, it is concluded that this claim does not constitute a valid mitigating factor in regard to the sanction to be imposed here. First, the IRS tax lien was not imposed upon Respondent as a sanction based upon his status as a practitioner authorized to appear before the Agency. Rather, it was imposed upon him in his status as a taxpayer in default on his taxes. Second, the veracity of Mr. Gee's claims with regard to the negative impact the lien has had on his life is not well supported in the record. There is no evidence in the record indicating exactly how much Mr. Gee has earned in income over the years after the lien was imposed in 2006. However, the record does reflect that Mr. Gee continues to live in his home, with his wife, daughter and grandson. Tr. 49, 231, 264-65. Further, since the lien was imposed, he has apparently supported his family and paid his annual income taxes, all without giving up his country club memberships, cable television or refinancing his home. Tr. 233, 86-87. In addition, it is not even clear that imposing the sanction requested here, of disbarment as a practitioner before the Agency, would prevent Respondent from earning an income. Mr. Gee testified that since 1995, he has held himself out as an expert in independent contractor tax issues. Tr. 246. In such capacity, he works as a "consultant" to attorneys and other CPAs, and there is no evidence that this consultancy work is contingent on Mr. Gee being capable of personally appearing before the IRS on behalf of clients. Tr. 246-247. In addition, Respondent testified that he currently serves as a speaker at conferences and seminars and does business planning. Tr. 251-253. There is no evidence of record that his work would be affected if he were disbarred in this proceeding. Further, as Ms. Hawkins testified, regardless of the outcome of this proceeding, Mr. Gee will still be a state licensed CPA. Tr. 161. Moreover, testimony from Mr. Warren, Chair of the Probability Cause Committee, suggested that the State Accountancy Board was not eager to sanction Mr. Gee, as the complaint filed against him with the Board in 2006 was still "being processed" at the time of hearing in July 2010. Tr.273-76. Thus, regardless of the outcome here, Mr. Gee will still be able to work as a CPA.

Respondent also offered as a mitigating factor the claim that he had made a number of good faith offers to the IRS in an effort to resolve his outstanding tax debt. R's Exs. 1-3, 9. Specifically, at the hearing Mr. Gee testified that he offered to "go and borrow all the money I could borrow on my house and I would give them one hundred (100) percent of the proceeds from that." Tr. 233. When that offer was declined he stated he offered to make installment payments. Tr. 234. When Revenue Officer Green and her supervisor Ms. Thacker did not accept that offer, Mr. Gee stated that:

> At the Appellate level what I did is something that I don't think anybody has ever done and I've never done it for any of my clients. I offered to borrow one hundred (100) percent of the money I could borrow on my house, which would have netted about sixty thousand dollars ($60,000.00). I was going to give them one hundred (100) percent of that money in one payment at that time. I also agreed to enter into an installment agreement at the same time and pay them fifteen hundred dollars ($1,500.00) a month. That would have been eighteen thousand ($18,000.00) a year. That would have been seventy-eight thousand dollars

($78,000.00). At the time the amount of tax that was owing, that's approximately eighty thousand dollars ($80,000.00) [sic]. That would have been somewhere between forty (40) and fifty (50) percent of the amount of the tax that was outstanding at that time …It was rejected out of hand.

Tr. 234-235. Mr. Gee asserted that in response, the Appeals Office advised him that the IRS needed "somewhere between ninety ($90,000.00) and a hundred thousand dollars ($100,000.00) in cash at one time down.... [and] a four thousand dollar [sic] ($4,000.00) a month installment agreement. That was an impossibility performance. I could not possibly have done either one of those things." Tr. 235. Mr. Gee said at that point the negotiations "just broke down and fell apart." Tr. 235; R's Exs. 1, 5. He also asserted that during the meeting with him "Ms. Thacker verbally abused me for thirty (30) or forty (40) minutes. In fact, it was probably the most verbal abuse I have been subjected to since I was in basic training in the United States Army . . . . Ms. Thacker said the CID [Criminal Investigations Division] would love to get a crack at you . . . . It was an obvious direct threat." Tr. 232; R's Exs. 5, 9.

This Tribunal does not have before it a complete picture of Mr. Gee's income, assets and liabilities as they existed at the time these offers were made in 2006 and thereafter. As a result, it cannot be determined whether the offers made by Mr. Gee to the IRS beginning in 2006 represented fair offers or not. The IRS rejected all the offers, and presumably it reasoned good cause to do so as it delayed its collection of back taxes. See C's Ex. I at 4-6 (IRS Appeals Office Notice of Determination finding that Mr. Gee did not qualify for a $50-60,000 Offer in Compromise because "absent special circumstances an offer submitted under doubt-as-to collectability [sic] (DTC) provisions must equal or exceed a taxpayer's reasonable collection potential (RPC)" and Respondent's financial information evidenced that his "RPC would be in excess of $200,000" and that Mr. Gee did not qualify for a "partial payment installment agreement," because prior to entry into such agreement, the taxpayer must have liquidated his assets and used the resultant equity in payment of taxes, which Mr. Gee had not done.); *see also U.S. Dept of State v. Ray*, 502 U.S. 164, 179 (1991) (Government conduct accorded a presumption of legitimacy). Therefore, the making of the offers does rise to the level of certainty to be a significant mitigating factor in this proceeding. As to the 30-40 minutes of "verbal abuse" and threat of criminal action allegedly made to Mr. Gee by Ms. Thacker, Ms. Green, who was also present at that meeting, denied that any verbal abuse occurred, and denied that threats were made. Tr. 103-05. There is no evidence that Mr. Gee was ever referred to the CID by Ms. Thacker or anyone else. As such, any such abuse does not constitute a mitigating factor here.

The issue in a disbarment proceeding is essentially fitness to practice. *Harary v. Blumenthal*, 555 F. 2d 11l3, 1116 (2d Cir. 1977*). Poole v. United States*, 1984 U.S. Dist. LEXIS 15351, *7 (D.D.C. 1984) ("With respect to attorneys or other agents, 'disreputable' conduct has generally included 'unprofessional' conduct and ... 'any conduct violative of the ordinary standard of professional obligation and honor.'") (quoting *Garfield v. United States* ex rel. Stevens, 32 App. D.C. 109, 140 (D.C. App. 1908))

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It is well established that every citizen has a duty to pay taxes, thereby "sharing with their fellow citizens the material burden of the government." *O'Malley v. Woodrough*, 307 U.S. 277, 282 (U.S. 1939); *United States v. Boyle*, 469 U.S. 241, 251 (1985) ("one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due"). A person's view towards paying taxes can be reflective of their respect for the rule of law and institutions of a democratic society:

> [O]ne sure way to determine the social conscience of an individual is to get his tax-reaction. Taxes, after all, are the dues that we pay for the privileges of membership in an organized society. As society becomes more civilized, Government—national, State and local government—is called on to assume more obligations to its citizens. The privileges of membership in a civilized society have vastly increased in modem times. But I am afraid we have many who still do not recognize their advantages and want to avoid paying their dues.... [in] the words of Abraham Lincoln: "The legitimate object of Government is to do for the people what needs to be done but which they cannot by individual effort do at all, or do so well, for themselves." Taxes are the price we all pay collectively to get those things done.

President Franklin Roosevelt, Address at Worcester, Mass., Oct. 21, 1936 (accessible at: http://www.presidency.ucsb.edu/ws/index.php?pid=15201#axzzlHSam1pCU); *see also Campania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, l00 (1927) ("Taxes are the price we pay for civilized society.") (J. Oliver Wendell Holmes, dissenting); *In re Waite*, 782 N.W.2d 820, 823 (Minn. 2010) ("There is no law of the state or nation which so uniformly affects every citizen as the income tax regulations. Income tax regulations and collection of these taxes form an integral part of our government system since they insure the revenues necessary to carry out the operation of the government. Any violation of the income tax laws represents a threat to the ability of our governmental units to function, whether such action is done with corrupt intent or not.")

Mr. Gee, however, is not just *any* citizen. He is a Certified Public Accountant, and among the selective group of practitioners authorized to practice before the IRS. Tr. 163-64. He has "special skills" with regard to taxation and occupies a special position of public trust. *United States v. Rice*, 52 F.3d 843, 849-850 (10th Cir. 1995) (upholding penalty enhancement for "not sophisticated" tax evasion against CPA based upon his special skills); *United States v. Wright*, 211 F.3d 233, 238 (5th Cir. 2000) (upholding penalty enhancement for non-sophisticated participation of tax evasion, against CPA based upon his special skills); *United States v. Arthur Young & Co*., 465 U.S. 805, 817-818 (1984) (a CPA position demands fidelity to the public trust); *Schmeidler v. Lazard Freres & Co.*, 1977 U.S. Dist. LEXIS 18056, *12 (S.D.N.Y. 1977) (accountant's business depends upon public trust). *In Touche Ross & Co. v. S.E.C.*, 609 F.2d 570 (2d Cir. 1979), the Second Circuit, in upholding the SEC rule enabling it to discipline accountants, observed that:

> The role of the accounting and legal professions in implementing the objectives of disclosure policy has increased in importance as the number and complexity of securities transactions has increased. By the very nature of its operations, the Commission, with its small staff and limited resources, cannot possibly examine, with the degree of close scrutiny required for full disclosure, each of the many financial statements which are filed. Recognizing this, the Commission necessarily must rely heavily on both the accounting and legal professions to perform their tasks diligently and responsibly. Breaches of professional responsibility jeopardize the achievement of the objectives of the securities laws and can inflict great damage on public investors.

*Id*. at 580-81; *see also Comm on Prof'l Ethics & Conduct v. Bromwell*, 221 N.W.2d 777. 779 Iowa 1974) ("Obedience to the law symbolizes respect for law. To the extent those licensed to operate the law's machinery knowingly and repeatedly violate essential statutes, there inexorably follows an intensified loss of lay persons' respect for law. This we can neither condone nor tolerate."). All these observations are equally as true with regard to taxation, authorized practitioners, and the IRS. Due to limited resources, the IRS relies heavily on its authorized practitioners to perform their tasks diligently and responsibly. Breaches of professional responsibility by authorized practitioners jeopardize the achievement of the objectives of our tax laws and can inflict great damage on the public perception of fairness in regard thereto, because "the integrity of [our] tax system ... depends upon voluntary compliance." *Sicignano v. United States*, 127 F. Supp. 2d 325, 332 (D. Conn. 2001).

Mr. Gee is also a tax scofflaw. Instead of paying his rightful share of taxes for nine years, he selfishly used that sum to maintain or improve his and his family's standard of living, while still reaping the "privileges of membership of an organized society" provided by the federal taxes paid by others. As Ms. Hawkins testified, "every time someone doesn't pay their taxes there is another taxpayer who is making up for that ...." Tr. 163. As a Vietnam War veteran (Tr. 230), Mr. Gee was fully aware of the essential expenditures of tax dollars to pay for salary and equipment for our military personnel to keep all citizens safe. At hearing he mentioned putting his daughter "on WIC," the program of the U.S. Department of Agriculture that provides for food, health care and nutrition for low-income women, infants and children. Tr.42. Knowing that you are enjoying such benefits of citizenship, when you have chosen to pay nothing towards them, especially at a time when your country is at war or when it is running a great deficit, or both, reflects an atrocious deficit of social conscience and integrity. It also reflects a total lack of respect for the taxation system, which is utterly unacceptable from a tax professional authorized to appear before the IRS. As Ms. Hawkins noted at hearing with regard to Mr. Gee, "[i]t didn't seem to shock his conscience that he went for literally thirteen (13) years without ever paying anything of any discernable amount until..2007"; "it wasn't until 2007 and it was really almost with his hands tied behind his back that he ended up relinquishing some funds." Tr. 177-78. That Mr. Gee is not fit to represent others before the IRS is plain from the myriad actions he took to avoid payment or assessment of his own taxes due, particularly the misrepresentation made to the IRS Appeals Office. *See Iowa Supreme Court Atty. Disciplinary Bd. v. Iversen*, 723

N.W.2d 806, 810 (Iowa 2006) (suspending attorney indefinitely for non-filing and non-payment, noting "[i]t is as wrong for a lawyer to cheat the government as it is for him to cheat a client").

At hearing, Mr. Gee asserted that disbarment "is in the extreme" and that "[t]o my knowledge, there is nobody that has ever been disbarred or even suspended for more than a brief period of time because of inability to pay." Tr.91. In support thereof, he proffered the testimony of Douglas Warren, his former representative in this proceeding, his long-time friend, and the Chair of the Probability Cause Committee of the Tennessee State Board of Accountancy, who testified he could recall no other similar case. Tr. 268-72. Mr. Warren further opined at hearing that in Tennessee, a CPA who failed to file his taxes for ten years would likely be suspended only for 18-24 months. Tr. 270. While a case has not been found where a practitioner has been disbarred by the IRS for failing to pay taxes under Section 10.51(a)(1), the mere absence of such precedent is not controlling. The Appeals Authority's decision in Davis certainly implies that under the proper circumstances, disbarment for failure to pay would be authorized. Davis at 6.

Further, Mr. Gee has argued "I have not committed a crime…Disbarment usually exists where someone has committed a felony or multiple felonies."[25] Tr.92. While it is true that practitioners are generally disbarred upon proof of commission of a felony, and the IRS rules even provide for expedited suspension in just such cases (31 C.F.R. § 10.82), Circular 230 does not limit disbarment to such cases. 31 C.F.R. § 10.76. See also, *Iowa Supreme Court Atty. Disciplinary Bd. v. Iversen*, 723 N.W.2d 806, 811 (Iowa 2006) (attorney suspended indefinitely for non-filing and non-payment, noting criminal sanction does not affect determination of appropriate sanction in disciplinary case where the concerns are "fitness to practice law, the need to deter others from similar conduct, and our assurance to the public that the courts will maintain the ethics of our profession"). Second, the mere absence of such conviction does not prove by itself that Mr. Gee did not commit a crime. Such argument is merely an example of the logical fallacy of *argumentum ad ignorantiam*, an argument from ignorance. *G&R Produce Co. v. United States*, 27 C.I.T. 1405, 1412 (Ct. Int'l Trade 2003) ("This type of fallacy asserts that because something has not been proved true, it is therefore false.") (citing John Locke, *Essay Concerning Human Understanding* 686 (Peter H. Nidditch ed., 197)).

Mr. Gee also implied that he has been unfairly singled out by the IRS for disbarment based upon his reputation and success in contesting IRS actions. Tr. 244. There is no evidence in this case that the IRS singled Respondent out on any improper ground. All the evidence in the case supports the propriety of OPR taking action in this case based upon a practitioner failing to pay his taxes for nine consecutive years. Further,

[25] In support of his claim that no sanction should be imposed, Respondent cites *In re Wray*, 433 F.3d 376 (4th Cir. 2005). R's Ex. 10. In that case, the Fourth Circuit held that a misdemeanor conviction for willful failure to pay income taxes over eleven years does not constitute a "serious crime" within the meaning of its court rules, because deceit is not a "necessary element" of the crime of willful failure to pay taxes. This case is not relevant here, as Mr. Gee has been found to have engaged in deceitful conduct.

the fact that Respondent has not been so convicted despite his failure to pay his taxes for so long, if nothing else, certainly belies his claim that he has been selected out for particular mistreatment by the IRS. *"Pseudonym Taxpayer" v. Miller*, 497 F. Supp. 78 (D. N.J. 1980) (IRS has discretion to decide whether to recommend and refer case to attorney general for prosecution).

Practice before the Internal Revenue Service 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. Disbarment is imposed in furtherance of the Internal Revenue Service's regulatory duty to protect the public interest and the Department by conducting business only with responsible persons. The Respondent's willful failure to follow the requirements of 31 C.F.R. Part 10, reflected by his failure to discharge known tax obligations over a period of many years and his acts to conceal assessment and prevent collection, show a high disregard of the standards established for the benefit of the Internal Revenue Service and the public. Disbarment is commensurate with the seriousness of the violations found herein.

## VIII. CONCLUSIONS

1. Respondent is hereby found to have engaged in disreputable conduct pursuant to 31 C.F.R. §§ 10.50 and 10.51.

2. The appropriate sanction to impose on Respondent for such disreputable conduct is disbarment.

## ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and the entire record, it is hereby:

**ORDERED** that Respondent, **EDGAR H. GEE, JR**., a Certified Public Accountant, be disbarred from practice before the Internal Revenue Service.

/s/

Susan L. Biro
Chief Administrative Law Judge

Dated: March 28, 2011
Washington, D.C.

**Pursuant to 31 C.F.R. § 10.71, this Decision and Order may be appealed to the Secretary of the Treasury within thirty (30) days from the date of this Decision. The appeal must be filed in duplicate with the Director of Practice [sic] and shall include exceptions to the Decision of the Administrative Law Judge and supporting reasons therefor, as more fully set forth in 31 C.F.R. Sections 10.70, 10.71 and 10.72.**