

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

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|-------------------------------|---|------------------------------|
| DIRECTOR, |) | |
| OFFICE OF PROFESSIONAL |) | |
| RESPONSIBILITY, |) | |
| |) | |
| Complainant, |) | |
| |) | Complaint No. 2010-09 |
| v. |) | |
| |) | |
| LUIS R. HERNANDEZ, |) | |
| |) | |
| Respondent. |) | |

DECISION AND ORDER ON DEFAULT

A Complaint, dated April 13, 2010, was issued by Bridgette M. Gibson, Area Counsel, General Legal Services, Dallas, and Michael L. Salyards, Office of Chief Counsel, on behalf of Karen Hawkins in her official capacity as Director of the Office of Professional Responsibility (“OPR”), United States Department of the Treasury, Internal Revenue Service (“IRS”), pursuant to 31 C.F.R. § 10.60 and the authority of 31 U.S.C. § 330 (“Complainant”).¹ The Complaint charges Respondent with disreputable conduct under 31 C.F.R. § 10.51 sufficient to warrant suspension from practice before the IRS for forty-eight (48) months. The Rules Applicable to Disciplinary Proceedings regarding Practice Before the Internal Revenue Service at 31 C.F.R. Part 10 (“Rules”) apply to this proceeding.²

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

² The rules are published in Treasury Department Circular 230 (www.irs.gov). For the Rules applicable to violations occurring before July 22, 2002, see Circular No. 230 (7-94); for those occurring thereafter but before September 26, 2007, see Circular No. 230 (7-2002); and for those occurring thereafter, see Circular No. 230 (4-2008). See, 31 C.F.R. § 10.91 (2007) (practitioners “will be judged by the regulations in effect at the time the conduct occurred.”)

On April 13, 2010, the Complaint was sent to Respondent via certified mail, return receipt requested *and* via regular first class mail, at Respondent's last known address of record with the IRS, Address 1, Brownsville, Texas 78526. *See* Certificate of Service attached to the Complaint; Compl. ¶ 3. According to the Rules, service of a complaint by certified mail is proven by the "returned post office receipt duly signed by the respondent." 31 C.F.R. § 10.63(a)(2)(i). The Rules also provide that if the certified mail is not claimed or returned undelivered, "service may be made on the respondent, by mailing the complaint to the respondent by first class mail" and "[s]ervice by this method will be considered complete upon mailing." 31 C.F.R. § 10.63(a)(2)(ii). Complainant has submitted a copy of the envelopes sent by certified mail that had been marked unclaimed.

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

The Complaint stated in part:

Pursuant to 31 C.F.R. § 10.62, Respondent's answer to this complaint must be filed with the Honorable Susan L. Biro, Chief Administrative Law Judge, Office of Administrative Law Judges, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, DC 20460, and a copy served on Michael L. Salyards, Senior Counsel, Office of Chief Counsel, as designated representative of the Director, [OPR], within thirty (30) calendar days from date of service. [address omitted]

* * *

Failure to file an answer to the complaint may result in a decision by default being rendered against Respondent.

Compl. at 1-2. Service on Respondent was complete upon mailing the Complaint via regular mail on April 13, 2010. To date, no answer to the Complaint has been filed with the undersigned.

The applicable Rules provide that:

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

31 C.F.R. § 10.64(d). Thirty days from the date of service of the Complaint, April 13, 2010, is May 13, 2010. To date, Respondent has not filed an answer to the Complaint. Pursuant to 31 C.F.R. § 10.64(d), Respondent's failure to file an answer within the time prescribed constitutes an admission of the allegations in the Complaint and a waiver of a

hearing on those allegations. Thus, a decision by default may be entered against Respondent.

Without further procedure, pursuant to 31 C.F.R. § 10.64(d), a decision by default is hereby entered based upon the documents in the case file and the following Findings of Fact and Conclusions.

Discussion of the Statute of Limitations

The five-year statute of limitations in 28 U.S.C. § 2462 has previously been held to apply to disciplinary proceedings brought under the Rules at 31 C.F.R. Part 10. *See, Dir. Of Practice v. McLucas*, Complaint No. 2000-19 (ALJ, April 2, 2001)(Order granting respondent's motion for summary disposition after finding the complaint barred by Section 2462); Redacted – Unpublished ALJ Opinion (Order dismissing complaint because the factual bases for alleged disreputable conduct occurred more than five years before the action was initiated). The statute of limitations provides:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued

28 U.S.C. § 2462.

The Court of Appeals for the District of Columbia Circuit has held that administrative proceedings brought by the Federal government for the assessment of penalties do qualify as an “action, suit or proceeding for the enforcement of any civil fine [or] penalty” within the meaning of Section 2462. *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994). In *3M*, the D.C. Circuit concluded that Section 2462 applies to claims of the Environmental Protection Agency when seeking to impose a civil penalty under the Toxic Substances Control Act (“TSCA”) in administrative penalty assessment proceedings. “Because assessment proceedings under TSCA seek to impose civil penalties, they are proceedings for the ‘enforcement’ of penalties,” the court held. 17 F.3d at 1461. The court then expanded this holding to apply to any Federal administrative penalty imposition, explaining:

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

Disbarment or suspension of a professional license has been held to be a “penalty” within the meaning of Section 2462. *Johnson v. Securities and Exchange Comm’n*, 87 F.3d 484, 488-89 (D.C. Cir. 1996) (holding that the imposition by the Securities and Exchange Commission of a six-month license suspension upon a securities industry supervisor for failing to adequately supervise a subordinate was a “penalty” encompassed by Section 2462).

In Count 1, Complainant alleges that Respondent failed to file a Federal income tax return for tax year 2001 by the due date, as extended, of August 15, 2002. In Count 2, Complainant alleges that Respondent failed to timely file a Federal income tax return for tax year 2002 by the due date as extended, of October 15, 2003. In Count 3, Complainant alleges that Respondent failed to timely file a Federal income tax return for tax year 2003 by the due date as extended, of October 15, 2004. Because the Complaint was filed on April 13, 2010, all claims in the Complaint that accrued before April 13, 2005, in accordance with the five-year statute of limitations in Section 2462, are barred. Therefore, Counts 1, 2 and 3, having accrued on August 15, 2002, October 15, 2003 and October 15, 2004, respectively, cannot be grounds upon which to enforce a penalty here.

Findings of Fact

1. Respondent has engaged in practice before the IRS, as defined in 31 C.F.R. §§ 10.2(a)(4), 10.2(a)(5) and 10.3(a) as an attorney. Compl. ¶ 1; 31 C.F.R. § 10.3(a).
2. Respondent is subject to the disciplinary authority of the Secretary of the Treasury and the OPR, in accordance with 31 U.S.C. § 330, 31 C.F.R. §§ 10.1(b) and 10.50(a). Compl ¶ 2.
3. Respondent's last known address of record with the IRS is Address 1, Brownsville, Texas 78526. Compl. ¶ 3.
4. For tax year 2004, Respondent was required by 26 U.S.C. §§ 6011, 6012 and 6072 to file a Federal individual income tax return on or before April 15, 2005. Respondent requested and was granted an extension for such filing until October 15, 2005, but did not file a return for 2004 until July 27, 2007.
5. For the tax year 2005, Respondent was required by 26 U.S.C. §§ 6011, 6012 and 6072 to file a Federal individual income tax return on or before April 15, 2006. Respondent requested and was granted an extension for such filing until October 15, 2006, but did not file a return for 2005 until September 12, 2007.
6. For the tax year 2006, Respondent was required by 26 U.S.C. §§ 6011, 6012 and 6072 to file a Federal individual income tax return on or before April 15, 2007. Respondent requested and was granted an extension for such filing until October 15, 2007. Respondent failed to file a Federal income tax return for tax year 2006.
7. For the tax year 2007, Respondent was required by 26 U.S.C. §§ 6011, 6012 and 6072 to file a Federal individual income tax return on or before April 15, 2008. Respondent requested and was granted an extension for such filing until October 15, 2008. Respondent failed to file a Federal income tax return for tax year 2007.
8. Respondent's failure to file timely Federal individual income tax returns for tax years 2004 and 2005 was willful.
9. Respondent's failure to file Federal individual income tax returns for tax years 2006 and 2007 was willful.

Discussion and Conclusions

Respondent is an attorney engaged in practice before the IRS. As such, he is, was and should have been fully aware of the legal duty to file Federal individual income tax returns, and when those returns were due to be filed. Indeed, the record shows that Respondent, in successfully requesting extensions to file returns for tax years 2004 through 2007, knew of his obligation to file returns. His failure to file timely tax returns was an intentional violation of a known legal duty and was therefore willful. *Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App LEXIS 2613 (4th Cir. 1991), citing *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

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

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

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

* * *

(1) Willfully failing to make a Federal tax return in violation of the revenue laws of the United States

31 C.F.R. § 10.51(1), Circular No. 230 (7-2002). As alleged to disreputable conduct occurring on or after September 26, 2007, Section 10.51(a)(6) provides:

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

* * *

(6) Willfully failing to make a Federal tax return in violation of the Federal tax laws

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

Filing a Federal income tax return in an untimely manner constitutes “failing to make a Federal tax return in violation of” the revenue laws of the United States or Federal tax laws. *Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App LEXIS 2613 (4th Cir. 1991). Findings of Fact 4, 5 and 8 support the conclusion that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51(f) from Circular No. 230 (Rev. 7-2002), and Findings of Fact 6, 7 and 9 support the conclusion that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51(a)(6) from Circular No. 230 (4-2008), Respondent is therefore subject to discipline under the Rules, and may be sanctioned for disreputable conduct.

In the Complaint, Complainant requests that Respondent be suspended from practice before the IRS for a period of forty (48) [sic] months. The provision of the Rules that address decisions by default, 31 C.F.R. § 10.64(d) does not require that the relief requested be granted upon a failure to file an answer, but only that such failure constitutes an admission of all of the allegations of the complaint and a waiver of hearing, and that a decision by default may be made without hearing or further procedure. The sanction is to be determined by examining the nature of the violations in relation to the purposes of the regulations along with all relevant circumstances, and giving appropriate weight to the recommendation of the administrative officials charged with the responsibility of achieving the statutory and regulatory purposes.

The issue in an IRS disciplinary proceeding is essentially whether the practitioner in question is fit to practice. *Harary v. Blumenthal*, 555 F. 2d 113, 116 (2nd Cir. 1977). A certified public accountant’s failure to file tax returns for three consecutive years has been held to constitute grounds sufficient for disbarment. *Poole v. United States*, No. 84-0300, 1984 U.S. Dist. LEXIS 15351 (D.D.C. June 29, 1984). The court in *Poole* stated, “willful failure to file tax returns, in violation of Federal revenue laws, in [sic] dishonorable, unprofessional, and adversely reflects on the petitioner’s fitness to practice. This is particularly true in a tax system whose very effectiveness depends upon voluntary compliance.” 1984 U.S. Dist. LEXIS 15351 at 8. In *Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991), an attorney was disbarred for willful failure to file timely tax returns for six consecutive years, albeit he had no tax liability for any of those years.

Practice before the IRS is a privilege, and one cannot partake of that privilege without also taking on the responsibilities of complying with the regulations that govern such practice. Suspension is imposed in furtherance of the IRS’ regulatory duty to protect the public interest and the Department by conducting business with responsible persons only. Respondent’s willful failure to follow the requirements of 26 U.S.C. §§ 6011, 6012 and 6072 as an attorney before the IRS, reflected in his failure to file returns for four consecutive years, shows a disregard for the standards established for the benefit of the IRS and the public.

Complainant seeks an order suspending Respondent for forty (48) [sic] months , however, that request was predicated upon Complainant’s allegations of seven counts of incompetence and disreputable conduct against respondent, three of which have been found barred by the statute of limitations in 28 U.S.C. § 2462. Respondent’s liability for the remaining four counts based on a failure to timely file Federal individual income tax

returns as alleged in Counts 4, 5, 6 and 7, warrants an indefinite suspension of Respondent, which is commensurate with the seriousness of the disreputable conduct found herein, and which allows the Director of the Office of Professional Responsibility complete discretion to determine when Respondent may be reinstated.

ORDER

It is hereby **ORDERED** that Respondent **LUIS R. HERNANDEZ**, be **suspended indefinitely** from practice before the Internal Revenue Service, with reinstatement to practice thereafter at the sole discretion of the Director of the Office of Professional Responsibility.

Susan L. Biro
Chief Administrative Law Judge³

Dated: June 15, 2010
Washington, D.C.

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

³ This decision is issued by the Chief Administrative Law Judge of the United States Environmental Protection Agency. The Administrative Law Judges of the Environmental Protection Agency are authorized to hear cases pending before the United States Department of the Treasury, pursuant to an Interagency Agreement dated October 1, 2008.