

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

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,)	
)	
Complainant)	
)	
v.)	Complaint No. 2009-19
)	
JOHN C. MCDANIEL,)	
)	
Respondent.)	

DECISION BY DEFAULT AND ORDER

This action was initiated by the filing of a Complaint dated April 13, 2009 by Carolyn H. Gray in her official capacity as Acting 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 *et seq.* The Complaint alleges that Respondent, John C. McDaniel, engaged in disreputable conduct by failing to timely file his Federal individual income tax return for tax years 2001, 2002 and 2003, and by his suspension from the Wyoming Board of Certified Public Accountants on August 4, 2004. The Complaint further alleges that such actions warrant his suspension from practice before the IRS, and requests that he be suspended for a period of 24 months.

The first page of the Complaint stated that an answer to the Complaint must be filed with the undersigned and a copy served on Counsel for Complainant “within thirty (30) calendar days from date of service,” and that failure to file an answer may result in a decision by default being rendered against Respondent. No answer to the Complaint has been filed to date.

On May 18, 2009, the undersigned issued a Request for Proof of Service in anticipation of an entry of decision by default, and on June 8, 2008, Complainant submitted a Response to the Request, attaching copies of two return receipts. On July 7, 2009, Complainant filed a Motion for a Decision by Default pursuant to 31 C.F.R. § 10.64(d), on the basis that no answer to the Complaint has been received on this matter. The motion was denied on the basis that the return receipts were not signed by the Respondent, but by other persons, and there was no evidence that the Complaint was sent to Respondent by first class mail or that requirements were met for service of the Complaint at the Respondent’s place of business. *See*, 31 C.F.R. §§ 10.63(a)(2)(i), 10.63(a)(2)(ii), 10.63(a)(3)(ii) (proof of service of the Complaint by certified mail is made by the “returned post office receipt . . . duly

signed by the respondent,” or by first class mail upon mailing if the certified mail is not claimed or accepted by the respondent or is returned undelivered, or by written statement identifying service at place of business.) A Renewed Motion for Decision by Default filed by Complainant also was denied where Complainant did not demonstrate that the Complaint was served by first class mail to Respondent’s last known address, or that the persons who signed the return receipts had authority to accept service on Respondent’s behalf.

On November 30, 2009, Complainant filed a Second Renewed Motion for a Decision by Default (Motion). Attached to the Motion is a copy of the Complaint with a cover letter, dated October 16, 2009, and certificate of service showing that the letter and Complaint were sent on October 16, 2009 by first class mail to Respondent at Address 1, Motion, Exhibit 3. Also attached to the Motion is a printout of an IRS “Account Transcript” dated October 15, 2009, showing Respondent’s name with the latter address, Motion, Exhibit 4. Attached as Exhibit 1 to the Motion is a copy of the Complaint with the original cover letter and certificate of service, dated April 13, 2009, showing that the Complaint was sent by certified mail to Respondent at the latter address and at two other addresses, Address 2 and Address 3. Exhibit 2 to the Motion is the return receipts showing receipt by individuals other than Respondent at each of those two addresses.

Also attached to the Motion is a Declaration of Erin J. Davidson, counsel for Complainant, dated November 23, 2009, stating that to date, her office has received neither an answer in this matter nor a request for extension of time to respond to the Complaint.

The Motion requests that judgment be rendered suspending Respondent from practice before the IRS for a period of 24 months, with reinstatement thereafter being at the sole discretion of the Office of Professional Responsibility. The Motion was served by first class mail to Respondent on November 23, 2009.

The Rules Applicable to Disciplinary Proceedings provide, at 31 C.F.R. § 10.64(d), in part as followings:

Failure to file an answer within the time prescribed . . . 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 . . .

The Rules further provide, at 31 C.F.R. § 10.68(b) that:

If a nonmoving party does not respond within 30 days of the filing of a motion for decision by default for failure to file a timely answer . . . the nonmoving party is deemed not to oppose the motion.

To date, no answer, motion for extension of time, or response to the Motion has been filed. Wherefore, Complainant’s unopposed Second Renewed Motion for a Decision by Default is granted, based upon the entire record and the following Findings of Fact and Conclusions.

FINDINGS OF FACT

1. Respondent has engaged in practice before the Internal Revenue Service (IRS) as a certified public accountant (CPA) as defined by 31 C.F.R. § 10.2(a).
2. Respondent is subject to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility (OPR), in accordance with 31 C.F.R. §§ 10.3 and 10.50.
3. Respondent's last known address of record with the IRS is Address 1.
4. Respondent remains delinquent to the United States in an amount in excess of \$1,000.
5. Respondent was required by 26 U.S.C. §§ 6011, 6012 and 6072 to timely file his annual individual Federal income tax returns (IRS Form 1040) for tax year 2001 on or before April 15, 2002.
6. Respondent failed to timely file his Federal income tax return for tax year 2001.
7. Respondent's failure to timely file said return for tax year 2001 was willful.
8. Respondent was required by 26 U.S.C. §§ 6011, 6012 and 6072 to file an annual individual Federal income tax return (IRS Form 1040) for tax year 2002 on or before April 15, 2003.
9. Respondent failed to file his Federal income tax return for tax year 2002.
10. Respondent's failure to file said return for tax year 2002 was willful.
11. Respondent was required by 26 U.S.C. §§ 6011, 6012 and 6072 to file an annual individual Federal income tax return (IRS Form 1040) for tax year 2003 on or before April 15, 2004.
12. Respondent failed to timely file his Federal income tax return for tax year 2003.
13. Respondent's failure to timely file said return for tax year 2003 was willful.
14. Respondent was suspended from the Wyoming Board of Certified Public Accountants on August 10, 2004 for failing to renew his permit, failing to register as a corporation, and failing to respond to Board inquiries.

CONCLUSIONS

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 IRS and the public from the disreputable conduct of 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, refuses to comply with any regulation in 31 C.F.R. part 10, or, with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. 31 U.S.C. § 330(b); 31 C.F.R. § 10.50(a).

As to disreputable conduct, the regulations which were in effect prior to July 26, 2002 provide at 31 C.F.R. § 10.51(d), in pertinent part:

Disreputable conduct for which an attorney, certified public accountant, enrolled agent, or enrolled actuary may be disbarred or suspended from practice before the Internal Revenue Service includes, but is not limited to:

* * *

(d) Willfully failing to make Federal tax return in violation of the revenue laws of the United States, or evading, attempting to evade, or participating in any way in evading attempting to evade any Federal tax or payment thereof . . .

31 C.F.R. § 10.51(d) (2001). The regulations which apply to violations occurring on or after July 26, 2002 and before September 26, 2007 provide at 31 C.F.R. § 10.51(f), in pertinent part:

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:

* * *

(f) Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax . . .

31 C.F.R. § 10.51(f) (July 26, 2002): see, Circular No. 230 (7-2002); Circular No. 230 (4-2008). The revenue laws of the United States provide at 26 U.S.C. §§ 6072(a) that income tax returns are required to be filed “on or before the 15th day of April following the close of the calendar year.” Failure to file a timely income tax return constitutes “failing to make a Federal tax return in violation of the revenue laws of the United States.” *Owrutsky v Brady*, No. 89-2402. 1991 U.S.App. LEXIS 2613 (4th Cir. 1991).

Findings of Fact 4 through 14 support a conclusion that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51 (2001) and 31 C.F.R. § 10.51(f) (July 26, 2002) for which he may be disbarred or suspended from practice before the IRS.

Complainant requests the sanction of suspension for 24 months. The provision of the rules which addresses 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.

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*, 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. In that case, the appellate court noted with approval:

The ALJ concluded that Owrutsky knew he was required to file returns, knew when they were required to be filed, and knew they were required to be timely filed. He held that Owrutsky's failure to timely file tax returns for six consecutive years was "clearly a voluntary, intentional violation of a known legal duty."

Also:

[T]he ALJ [found] that Owrutsky, an experienced practicing attorney, was fully aware that he had a legal duty to timely file returns regardless of his tax liability.

Owrutsky v. Brady, 1991 U.S. App. LEXIS 2613 at *3-5.

Those same findings can be made in this case. Respondent is a certified public accountant who practiced before the IRS. As such, he was and is fully aware of when his tax returns were due to be filed and that he had a legal duty to timely file his tax returns. He failed to do so for three consecutive tax years, from 2001 through 2003.

Practice before the IRS is a privilege, and one cannot partake of that privilege without also taking on the responsibility 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 31 C.F.R. Part 10, reflected by his failure to discharge known obligations over a period three years shows a disregard of the standards established for the benefit of the IRS and the public. Suspension for a period of 24 months is commensurate with the seriousness of the violations found herein.

ORDER

It is hereby **ORDERED** that Respondent **JOHN C. MCDANIEL**, a certified public accountant, be **suspended from practice before the Internal Revenue Service for a period of twenty-four (24) months**. Reinstatement after that period may be made at the sole discretion of the Office of Professional Responsibility.

Pursuant to 31 C.F.R. § 10.77 this Decision and Order may be appealed to the Secretary of the Treasury within thirty (30) days from the date that this Decision is served on the parties. The appeal must be filed in duplicate with the Director of Practice and shall include exceptions to the Decision of the Administrative Law Judge and supporting reasons therefore.

Susan L. Biro
Chief Administrative Law Judge

Dated; December 30, 2009
Washington, D.C

This order 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 for a period beginning October 1, 2008.