UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,	)	
Complainant,	)	
v.	)	**Complaint No. 2010-11**
WALLACE H. TUTTLE	)	
Respondent.	)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

I. Background

On May 7, 2010, Complainant Karen L. Hawkins, acting in her official capacity as Director of the Office of Professional Responsibility ("OPR"), United States Department of the Treasury, Internal Revenue Service ("IRS"), initiated this proceeding by filing a Complaint against Respondent Wallace H. Tuttle pursuant to 31 U.S.C. § 330 and 31 C.F.R. §§ 10.20, 10.50, 10.51, 10.52, 10.60, and 10.62.[1] The Complaint charges Respondent, an attorney who has engaged in practice before the IRS, with eight counts of disreputable conduct, as defined by 31 C.F.R. § 10.51. Specifically, the Complaint alleges that Respondent willfully failed to timely file individual Federal income tax returns for tax years 1997 and 2000; willfully failed to file individual Federal income tax returns for tax years 1999, 2007, and 2008; and willfully failed to timely file Quarterly Federal Employment tax returns and timely make the required deposit of employment taxes therewith, for tax periods ending September 30, 1998, December 31, 1998, and March 31, 1999. The Complaint further alleges that these actions reflect adversely on Respondent's fitness to practice before the IRS. Consequently, the Complaint seeks to have Respondent disbarred from practice before the IRS pursuant to 31 U.S.C. § 330 and 31 C.F.R. §§ 10.50, 10.70, and 10.76.

Respondent filed an Answer to Complaint on July 8, 2010, and an Amended Answer thereto on September 14, 2010 ("Answer"). Respondent admitted in his Answer that he failed to file or timely file the tax returns as charged in the Complaint, except that he denied the allegation in Count 2 that he "failed to file" an individual Federal income tax return for tax

[1] The IRS promulgated regulations at 31 C.F.R. Part 10 (§§ 10.1-10.93) setting forth the duties and restrictions relating to practice before the IRS, the sanctions for violations of the regulations and the basis therefore, and the procedures applicable to disciplinary proceedings for violations (collectively, "the Rules"). Citations to the Rules can also be found in corresponding sections of Treasury Department Circular No. 230, entitled "Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, Enrolled Retirement Plan Agents, and Appraisers before the Internal Revenue Service" (Rev. 4-2008), issued pursuant to the provisions of 31 U.S.C. § 330.

year 1999. Answer ¶¶ 12, 17, 22, 27, 32, 37, 42, and 47. Respondent also denied that each such failure was “willful,” “intentional or deliberate,” but “admitted that the failure was negligent.” Answer ¶¶ 13, 18, 23, 28, 33, 38, 43 and 48.

The parties submitted a Joint Set of Stipulated Facts, Exhibits and Testimony on August 23, 2010 ("Stips."). The facts to which the parties stipulated included that Respondent was required by law to timely file individual Federal income tax returns (IRS Form 1040) for tax years 1997, 1999, 2000, 2007, and 2008 and Quarterly Federal Employment tax returns (as well as make a timely deposit of such taxes) for the periods ending September 30, 1998, December 31, 1998, and March 31, 1999. Stips. 2, 3, 6, 8, 9, 11, 13, 15, 17, and 19. Further, Respondent stipulated that he failed to timely file annual returns for tax years 1997 and 2000; failed for file any annual returns for 2007 and 2008; and failed to timely file the three quarterly returns or timely make the required deposit of employment taxes. Stips. 7, 10, 12, 14, 16, 18, and 20.

Pursuant to a Prehearing Order issued on July 14, 2010, Respondent filed a Prehearing Memorandum on September 14, 2010 ("R's PH Memo"). In his Prehearing Memorandum, Respondent indicated that he intended only to offer his own testimony at hearing, and that during such testimony he would "accept responsibility for the failure to timely file returns," testify that "the 1040 1999 return is believed to have been filed, although not timely," and "further testify as to the nature of the circumstances surrounding the failures to timely file returns and the lack of intention or deliberation." R' s PH Memo at 1. In his Prehearing Memorandum, Respondent also represented his intent to offer into evidence at hearing one exhibit - his 1999 1040 Tax Return, a copy of which was not attached thereto. *Id.*

By Order dated October 20, 2010, Complainant was granted leave to take the Respondent's deposition. Such deposition occurred via telephone on November 4, 2010, and the transcript thereof ("Tr.") was received by this Tribunal on November 10, 2010.

Subsequently, by Order dated November 18, 2010, the deadline for filing pre-trial motions was extended to December 10, 2010, and the hearing in this matter was rescheduled to begin on March 29, 2011.

On December 10, 2010, Complainant filed a Motion for Summary Judgment ("Motion"). Attached to the Motion are four exhibits. Exhibit 1 is a copy of the Transcript of Respondent's Deposition. Exhibit 2 is Respondent's Attestation/Declaration as to the deposition transcript dated December 10, 2010. Exhibit 3 is a set of certified copies of IRS Account Transcripts for Wallace H. Tuttle's Individual Income Tax Returns (Form 1040) for the 1997, 1999, 2000, 2007, and 2008 tax years and IRS Account Transcripts for Wallace H. Tuttle, P.C.'s Employer's Quarterly Federal Tax Returns (Form 941) for the third and fourth quarters of the 1998 tax year and the first quarter of the 1999 tax year. Exhibit 4 is Karen L. Hawkins' Declaration dated November 18, 2010.

According to the Prehearing Order, Respondent's response to the Motion was due fifteen days after service, i.e., on or before December 25, 2010. See 31 C.F.R. § 10.68(a)(2)(" ... the non-moving party must file a written response within 30 days unless otherwise ordered by the

Administrative Law Judge."). To date, Respondent has not submitted a response to the Motion.[2]

II. Standards for Summary Adjudication

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

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

The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 V.S. 317, 323 (1986). Once the moving party has met its initial burden, the non-moving party "may not rely merely on allegations or denials" in its pleadings but "must set out specific facts showing a genuine issue for trial." FRCP 56(e)(2). If the non-moving party "does not so respond, summary judgment should, if appropriate, be entered against that party." *Id.*

In evaluating a motion for summary judgment, the tribunal must view the record in a light most favorable to the non-moving party, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). The record to be considered by the tribunal includes any material that would be admissible or usable at trial. *Horta v. Sullivan*, 4 F.3d 2,8 (1st Cir. 1993), *citing* l0A Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2721, at 40 (2d ed. 1983). However, the burden of coming forward with evidence in support of their respective positions remains squarely upon the litigants. *See Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir. 1994) ("[J]udges are not archaeologists. They need not excavate masses of papers in search of revealing tidbits - not only because the rules of procedure place the burden on the litigants, but also because their time is scarce.").

[2] The Prehearing Order (p. 3) directed that, prior to filing any motion, the moving party shall contact the other party and the motion shall state the position of the other party regarding the relief sought in the motion. In its Motion, Complainant indicated that it "asked Respondent during his deposition [taken November 4, 2010] if he would oppose Complainant's motion for summary adjudication. Respondent indicated that he does oppose Complainant's motion." Motion at 4, n. 1 citing Tr. 89-90.

III The Motion

Complainant's Motion argues:

> Summary judgment is appropriate in this matter. The facts and evidence in this case demonstrate that Respondent's failures were indeed willful: that he willfully failed to timely file his individual Federal income tax returns (IRS Forms 1040) for tax years 1997 and 2000; that he willfully failed to file his individual Federal income tax returns (IRS Forms 1040) for the tax years 1999, 2007 and 2008; and that he willfully failed to timely file Quarterly Federal Employment tax returns (IRS Forms 941) for the tax periods ending September 30, 1998, December 31, 1998 and March 31, 1999; and to timely make the required deposit of employment taxes in conjunction with those three returns. Complainant also asserts that such misconduct is disreputable conduct warranting a sanction, and that the evidence supports disbarment as the appropriate sanction for such disreputable misconduct.

Motion at 10-11.

In support thereof, as to the annual returns in particular, Complainant states that Respondent has admitted being required by Federal law to timely file his Federal individual income tax returns for tax years 1997, 1999, 2000, 2007, and 2008. Motion at 11, citing Answer ¶ 5, 11, 16, 21, 26, and 31; Tr. 58, and 26 U.S.C. §§ 6011, 6012, and 6072. Further, Respondent "knew" he was required to timely file said returns "by virtue of the fact that he had timely filed returns and extensions in the past," Complainant alleges. Motion at 12, citing Ex. 1 at 58-59, Ex. 3. "Third, Respondent admits ... that he failed to timely file his tax returns for tax years 1997 and 2000, and that he failed to file for tax years 2007 and 2008." Motion at 12, citing Answer ¶¶ 12, 22, 27, and 32.

As to tax year 1999, Complainant recalls that in his Answer Respondent denied the allegation that such return was not filed, but at his deposition claimed that the return was "filed late, in July of 2003." Motion at 12, citing Tr. 66. However, despite representing his intention to do so, Respondent has not produced any evidence that the return was indeed filed, and at his deposition indicated that he had not been able to locate a copy of the return, Complainant declares. Motion at 12, citing Tr. at 11. "By contrast," Complainant states, "certified IRS transcripts - reveal that, as of October 25, 2010 ... the IRS had never received a tax return for that year." Motion at 12, citing Ex. 3 at 4. Respondent may not rest on mere denials, but must assert specific facts which show a genuine dispute, Complainant expounds. Therefore, under these circumstances, "Respondent has failed to meet his burden of proof and establishes that there is no genuine issue of material fact that the tax return for 1999 was no filed," Complainant concludes.

As to the Quarterly Federal Employment tax returns for the periods ending September 30, 1998, December 31, 1998, and March 31, 1999, Complainant similarly observes that Respondent has admitted to being required to timely file such returns and make the required deposit of employment taxes in conjunction therewith on behalf of "Wallace H. Tuttle, PC

(EIN: Redacted)." Motion at 13, citing Answer ¶ 6, 36, 41, and 46, and 26 U.S.C. §§ 3301, 3306, 3121, 3501, 6011, 6041, 6157, 6513, 6671 and 6672. Further, Respondent has admitted that he failed to timely file such quarterly returns and make the required deposits of employment taxes in conjunction therewith. Motion at 13, citing Answer ¶ 37, 42, and 47. IRS transcripts confirm those quarterly returns and deposits were not timely filed, Complainant represents. Motion at 13, citing Ex. 3 at 12-17. "As such, Complainant is entitled to a finding that Respondent knew of his obligation to timely file these returns and to timely make the required deposit of federal employment taxes in conjunction with those returns, but failed to meet his obligations," the Motion pleads. Motion at 13-14.

That such misconduct was "willful," i.e., "a voluntary, intentional violation of a known legal duty," Complainant asserts, is evidenced by the fact that Respondent was an attorney, who admitted at his deposition that he was aware that he was required to timely file the tax returns referenced in each count of the Complaint. Motion at 14-15, citing, *inter alia, United States v. Pomponio*, 429 U.S. 10, 12 (1996), Tr. 58. To the extent that Respondent's explanation for his violations is that he was "doing other things," and has "an unfortunate bad habit of putting clients [sic] work in front of [his] own," is no excuse Complainant suggests, noting that at his deposition Respondent admitted to taking vacations, playing golf, going to the gym as well as running once or twice a week, spending a "couple of hours each week playing fantasy football," occasionally serving as an expert witness, volunteering for the local bar association, doing pro bono work, and attending and presenting at professional seminars. Motion at 15-17, citing Tr. 6-7, 42-45, 47-49, 51-55, 58. "Respondent is an attorney who works in an area of law where deadlines are 'critical,'" Complainant proffers, noting that IRS "Appellate Authority has found that 'most people have time consuming obligations such as caring for ill relatives or caring for young children and yet are able to meet their tax filing obligations.'" Motion at 17-18, quoting *OPR v. Kilduff*, Complaint No. 2008-12, p. 6. (Decision on Appeal, January 20, 2010). Moreover, Respondent admitted at his deposition to using the services of a certified public accountant to produce his annual business and personal federal tax returns. Motion at 18, citing Tr. 32-33. Therefore, Respondent's actions represent a "pattern," of "repetitive disregard" for his known Federal tax obligations, Complainant surmises. Motion at 18.

IV. Discussion of Liability

A. Applicable Legal Standards

Section 330(b) of Title 31 of the United States Code provides that:

> After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department, or censure, a representative who- -
>
> (1) is incompetent [or]
> (2) is disreputable ....

31 U.S.C. § 330(b).

The Rules set forth the duties and restrictions relating to practice before the IRS, the sanctions for violations of the regulations and basis therefor, and the procedures applicable to disciplinary proceedings for violations. Section 10.50 of the Rules provides in relevant part that:

> The Secretary of the Treasury, or delegate, after notice and an opportunity for a proceeding, may censure, suspend, or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable (within the meaning of § 10.51) ....

31 C.F.R. § 10.50(a). Section 10.51(a), in turn, provides in pertinent part that -

> 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).[3]

In determining the penalty for engaging in disreputable conduct, the regulations provide that "[t]he sanction imposed ... shall take into account *all relevant facts and circumstances*." 31 C.F.R. § 10.50(d)(2010) (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 that –

> 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 (2010).

[3] The section quoted applies to the violations at issue in Counts 4 and 5, pertaining to tax years 2007 and 2008. *See* 72 Fed. Reg. 54540, 54550 (Sept. 26, 2007). This provision was previously codified, with slightly different language, as 31 C.F.R. § 10.51(d)("Willfully failing to make a Federal tax return in violation of the *revenue laws of the United States* . . . "), and such provision applies to the violations alleged in Counts 1-3 and 6-8. *See* 59 Fed Reg. 31528 (June 20, 1994) (regulations effective June 20, 1994 through July 26, 2002).

B. Count 2 – The 1999 Return

Respondent stipulated in this proceeding to being required by law to timely file individual Federal income tax returns (IRS Form 1040) for tax years 1997, 1999, 2000, 2007, and 2008 and Quarterly Federal Employment tax returns (and make a timely deposit of such taxes) for the periods ending September 30, 1998, December 31, 1998, and March 31, 1999. Stips. 2, 3, 6, 8, 9, 11, 13, 15, 17, and 19. Further, Respondent stipulated that he failed to timely file annual returns for tax year 1997 and 2000; failed for file any returns for 2007 and 2008; and failed to timely file the three quarterly returns or timely make the required deposit of employment taxes. Stips. 7, 10, 12, 14, 16, 18, and 20. The only factual dispute raised by Respondent in this regard is his denial in his Answer of the allegation made in Count 2 of the Complaint that he "failed to file" his 1999 return. Answer ¶ 17. However, Mr. Tuttle clarified his position with regard to such filing in his Prehearing Memorandum stating "the 1040 1999 return is believed to have been filed, although not timely," and at his deposition musing "I think it would have been filed at the same time that the 1997 return was filed" in July of 2003. R's PH Memo at 1; Tr. 66. Nevertheless, Respondent acknowledged at his deposition taken in November 2010 that he had not located a copy of the return, and promised to furnish a copy to Complainant's counsel "immediately," if and when such return was found. Tr. 66, 87.

Complainant's Motion indicates that, to date, Respondent has not furnished any evidence that his individual Federal income tax return for 1999 was filed at any time. Motion at 12. Further, Complainant advises Respondent's IRS Account Transcript for tax year 1999 reflects no such filing. *Id*., citing Motion Ex. 3 at 4.

The discrepancy regarding whether Respondent filed his 1999 return late (as Mr. Tuttle alleges) or failed to file at all (as Complainant alleges) does not create a genuine issue of material fact preventing summary adjudication generally or even specifically as to Count 2. It is well established that 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. *Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991). Therefore, in either case, Respondent "failed" to make his 1999 Federal tax return, and all of the other returns as alleged in the Complaint, as required by law.

C. Willfulness

The applicable regulatory sections, 31 C.F.R. § 10.51(a)(6) (as to Count 4 and 5) or § 10.51(d) (as to Counts 1-3 and 6-8), both require that for a failure to file to rise to the level of disreputable conduct it must be "willful." In this proceeding, Mr. Tuttle has denied his failures were "willful," instead casting them as "negligent." Answer ¶ 13, 18,23, 28, 33, 38, 43, and 48; R's PH Memo at 1.

As noted by Complainant in its Motion at 14, in *OPR v. Banister*, IRS Appellate Authority explicitly addressed 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 (Decision on Appeal, June 25, 2004) at 40, accessible at http://www.irs.gov/pub/irs-utl/banni...l.decision. pdfat.

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," Appellate Authority adopted such definition for disciplinary cases. *Banister* at 42, 44, 49, 58, *citing United States v. Pomponio*, 429 U.S. 10 (1976), *United States v. Bishop*, 412 U.S. 246 (1973), and *Cheek v. United States*, 498 U.S. 192 (1991). *See also Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613, at *4 (4th Cir. 1991)(finding in the context of an IRS disciplinary proceeding for untimely filing of tax returns the term "willfully" means "a voluntary, intentional violation of a known legal duty").

It has been explained in other cases that to act "willfully" is to act voluntarily, purposefully, deliberately, and intentionally, as distinguished from accidentally, inadvertently, or negligently. *United States v. Merritt*, 639 F.2d 254, 286 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 (5th Cir. 1991))("[A] 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."). 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. 10, 12 (1976); *United States v. Tucker*, 686 F.2d 230, 232 (5th Cir. 1982).

In contrast, negligence is defined as "the failure to do what a reasonable and ordinarily prudent person would do under the circumstances." *Bassett v. Commissioner*, 67 F.3d 29, 31 (2d Cir. 1995), citing *Goldman v. Commissioner of Internal Revenue*, 39 F.3d 402, 407 (2d Cir. 1994)(upholding imposition of penalty on minor for guardian's failure to file returns).

Distinguishing between negligence and wilfulness, [sic] the Ninth Circuit in *Phillips v. United States IRS* explained:

> "[T]he Government must prove more than mere negligence." [] Where a corporate officer sent the IRS a check, but the IRS did not negotiate it until a month later when the officer had been forced out of power and the corporation dishonored his check without his knowledge, his failure to pay the taxes was non-willful as a matter of law. [] Even if he was negligent, "negligence is not willfulness. "
>
> * * *

> "[W]illful" generally requires a degree of knowledge or intent. For purposes of interpreting tax statutes, the Court has repeatedly held that "willful" requires not only specific intent to do that which is prohibited by law, but also knowledge that one's actions are prohibited by law.
>
> * * *
>
> As this case demonstrates, the distinction between willful failure and gross negligence is an important one. Under a gross negligence or ought-to-know standard, Mr. Wray might well be liable even though he is paralyzed from the neck down and was confined to his apartment during the period when the taxes were not paid, even though he had entrusted day-to-day management of his company to a long-time aide, and even though that aide never told him that the withholding taxes were not being paid. Under a willful failure to pay standard, however, the verdict that the majority bemoans could not be sustained, because there is no evidence that Mr. Wray knew that the taxes were not being paid, let alone that he intended not to pay them.

Phillips, 73 F.3d 939, 942, 945-46 (9th Cir. 1996)(quoting majority opinion and dissent) (citations omitted). See also *United States v. Strong*, 1997 U.S. App. LEXIS 32231 (4th Cir. 1997)(upholding conviction for willful failing to file income tax returns finding evidence of stroke and amnesty program could not support negligence defense as they occurred after crimes had been completed); *United States v. Ransom*, 805 F.2d 1037 (6th Cir. 1986)(attempt to establish a trust and use of church account for personal transactions "are indicative of a conscious scheme to evade payment of taxes and tend to prove that defendant's failure to file tax returns was intentional or willful, rather than negligent or inadvertent."); *Lilley v. Commissioner*, T.C. Memo 1989-602, 1989 Tax Ct. Memo LEXIS 593 (T.C. 1989)(reliance upon expert advice not to file a tax return due is unreasonable and thus failure to file under such circumstances is willful); *United States v. Street*, 370 Fed. Appx. 343, 345 (3d Cir. Pa. 2010)(upholding conviction for willfully failing to file where defendant retained accountant to prepare outstanding returns); *United States v. Sullivan*, 369 F. Supp. 568, 569 (D. Mont. 1974) ("If by congressional fiat it is bad to fail to file an income tax return," then willfulness may be found when "the obligation to act is fully known and consciously disregarded.").

At his deposition taken on November 4, 2010, Respondent was explicitly asked to provide the "factual bases" for his assertion that his failure to timely file his 1997 return was not willful, but negligent. Tr. 60. In response, Mr. Tuttle stated:

> Well, I guess I'm not, it was not, it was not my intention not to file. It was not my intention not to file timely. But I did fail to file timely
> []
> Because I did not get the returns done.
> []
> Because I didn't have the time to get them finished. I was doing other things. I recognize that's not an excuse, okay, I'm not presenting it as an excuse.

Tr. At 60-61

In response to an inquiry as to the "other things" he was doing that prevented him from timely filing his 1997 return, Mr. Tuttle explained: "[i]t was client, client representation." Tr. 61. However, Mr. Tuttle could not recall a specific case which at that point was consuming the time and resources he would have otherwise had available to complete his return and could think of no reason for his failure to timely file besides his busy practice. Tr. 61-62, 65.

In regard to his 1999 return, Mr. Tuttle stated his reasons for failing to file that return timely was the same as for the 1997 return and "not having the documentation up to date and not [being] able to spend the time to do it." Tr. 67. Similarly, with regard to his returns for calendar years 2000, 2007, 2008, and the three 941s, Mr. Tuttle stated his reasons for failing to timely file or file at all were the same as those for calendar years 1997 and 1999 and nothing else. Tr. 69-70, 72-73, 76-77, 81-82, 84-85, 88.

Upon consideration, it is found that a "busy practice," does not constitute a justifiable excuse for Respondent's failures to file or timely file his Federal tax returns and the clear and convincing undisputed evidence establishes that Respondent's failures as alleged were "willful" within the meaning of 10 C.F.R. § 10.51.

First, it must be noted that Respondent is an experienced attorney who has been in private practice forty years, since approximately 1971. Tr. 13-14. While the focus of his practice is bankruptcy, he also has provided advice on tax collection issues. Tr. 23, 34, 42. Respondent acknowledged being aware of the tax filing deadlines and in the past timely filed his personal and corporate federal returns. Tr. 58-59, 23. At his deposition, Mr. Tuttle indicated that he has always been solely responsible for preparing and filing quarterly employment tax returns for his corporation, Wallace H. Tuttle, P.C., but that he has a "CPA that does the annual returns" for himself and his corporation. Tr. 32-33. Thus, Respondent clearly knew of his legal obligation to timely file his tax returns.

Second, in support of his negligence claim, Mr. Tuttle described his practice as "extremely busy and rarely very profitable," stating "[i]t involves a lot of time, a very highly documentation oriented business. We spend a lot of time with our clients. This is not a mill type practice. And we have just been extremely busy. We were always, always very busy, but then when they changed the [bankruptcy] statute in 2005, they made it so much more complicated that now we're basically swamped all the time." Tr. 34. Respondent explained that he has not hired additional staff in response to the activity level of the practice because he "[c]an't afford it, plus it tends to be more complicating ... this is a highly specialized business and a lot of training involved. And training takes a lot of time away from doing client stuff." Tr. 35. Mr. Tuttle estimated that he works 60-70 hours a week, stating that "I don't have recreational time because I work on Saturdays and I work on Sundays, ... no more Wednesday afternoons off for golf. Tr. 43. His last vacation, Respondent recalled, was in 2004. Tr. 44. However, Mr. Tuttle also testified at this deposition that despite his busy practice he does find time to exercise, running once or twice a week, and participating in a couple of short races

every year. Tr. 46-47. Until last year, he said he also went to a gym once or twice a week. Tr. 48. In addition, he performs volunteer work on pro bono cases for the local bar association every year and annually attends various professional seminars around the country, occasionally teaching at them. Tr. 48-51, 54-55. Mr. Tuttle estimated that he annually spent 20-30 hours working for the American Bankruptcy Institute, since it was formed in 1999 or 2000. Tr. 43-54. Respondent also mentioned that he spends "maybe a couple of hours a week." participating in a "fantasy football league." Thus the record indicates that while his practice was busy, work matters did not utterly consume his time, attention, and energy during the relevant periods and thereby effectively prevent him for addressing his tax obligations.

Finally, while Mr. Tuttle claims that it was not his intent not to file or to file untimely, his IRS Account Transcripts reflect that he filed his relevant returns 2 ½ -5 years late, or *not at all*, as in the case of the 2007 and 2008 returns. Motion, Ex. 3. Such non-filing and extensive periods of delay reflect a conscious decision to disregard of tax obligations, rather then an inadvertent overlooking of them due to more current pressing matters.

In sum, taken together, the testimony of Mr. Tuttle and the other evidence of record, clearly and convincingly demonstrates that Respondent knew of his obligation to timely file his tax returns and consciously disregarded that obligation without sufficient cause. As he himself admitted at his deposition - "I have an unfortunate bad habit of putting clients work in front of my own." Tr. 24. As such, the record establishes that Respondent's failures to file his tax returns as alleged in the Complaint were "voluntary, intentional violations of a known legal duty," and therefore, "willful," within the meaning of 31 C.F.R. § l0.51.

D. Statute of Limitations

Complainant's Motion (n.3) notes, and makes several arguments against, the potential application of a five year statute of limitations under 28 U.S.C. § 2462 to Counts 1-3, and 6-8. Although Respondent has not raised this issue, there is case law supporting the proposition that courts should raise *sua sponte* certain jurisdictional statutes of limitation. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008). However, it is unnecessary for this Tribunal to address that issue, since Counts 4 and 5 are unaffected by this potential issue and suffice to support the sanction imposed herein.

V. Penalty

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)(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 attorneys. 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), publicly accessible at: http://www.abanet.org/cpr/regulation/standards_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 provides 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 3.0(a)-(d). Further, Section 9.22 of the ABA Standards identifies as aggravating factors to be considered: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of 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; (1) 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.

Based upon Respondent having committed 8 counts of disreputable conduct under Circular 230, Complainant seeks disbarment in this case. In support thereof, it argues that

"deference should be paid to the sanction sought by the Director." Motion at 19. Citing her Declaration, Complainant asserts Karen Hawkins, OPR's Director, has determined that disbarment is appropriate, finding that Respondent's failure to comply with his tax obligations to be an "extremely serious offense." Motion at 20, citing Motion Ex. 4 ¶ 4. Further, Ms. Hawkins considered the impact on tax administration if Respondent were not properly sanctioned, as "the system of voluntary self-assessment requires cooperation and compliance from tax practitioners." Motion at 21, citing Motion Ex. 4 ¶ 7.

As noted earlier, Respondent did not file a response to Complainant's Motion. Furthermore, in neither his Answer, Prehearing Memorandum, or deposition did Respondent offer any specific argument with regard to sanction or facts in mitigation of the penalty proposed by Complainant, although given opportunity to do so. *See* Tr. 88 (Respondent declined when asked if there was "[a]nything else you would like to add to what you have told me"). Therefore, there appears to be no desire on the Respondent's part or need for hearing to elicit further evidence as to the appropriate sanction.

As indicated above, in reaching the sanction here, determination will be made taking into account only those violations set forth in Counts 4 and 5 relating to tax years 2007 and 2008, within the five-year statute of limitations.

The record reflects a number of aggravating factors at play in this case, including a pattern of misconduct, failure to come into compliance, lack of contrition, and substantial experience in the practice of law. For example, at his deposition in 2010, Mr. Tuttle acknowledged that he had been reprimanded 5-7 years ago by the state bar association for failing to timely provide a client with a bill. Tr. 17. Mr. Tuttle's explanation for his misconduct was "[j]ust an overwhelming load of work." Id. Nevertheless, thereafter, he apparently continued to allow his work to take precedence over his legal obligations, including timely filing his returns for tax years 2007 and 2008. As a result of such mis-prioritizing, and despite the institution of this proceeding in May 2010, Mr. Tuttle's tax returns for 2007 and 2008 apparently still remain outstanding.[4] Further, Mr. Tuttle's deposition and pleadings filed in this case reflect an absence of any sincere expressions of remorse over his untimely tax filings and an attitude towards remediation that, at best, could be characterized as laissez faire.

Moreover, it is noted that Respondent's IRS Account Transcripts reflect that at no point did he pay estimated taxes or were taxes withheld from his income by his corporation for 2007 and 2008 calender years, and that he filed for extensions of time to file his returns as to both years without contemporaneously paying any tax due, and has not paid any taxes for those years to date. Motion, Ex. 3; Tr. 75-76, 78-79. *In Lacheen v. IRS (In re Lacheen),* 365 B.R. 475, 485 (Bankr. E.D. Pa. 2007), the court characterized "failing to make estimated

[4] At his deposition in November 2010, Mr. Tuttle represented (as he had presumably been advised by his CPA) “that the [2007] return will be ready within the week” and so avered [sic] that “it will be filed shortly.” Similarly, he asserted that the 2008 return is “also supposed to be completed, but it will take a bit longer because we still have to finish some corporate records.” Tr. 74, 77-79, 88. Respondent promised to provide copies of these returns to Complainant’s counsel upon their filing. Tr. 88-89. There is no indication in the Motion filed in December 2010, or otherwise in the record, that any such returns have bee provided to Complainant or filed.

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:

> [T]he 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 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.*

Lachen, 365 B.R. at 485 (citations omitted) (italics added), quoting *In re Ripley*, 926 F.2d 440, 446 (5th Cir. 1991). In this case, Mr. Tuttle's failure not only to file his returns timely but to make any tax payments in regard to calendar [sic] years 2007 and 2008, despite the passage of an extended period of time and the pendency of this action, is suggestive of an intent to delay if not evade his tax payments.

On the other hand, there are also a number of mitigating factors at play in this case, including the absence of a prior IRS disciplinary record, an extensive career of some forty years, age, and willingness to cooperate in stipulations.

The issue in a disciplinary proceeding is essentially whether the practitioner in question is fit to practice. *Harary v. Blumenthal*, 555 F. 2d 1113, 1116 (2d Cir. 1977). The late science fiction writer, Douglas Adams, a notorious procrastinator, famously once said, "I love deadlines. Especially the whooshing sound they make as they fly by." See http://www.douglasadams.se/quotes. It appears from this case that Respondent shares Mr. Adams's view on deadlines, at least in regard to filing his federal tax returns. However, where such an attitude towards deadlines may be tolerable in a writer, it is not in a lawyer, especially one who acknowledges that deadlines are "critical" in his work (Rr. 38), and it is not for a citizen with regard to fulfilling his tax filing obligations. *OPR v. Moose*, Complaint No. 2007-38, at 5-6 (Decision on Appeal, March 16, 2009) (the obligation to timely file one's federal income tax returns is a "basic obligation of citizenship"), accessible at http://www.irs.gov/pub/irs-utllmoose_decision_on_appeal_redacted.pdf; *In re Fink*, 1986

U.S. Dist. LEXIS 17858, at *124 (S.D. Ga. 1986) ("Every citizen is presumed to know and understand the duty to file a Federal income tax return .... ").

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. Prior cases have held that a certified public accountant's failure to file tax returns for three consecutive years was sufficient grounds for disbarment. *Poole v. United States*, No. 84-0300, 1984 U.S. Dist. LEXIS 15351 CD.D.C. June 29, 1984). The court in Poole stated, "[W]illful 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 willfully failing to file timely tax returns for six consecutive years, albeit he had no tax liability for any of those years. While Respondent failed to file in this case for only two consecutive years, his utter lack of contrition and his failure to come into compliance despite the pendency of this action strongly suggests that he lacks the requisite respect for the institution and processes of the IRS.

Disbarment and suspension are imposed in furtherance of the IRS's 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 a practitioner authorized to appear before the IRS, reflected by his failure to discharge known tax filing obligations over a period of several years, shows a disregard for the standards established for the benefit of the IRS and the public.

VI. Conclusions

Complainant has carried its burden of demonstrating that no genuine issues of material fact exist, and that Complainant is entitled to judgment as a matter of law, with regard to Respondent's liability for engaging in disreputable conduct by willfully failing to make Federal tax returns in violation of the Federal tax laws as alleged in the Complaint.

It is concluded that disbarment is an appropriate sanction to impose against Respondent for the 2007 and 2008 violations found herein.

ORDER

It is hereby **ORDERED** that:

1. Complainant's Motion for Summary Judgement [sic] is **GRANTED**; and

2. Respondent **WALLACE H. TUTTLE**, be DISBARRED 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.

/s/
Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[5]

Dated: March 10, 2011
Washington, D.C.

[5] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the United States Department of the Treasury, pursuant to an Interagency Agreement dated October 1, 2008.

NOTICE OF APPEAL RIGHTS

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

In the Matter of Wallace H. Tuttle, Respondent
Complaint No. 20l0-11

CERTIFICATE OF SERVICE

I certify that a true copy of **Order Granting Motion For Summary Judgment,** dated March 10, 2011, was sent this day in the following manner to the addressees listed below:

_____
Maria Whiting-Beale
Staff Assistant

Dated: March 10, 2011

Copy By First Class Regular Mail To:

Russ E. Eisenstein, Attorney
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Office of Chief Counsel
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Copy By Certified Mail Return Receipt To:

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