

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

DIRECTOR,)	
OFFICE OF PROFESSIONAL)	
RESPONSIBILITY,)	
)	
Complainant,)	
)	
v.)	Complaint No. 2009-24
)	
KIRK G. SALISBURY,)	
)	
Respondent)	

DECISION BY DEFAULT AND ORDER

A Complaint, dated October 5, 2009 was issued by Senior Attorney 1, Office of Chief Counsel, Internal Revenue Service, for Area Counsel 1, General Legal Services, on behalf of Karen Hawkins, in her official capacity as Director, Office of Professional Responsibility, United States Department of the Treasury, Internal Revenue Service (IRS) pursuant to 31 C.F.R. §§ 10.50, 10.51, 10.52, 10.60, and 10.62.¹ The Complaint charges the Respondent with misconduct sufficient to warrant his disbarment from practice before the IRS, under the authority of 31 C.F.R. §§ 10.50.²

Pursuant to 31 C.F.R. § 10.63(a)(2) on October 5, 2009, the Complainant mailed a copy of the Complaint and a Notice of Institution of Proceedings, by certified mail/return receipt requested and by first class mail to Respondent at his address of record at Address 1. *See*, Complainant’s Motion for Default Judgment, Exhibits A and B.

The certified mail return receipt was signed by “Signatory 1” on October 8, 2009. *See*, Exhibit C to Motion. The envelope with the Complaint sent by regular mail was not returned as undeliverable. *See*, Declaration of Senior Attorney 1 in Support of Complainant’s Motion for a Default Judgment, dated November 25, 2009. ¶ 6

¹ Citations to the regulations codified at 31 C.F.R. Part 10 (§§ 10.0-10.93). Practice Before the Internal Revenue Service, 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.

² The citations in the Complaint to the regulatory provisions that Respondent allegedly violated refer to those which were in effect at the time the violations occurred. *See*, Complaint n. 1: 31 C.F.R. § 10.91 (2007) (“... conduct engaged in prior to [September 26, 2007] will be judged by the regulations in effect at the time the conduct occurred.”)

The Notice of Institution of Proceedings accompanying the Complaint advised Respondent in pertinent part that:

Pursuant to 31 C.F.R. § 10.60, you are hereby notified that the Director, Office of Professional Responsibility, has instituted proceedings for your disbarment from practice before the Internal Revenue Service by the filing of the enclosed complaint.

Pursuant to 31 C.F.R. § 10.64, we must receive your answer within 30 calendar days from date of service. Please send the answer to me at the letterhead address.

You must also file the answer to the complaint with the Chief Administrative Law Judge within 30 calendar days from date of service, as follows: [address omitted].

Any request for additional time to answer this complaint must be directed to the Chief Administrative Law Judge.

Failure to file your answer within 30 calendar days from date of service will result in a motion for decision by default pursuant to 31 C.F.R. § 10.64(d).

See, Motion, Ex. A (footnotes omitted).

On December 1, 2009, Complainant filed a Motion for a Default Judgment on the basis that Respondent has not answered the Complaint in this manner within the 30 day time limit. The Motion requests that judgment be rendered disbaring the Respondent from practice before the IRS. The Motion was served by certified mail and by first class mail to Respondent on November 25, 2009.

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

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 Motion for Default Judgment is granted, based upon the entire record and the following Findings of Fact and Conclusions.

FINDINGS OF FACT

1. At all times material hereto, 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. At all times material hereto, Respondent was involved in the presentation of matters to the IRS concerning matters relating to taxpayer, as defined by 31 C.F.R. § 10.2(a)(4).
5. At all times material hereto, Respondent received gross income exceeding the minimum amount that would require him to timely file an individual Federal income tax return (IRS Form 1040) on or before the date due for such return.
6. 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 years 2002 and 2003 on or before April 15, 2003 and April 15, 2004, respectively.
7. Respondent failed to timely file his Federal income tax returns for tax years 2002 and 2003.
8. Respondent's failures to timely file said returns for tax years 2002 and 2003 were willful.
9. 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 years 2004 through 2007 on or before April 15 of the following year for each of those years.
10. Respondent failed to file his Federal income tax returns for tax years 2004 through 2007.
11. Respondent's failures to file said returns for tax years 2004 through 2007 were willful.
12. Respondent was required by 26 U.S.C. §§ 6011, 6012 and 6072 to timely pay his individual Federal income taxes for tax years 2002 and 2003.

13. Respondent failed to timely pay his individual Federal income taxes for tax years 2002 and 2003.
14. Respondent's failures to timely pay said taxes were willful.
15. Through letters dated January 22, 2007, April 21, 2008 and June 2, 2009, Complainant advised Respondent in writing of the law, facts, and conduct she determined warranted the issuance of the Complaint, and Respondent has been accorded an opportunity to dispute those facts, assert additional facts, and make arguments, in compliance with 31 C.F.R. § 10.60(c). Complaint, Exhibits A-C.

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. § 10.51(a). As to disreputable conduct, the regulations at 31 C.F.R. § 10.51(f), which apply to violations occurring on or after July 26, 2002 and before September 26, 2007, provide 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, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.³

As to violations occurring on or after September 26, 2007, the regulations currently codified at 10.51(a) provide in pertinent part:

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

* * *

³ This version of the regulation applies to violations occurring on or after July 26, 2002 and before September 26, 2007. 31 C.F.R. § 10.51(f), Circular No. 230 (7-2002); Circular No. 230 (4-2008).

(6) Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax⁴

Findings of Fact 5 through 14 support a conclusion that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51(f) (July 26, 2002) and 31 C.F.R. § 10.51(a)(6) (July 27, 2007), for which he may be disbarred or suspended from practice before the IRS.

Complainant requests the sanction of disbarment. 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.

The issue in a disbarment proceeding is essentially whether the practitioner in question is fit to practice. *Harary v. Blumenthal*, 555 F.2d 1113, 1116 (2d 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. In that case, the appellate court noted:

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.

Id. At 3-5.

Those same findings can be made in this case. Respondent, Kirk G. Salisbury, is a certified public accountant, who practiced before the IRS. As such, he was and is fully aware of

⁴ This version of the regulation applies to violations occurring on or after September 26, 2007. 31 C.F.R. § 10.51(6). Circular No. 230 (4-2008).

when his tax returns were due to be filed and that he had a legal duty to timely file his tax returns and pay any tax liability in a timely manner. He failed to do so for six consecutive tax years, from 2002 through 2007.

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. Disbarment 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 of six years shows a disregard for the standards established for the benefit of the IRS and the public. Disbarment is commensurate with the seriousness of the violations found herein.

ORDER

It is hereby **ORDERED** that Respondent **KIRK G. SALISBURY**, a certified public accountant, be **disbarred from practice before the Internal Revenue Service**.

Susan Biro
Chief Administrative Law Judge⁵

Dated: December 31, 2009
Washington, D.C.

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.

⁵ 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.