

**UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF PROFESSIONAL RESPONSIBILITY
WASHINGTON, D.C.**

**DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,
Complainant**

v.

Complaint No. 2008-12

**KEVIN KILDUFF,
Respondent**

DECISION

JOEL P. BIBLOWITZ, Administrative Law Judge: On May 30, 2008 a Complaint was issued by the Director, Office of Professional Responsibility, Department of the Treasury, Internal Revenue Service, herein called the Complainant and/or OPR, pursuant to 31 C.F.R. Sc. 10.60, issued under the authority of 31 U.S.C. Sec. 330. The Complaint seeks to have Kevin Kilduff, and attorney engaged in practice before the Internal Revenue Service, who is subject to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility, suspended from practice before the Internal Revenue Service for a period of forty eight months by reason of having engaged in disreputable conduct as set forth in 31 C.F.R. Sec. 10.51. The Complaint alleges Respondent failed to timely file Federal tax returns for the tax years 2000, 2002, 2003, 2004 and 2005, and failed to file a tax return for tax year 2002. Respondent filed an Answer to the Complaint denying most of its substantive allegations, and a hearing was held in Boston, Massachusetts on October 1, 2008 at which the parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the parties have been given due consideration. Upon the entire record and my observation of the demeanor of the witnesses, I make the following

Findings of Fact

Respondent, an attorney who has engaged in practice before the Internal Revenue Service, and whose last known address of record with the Internal Revenue Service is Address 1, is subject to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility. The Complaint alleges, as "background facts," that Respondent failed to file timely Federal individual income tax returns for tax years 1998 and 1999 and owed more than \$18,000 in personal income taxes to the Internal Revenue Service, although since the filing of the Complaint, he has paid \$15,000 toward that liability. Respondent admits that his 1998 and 1999 tax returns were filed late, but defends that it was due to reasonable cause. The Complaint further alleges "charges of misconduct" for the tax years 2000 through 2005. It is alleged, and admitted by the Respondent, that he was required to timely file a Federal individual income tax return for each of these years on or before October 15 of the following year. It is further alleged that the Respondent "willfully failed to timely file a Federal income tax return" for the tax years 2000, 2001, 2003, 2004 and 2005, and that he willfully failed to file a Federal individual income tax return for the tax year 2002. The Respondent's Answer denies these allegations.

Attorney 1, attorney advisor for the Office of Professional Responsibility, testified for the Complainant. She testified that she is currently the litigation point of contact for the Complainant, that she perfects files that are going to litigation, and works with the General Legal Services attorney who is in charge of the litigation. She testified that Respondent's situation was referred to OPR by Revenue Office 1, an IRS revenue officer in about 2005, Revenue Officer 1 alleged that the Respondent had failed to timely file tax returns for two years, but Attorney 1 is not aware of how Revenue Officer 1 obtained this information, and Revenue Officer 1 did not tell her that she was engaged in a dispute with the Respondent while he was representing a taxpayer. To her knowledge, the Respondent was not under audit by the IRS at the time. As a result, by letter dated October 11, 2006, Stephen Whitlock, Acting Director of OPR, wrote to Respondent:

This letter is in regard to your eligibility to practice before the Internal Revenue Service and is being sent pursuant to section 10.60 of Treasury Department Circular 230, a copy of which is enclosed.

A review of your personal tax filing history reveals that you did not file Federal individual income tax return (Form 1040) for years 2002, 2004, and 2005. Also, this review reveals that you late filed Federal individual income tax return (Form 1040) for years 1998, 1999, 2000, 2001, and 2003. This pattern of non-compliance on your personal returns suggests a violation of section 10.51(f) of Circular 230.

Further action with respect to the above information will be held in abeyance for a period of 30 days from the date of this letter. Within that time, you are afforded an opportunity to request a conference at this office or to submit a response with your explanation of the foregoing matters. If you wish a conference, please provide alternative dates and times that would be convenient for you. A power of attorney must be submitted should you engage the services of a representative.

Your response is requested within 30 days. Should you have any questions, please contact . . .

By letter dated January 8, 2007, Attorney 2, Enforcement Attorney for OPR, wrote to Respondent:

Enclosed is a copy of a letter from the Acting Director, Office of Professional Responsibility, dated October 11, 2006, regarding your eligibility to practice before the Internal Revenue Service. To date, this office has received no response. I will provide you an additional 20 days from the date of this letter to respond. After such time, any disposition of this case will be based solely upon the information already in my possession. Such disposition may include seeking the imposition of a sanction via an Administrative hearing.

Please direct your reply to me at ...

By letter dated February 5, 2007, Respondent wrote to Attorney 2:

I am writing to you in response to your letter dated January 8, 2007 (a copy of which is enclosed for your convenience). Your letter makes reference to an October 11, 2006 letter from the Acting Director of the Office of Professional Responsibility (a copy of which is also enclosed for your convenience).

The acting director's letter states that I failed to file federal income tax returns for the tax years 2002, 2004 and 2005. This statement is not correct. My 2002 federal income tax return was filed prior to my receipt of the acting director's letter. In addition, my 2005 tax return was on a valid extension until October 15, 2006- and has subsequently been timely filed along with a copy of my 2004 tax return.

I am happy to provide your office with copies of these tax returns if it is necessary. However, I assume you can confirm this information through your direct access of the Internal Revenue's database. Should you desire a printed copy of my tax returns, or require any additional information in connection with this matter, please feel free to contact me at . . . I will also make myself available for a conference should you feel that is necessary.

Attorney 1 identified IRS Certificates of Official Record dated August 26, 2008 as the transcript record of the Respondent's Federal tax filings for tax years 2000 through 2005. She testified that these official records establish the following regarding the Respondent's Federal individual tax returns for these years: the Respondent filed for two extensions for tax year 2000 and the return was due on October 15, 2001. He filed his return for tax year 2000 on April 10, 2003. The Respondent filed for an extension for his Federal income tax return for tax year 2001, and it was due October 15, 2002, but was not received until August 5, 2004. Pursuant to an extension of time to file his 2002 Federal income tax return, the return was due on October 15, 2003, but Attorney 1 testified that there is no record of his return having been filed and the IRS Certificate states: "No record of return filed." Pursuant to an extension of time to file, the Respondent's 2003 return was due on August 15, 2004, but was not received by the IRS until June 30, 2006. Pursuant to two extension of time to file, Respondent's 2004 return was due on October 15, 2005, but was not filed until November 24, 2006. His 2005 return was due to be filed on October 15, 2006 pursuant to an extension of time to file, but it was no filed until November 24, 2006. Attorney 1 testified further that in recommending that the Respondent be suspended from practicing before the IRS for a period of forty eight months, OPR took into consideration as aggravating factors the length of noncompliance by the Respondent and the fact that he was a tax attorney with a large firm and had previously been employed by the IRS as a tax attorney. They also considered, as a mitigating factor, his explanation that he had moved to State 1 to care for his ailing parents during the period in question.

The Respondent testified in narrative form. On July 31, 2008 I issued an Order directing the parties to notify the other party by September 12, 2008 of all the witnesses that it intends to call and all exhibits that it intends to employ at the hearing. I received a timely response from the Complainant, but no response from the Respondent to this order. When the Respondent commenced testifying herein, the Complainant noted her objection to the Respondent calling any witness or introducing any exhibits on his behalf because of his failure to comply with my ruling. When I asked the respondent for his response, he defended that his is not familiar with National Labor Relations Board practices and procedures. I informed him that it had nothing to do with the Labor Board or its procedure; I issued an Order that he failed to comply with and, therefore, I ruled that he could not call any witnesses or present any exhibits. At that point Complainant stated that although the Respondent did not respond to my Order, she anticipated that he would testify on his own behalf, so she had no objections to his testimony.

The Respondent was employed as an attorney by the IRS for about five years, beginning in about 1993. Since that time he has been employed by, and a partner in, law firms, initially in Philadelphia and, at the present time, in Boston. His principal defenses herein are

that he filed all his tax returns, including the 2002 Federal tax return that the Complainant alleges was not filed, although he admits that “a couple” of his returns may have been filed late. He also defends that all the returns were accurate and that every dollar of taxes that were due were paid. His other defense is that this matter was instituted as a personal vendetta against him by Revenue Officer 1 because of his “zealous” representation of a client in dealing with Revenue Officer 1, the IRS agent in the case. The IRS is extremely strict about the need for taxpayer privacy and access to taxpayer information is strictly limited. Violations of these secrecy rules are grounds for termination of IRS employees. Since it is admitted by the Complainant that Revenue Officer 1 initiated this matter, he testified: “If it is determined that [Revenue Officer 1] improperly accessed my taxpayer information, I believe that’s ground for dismissal of this entire action on a legal basis.”

Respondent also defends reasonable cause for the late filing of some of his returns, which he refers to as the reasonable cause standard: “The reasonable cause standard states that if a taxpayer can demonstrate that the untimely nature of the filing of payment of tax is based on reasonable cause . . . the penalties should be abated. . .” In this regard, in about 1999, his mother was diagnosed with Illness 1 and he quit his job in Philadelphia and moved to Boston and moved in with his parents to care for his mother, and remained with them for the next five years. During this period, he and his sister cared for their parents, cooking and taking them to doctor appointments: “That’s why my tax returns were late.” He also testified that he is a partner in the fifth largest law firm in Boston and “one of the most highly regarded tax controversy attorneys in this city [Boston].” On cross examination he testified that he continued to work between 1999 and 2005 representing clients before the IRS.

Analysis and Conclusions

Respondent defends that he filed his 2002 return, although he never alleged that it was filed in a timely manner, and that while a couple of his tax returns during this period were filed late, these late filings should be excused because of his obligations in caring for his parents. Putting aside the 1998 and 1999 tax returns which, admittedly were filed late, but were only alleged as background by the Complainant, the evidence establishes that his 2000 Federal tax return was filed eighteen months late, his 2001 Federal tax return was filed twenty two months late, his 2003 Federal tax return was also filed twenty two months late, his 2004 Federal tax return was filed thirteen months late, and his 2005 Federal tax return was filed one month late. The Respondent testified that he filed his 2002 Federal tax return, but the IRS Certified Record states that although he was granted two extensions of time to file the return on April 15 and mailed the return by first class mail, there is no proof of his having filed this return other than by determining his credibility herein, which I do reluctantly, because the conflict between his testimony and the IRS’ certified official records requires me to do so.

Throughout the course of this matter, I was struck by the Respondent’s apparent disinterest in, or lack of respect for, this proceeding. Although he has been a practitioner in the tax field for fifteen years, and began his legal career as an IRS attorney, his Answer to the Complaint was filed late, although the Complainant stated that they would waive the late filing. On October 11, 2006, the Complainant wrote to him to notify him of the allegations against him which “suggests’ a violation of Section 10.51(f). A response was requested within 30 days. Having received no response, Complainant wrote again to Respondent on January 8, 2007, giving him an additional 20 days to respond, but he did not respond until February 5, 2007, twenty eight days later, disagreeing with the Complainant’s allegations. In his response, the Respondent stated: “I am happy to provide your office with copies of these tax returns if it is necessary,” although he did not do so. It appears to me that if he truly took the IRS’ complaint

seriously, he would have responded immediately after receiving Whitlock's October 11, 2006 letter and would have sent him a copy of his 2002 Federal tax return, rather than waiting almost four months before responding and offering to provide the return. In a similar manner, when I issued my Order setting forth a deadline for notifying the other party of proposed witnesses and exhibits, he did not respond. When Respondent made clear his desire to call a witness, I questioned him about his failure to respond to my Order, and he blamed it on his lack of experience with NLRB practices and procedure, whereas it had nothing to do with that, it was simply a failure to respond to my Order. While the above history does not establish that the Respondent is an incredible witness, it convinces me that he does not feel the need to follow the orders or directions of others, whether it is the undersigned or the IRS, and I find that the IRS certified record stating that his 2002 Federal tax return was not filed is correct.

I therefore find that the Respondent did not file a Federal tax return for tax year 2002, and filed his tax return for tax years 2000, 2001, 2002, 2004 and 2005 late for periods ranging from one month to twenty two months. The ultimate issue therefore is whether this constitutes grounds for suspension of practice before the IRS and, if so, for how long a period of time. I will then examine if Respondent's "vendetta defense" constitutes a valid defense to the allegations herein and if his reasonable cause defense mitigates this violation, in whole or in part. In doing so, it is important to remember that it is not alleged herein that any of his returns were false, or he failed to pay any of the taxes due to the IRS.

Pursuant to 31 C.F.R. 10.52(a) a practitioner may be censured, suspended or disbarred from practicing before the IRS for willfully violating any of the provisions set forth in Circular 230. Section 10.51 provides that these sanctions may be imposed on a practitioner who engages in disreputable conduct, and the appropriate subsection of that provision states: "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 evading or attempting to evade any assessment of payment of any Federal tax." The initial issue herein is whether the Respondent's actions in tax years 2000 through 2005 constitute disreputable conduct as set forth therein.

Section 10.51 refers to "Willfully failing to make a Federal tax return . . ." ¹ It is important to note what it does and does not state. It requires that the failure be willful, and does not specifically state that the filing of a late return, or late returns, constitutes disreputable conduct. I note, as well, that of the three Regulations set forth below in footnote 1, only the 1994 fails to state "willfully evading or attempting to evade. . ." Regardless, I find that the willful requirement has been met here. The Respondent is an experienced practitioner in the field with fifteen years experience as a practitioner with IRS procedure. He was obviously aware of the requirement of filing Federal tax returns, and doing so on a timely basis. That he went six years without filing a return, or a timely return, could not have been because he was unaware of his tax obligation. In addition, "willful" has consistently been held to mean the "voluntary, intentional violation of a known legal duty." *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *Thibodeau v. United*

¹ There are some minor differences between the IRS Regulations governing practitioners. The 1994 Regulations state: "Willfully failing: to make a Federal tax return in violation of the revenue laws of the United States, or evading, attempting to evade, or participating in any way in evading or attempting to evade any Federal tax or payment thereof. . ." The 2002 Regulations state: "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. . ." the 2005 Regulations state: "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 . . ." the effective date of the 2005 revision is June 20, 2005.

States, 828 F .2d 1499, 1505 (11th Cir. 1987). I therefore find that by failing to file a Federal tax return for tax year 2002, the Respondent engaged in disreputable conduct under Section 10.51 of Circular 230. The next issue is whether the late filings of his Federal tax returns for tax years 2000, 2001, 2003, 2004 and 2005 also constitute disreputable conduct under Circular 230. Counsel for the Complainant, in her brief, cites no case for the proposition that the late filing of tax returns constitute disreputable conduct under Section 10.51 and I could find no such precedent. In addition, as stated by the Respondent in his brief, Section 10.51 ((d) in the 1994 Regulations and (f) in the 2002 and 2005 Regulations) does not refer to untimely or late filings of Federal tax returns. I therefore find that the late filing of the Respondent's Federal tax returns for tax years 2000, 2001, 2003, 2004, and 2005 do not constitute disreputable conduct as set forth in Section 10.51 of the Treasury Department's Circular 230.

The Respondent's two defenses herein are that the situation with his parent constituted reasonable cause for his tax delinquencies and should therefore be excused or mitigated, and that because this matter was instituted due to a vendetta by IRS Revenue Officer 1, this proceeding should be dismissed. I find that neither defense has merit. While I can sympathize with the Respondent and his obligations and sacrifices during this period, the record establishes that during the period encompassing tax years 2000 through 2005 he was employed full time for a major laws firm with yearly adjusted gross income ranging from \$102,000 to \$138,000. Further, while he had obligations caring for his parents during this period, it is difficult to imagine that he could not find the time to prepare and timely file these returns. Considering his expertise in the field, it should not have consumed an inordinate amount of time. I therefore reject the Respondent's reasonable cause defense herein.

Remaining is the Respondent's "vendetta" allegation and defense, that because IRS Revenue Officer 1 was unhappy with the Respondent's zealous representation of a client, she improperly viewed his tax returns and initiated this proceeding. There are a number of problems with this defense: the Respondent did not prove that Revenue Officer 1 improperly accessed his confidential tax records and has not established that, even if she had, that it would constitute grounds for dismissing this proceeding. Respondent, in his brief, states: "During the course of the Respondent's representation of Business 1, Revenue Officer 1 launched her own investigation in the Respondent's personal tax history. Revenue Officer 1 began inspecting the Respondent's tax return information in the Fall of 2004 and referred the matter to the Office of Professional Responsibility in April 2005." While the Respondent credibly testified that he dealt with Revenue Officer 1 on the Business 1 matter, and Attorney 1 testified that Revenue Officer 1 initially referred the Respondent's situation to the IRS for investigation, there is no evidence that Revenue Officer 1 improperly accessed his tax records, nor is there any evidence that she referred the matter to the Complainant in retaliation for his zealous representation of his client. Further, as stated above, the Respondent cites no case to support the proposition that even if Revenue Officer 1 had done as he alleges, it would constitute a defense to this proceeding. If Revenue Officer 1 had improperly accessed his tax records, the appropriate remedy might be to institute intra-agency charges against her for engaging in such alleged activity. This "vendetta" defense is therefore rejected.

The Proposed Sanction

The Complainant proposes a forty eight month suspension from practice as the appropriate sanction in this matter. The Respondent defends that the appropriate sanction herein is a "private" reprimand. As the Director of the Office of Professional Responsibility is the official with the responsibility for regulating practice before the IRS, his/her proposed sanction is entitled to some deference. The record herein establishes that his 2000, 2001, 2003, 2004, and

2005 Federal tax returns were filed late. That does not constitute disreputable conduct under Section 10.51 of Circular 230. Further, there is no allegation or evidence that any of the Respondent's Federal tax returns during this period were false or improper, or that he underpaid his taxes for any of these tax years. For these reasons, I find that a 24-month suspension from practice before the Internal Revenue Service is an appropriate remedy herein. This remedy is appropriate and in line with the *Marks* and *Marcus* cases cited by the Complainant. Although those cases resulted in disbarment of the practitioners, they were both Default Judgment cases, and in *Marks*, the practitioner had failed to file Federal tax returns for five years, and in *Marcus*, the practitioner had failed to file his Federal tax returns for eight years and had failed to pay his Federal taxes for seven years. The instant matter is obviously distinguishable.

Conclusions of Law

1. At all times material, the Respondent, Kevin Kilduff, was a tax attorney engaged in practice before the Internal Revenue Service.
2. The Respondent engaged in disreputable conduct within the meaning of Section 31 C.F.R. 10.51 by failing to file a Federal tax return for tax year 2002.
3. A 24-month suspension from practice before the Internal Revenue Service is an appropriate sanction for the disreputable conduct engaged in by the Respondent.

Upon the foregoing findings of fact and conclusions of law and the entire record, pursuant to 31 C.F.R. 10.70(b) (10) and 10.76, Issue the following

Order²

The Respondent, Kevin Kilduff, is hereby suspended from practice before the Internal Revenue Service for the period of twenty four (24) months.

Dated, Washington, DC **November 18, 2008**

Joel P. Biblowitz
Administrative Law Judge

² Pursuant to 31 C.F.R. 10.77, either party may appeal this decision to the Secretary of the Treasury within thirty (30) days from the date of issuance.