

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

<b>DIRECTOR,</b>	)	
<b>OFFICE OF PROFESSIONAL</b>	)	
<b>RESPONSIBILITY,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	<b>Complaint No. 2010-03</b>
<b>v.</b>	)	
	)	
(b)(3)/26 USC 6103	)	
	)	
<b>Respondent.</b>	)	

**DECISION AND ORDER ON DEFAULT**

The Complaint initiating this matter was issued on August 13, 2010 by Pamela D. Langston-Cox, Area Counsel, General Legal Services, Chicago, and signed by Russ E. Eisenstein, Attorney for Complainant Karen L. Hawkins in her official capacity as Director of the Office of Professional Responsibility ("OPR"), United States Department of the Treasury, Internal Revenue Service ("IRS")<sup>1</sup>. The Complaint was issued pursuant to the rules governing practice before the IRS, 31 C.F.R. Part 10 ("Rules"), promulgated under 31 U.S.C. § 330.<sup>2</sup> The Complaint charges Respondent with 22 counts of violating the Rules, constituting disreputable conduct sufficient to warrant disbarment from practice. Specifically, Respondent is charged with (b)(3)/26 USC 6103 failure to provide (b)(3)/26 USC 6103, and making false and misleading representation regarding (b)(3)/26 USC 6103. To date, no answer to the Complaint has been filed.

<sup>1</sup> The regulations governing this proceeding require that a complaint be "signed by the Director of the [OPR] or a person representing the Director of the [OPR] under § 10.69(a)(1)," which further provide that an "attorney or an employee of the [IRS] representing the Director of the [OPR] in a proceeding under this part may sign the complaint...on behalf of the Director of the [OPR]." 31 C.F.R. §§ 10.62, 10.69(a)(I). Complainant has established that Russ E. Eisenstein is an IRS attorney and a "designated representative of the Director." Complaint at 1-2.

<sup>2</sup> The Rules are published in Treasury Department Circular 230, available online at [www.irs.gov](http://www.irs.gov).

On September 22, 2010, Complainant filed and served on the Respondent a Motion for Default Judgment ("Motion") on the basis of Respondent's failure to file an answer to the Complaint. In support of the Motion is a Declaration of Russ E. Eisenstein in support ("Declaration" or "Decl.").

According to 31 C.F.R. §§ 10.63(a)(2)(i) and 10.63(a)(2)(ii), proof of service of the Complaint by certified mail is made by the "returned post office receipt duly signed by the respondent," or upon mailing by first class mail "[i]f the certified mail is not claimed or accepted by the respondent, or is returned undelivered."<sup>3</sup> On August 13, 2010, Complainant mailed a copy of the Complaint simultaneously by certified mail return receipt requested, and by first class mail, to the Respondent at his last known address of record: Address Redacted, (b)(3)/26 USC 6103. See, Certificate of Service accompanying the Complaint as well as the Motion. On the receipt for the certified mailing (the "green card") is a signature and printed name that appears to be that of (b)(3)/26 USC 6103, with the box marked "addressee" checked, and a date of delivery on August 21, 2010. See, Exhibits attached to Declaration.<sup>4</sup> The Declaration states that the Complaint sent by first class mail was not returned as undeliverable. It is concluded that service of the Complaint on Respondent was completed in this case by the certified mailing received by the Respondent on August 21, 2010.

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

Accordingly, the Complaint stated in part:

Pursuant to 31 C.F.R. § 10.64, Respondent's answer to this complaint must be filed with the Honorable Susan L. Biro, Chief Administrative Law Judge, U.S. Environmental Protection Agency, Office of Administrative Law Judges, Mail Code 1900L, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460, and a copy served on Russ E. Eisenstein, Attorney, Office of Chief Counsel, as designated representative of the Director, [OPR], within thirty (30) calendar days from date of service. [address omitted]

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<sup>3</sup> While Rule § 10.63 appears to contemplate service will be attempted by certified mail initially, and upon that failing, then by regular mail, it does not appear to require the mailings to be performed in series rather than simultaneously. Nor does it appear that seriatim service is more likely than simultaneous service to provide the Respondent with his due process right to notice of the proceeding and his opportunity to be heard.

<sup>4</sup> The exhibits attached to the Motion include a series marked Exhibits A through D (presumably attached to the Declaration), a series (apparently attached to the Complaint) marked Exhibit A through Exhibit G, and another two documents marked Exhibits E and F (apparently attached to the Declaration). The last page of Exhibit G is a certificate of service of the Complaint which shows a Certified Mail number matching that on a copy of the return receipt ("green card") which appears to be signed by Respondent, and which is presented as the second Exhibit F.

\* \* \*

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

Complaint at 1-2.

The applicable Rules provide that:

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

31 C.F.R. § 10.64(d). Thirty days from the date of service of the Complaint, August 21, 2010, is September 20, 2010. As noted above, to date, Respondent has not filed an answer to the Complaint. Pursuant to 31 C.F.R § 10.64(d), Respondent's failure to file an answer within the time prescribed constitutes an admission of the allegations in the Complaint and a waiver of a hearing on those allegations. To date, Respondent also has not filed any response to the Motion for Default, and the Rules provide that "If a nonmoving party does not respond within 30 days of the filing of a motion for decision by default for failure to timely answer ... , the nonmoving party is deemed not to oppose the motion." 31 C.F.R § 10.68(b). Thus, a decision by default may be entered against Respondent.

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

### **Discussion of the Statute of Limitations**

The five-year statute of limitations in 28 U.S.C. § 2462 has previously been held to apply to disciplinary proceedings brought under the Rules. Redacted, Unpublished Opinion (Order granting respondent's motion for summary disposition after finding the complaint barred by 28 U.S.C. § 2462); Redacted, Unpublished Opinion (Order dismissing complaint because the factual bases for all alleged disreputable conduct occurred more than five years before the action was initiated). The statute of limitations provides:

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

28 U.S.C. § 2462.

The Court of Appeals for the District of Columbia Circuit has held that administrative proceedings brought by the Federal government for the assessment of penalties do qualify as

an "action, suit or proceeding for the enforcement of any civil fine [or] penalty" within the meaning of Section 2462. *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994). In *3M*, the D.C. Circuit concluded that Section 2462 applies to claims of the Environmental Protection Agency when seeking to impose a civil penalty under the Toxic Substances Control Act ("TSCA") in administrative penalty assessment proceedings. "Because assessment proceedings under TSCA seek to impose civil penalties, they are proceedings for the 'enforcement' of penalties," the court held. 17 F. 3d at 1459. The court then expanded this holding to apply to any Federal administrative penalty imposition, explaining:

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

*Id* at 1461.

Disbarment or suspension of a professional license has been held to be a "penalty" within the meaning of Section 2462. *See, Johnson v. Securities and Exchange Comm'n*, 87 F.3d 484, 488-89 (D.C. Cir. 1996) (holding that the imposition by the Securities and Exchange Commission of a six-month license suspension upon a securities industry supervisor for failing to adequately supervise a subordinate was "penalty" [sic] encompassed by Section 2462); *see, Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000) (holding that the Federal Deposit Insurance Corporation's removal of a banker from his position and expulsion from the banking industry constituted [a] "penalty" within the meaning of Section 2462). It is concluded that disbarments or suspensions of practitioners under IRS' Rules Applicable to Disciplinary Proceedings regarding Practice Before the Internal Revenue Service at 31 C.F.R. Part 10 are "penalties" within the meaning of Section 2462.

In Count 1, Complainant alleges that Respondent [REDACTED] (b)(3)/26 USC 6103  
[REDACTED]. In Count 2, Complainant alleges that Respondent [REDACTED] (b)(3)/26 USC 6103  
[REDACTED]. In Count 3,  
Complainant alleges that Respondent [REDACTED] (b)(3)/26 USC 6103  
[REDACTED]. In Count 4, Complainant alleges that Respondent [REDACTED] (b)(3)/26 USC 6103  
[REDACTED]. In Count 5, Complainant  
alleges that Respondent [REDACTED] (b)(3)/26 USC 6103. In Count  
6, Complainant alleges that Respondent [REDACTED] (b)(3)/26 USC 6103  
[REDACTED]. In Count 7, Complainant alleges that Respondent [REDACTED] (b)(3)/26 USC 6103  
[REDACTED]. In Count 8, Complainant alleges  
that Respondent [REDACTED] (b)(3)/26 USC 6103  
[REDACTED]. In Count 9, Complainant alleges that Respondent [REDACTED] (b)(3)/26 USC 6103  
[REDACTED]. In Count 10, Complainant alleges that Respondent [REDACTED] (b)(3)/26 USC 6103  
[REDACTED].

Because the Complaint was filed on August 13, 2010 [sic], all claims in the Complaint that accrued before August 13, 2010, in accordance with the five-year statute of limitations in Section 2462, are barred. Therefore, Counts 1 through 10, all having accrued at least five years before the complaint was filed, cannot be grounds upon which to enforce a penalty here.

**FINDINGS OF FACT**

1. Respondent has engaged in practice before the IRS, as defined in 31 C.F.R. §§ 10.2(a) (4), 10.2(a) (5), and 10.3(a) as an attorney. Complaint ("Compl.") ¶¶ 1, 4; 31 C.F.R. § 10.3(a).
2. Respondent is subject to the disciplinary authority of the Secretary of the Treasury and the OPR, in accordance with 31 U.S.C. § 330, 31 C.F.R. §§ 10.1 (b) and 10.50 (a). Compl. ¶ 2.
3. Respondent's last known address of record with the IRS is Address Redacted, (b)(3)/26 USC 6103. Compl. ¶ 3.
4. (b)(3)/26 USC 6103  
Compl. ¶¶ 5, 66. (b)(3)/26 USC 6103  
Compl. ¶¶ 67, 126; Decl. ¶ 5.
5. (b)(3)/26 USC 6103  
Compl. ¶ 5, 71.  
(b)(3)/26 USC 6103  
Compl., 72, 126, Decl. ¶ 5, Exhibit E.
6. (b)(3)/26 USC 6103  
Compl. ¶¶ 68, 76. (b)(3)/26 USC 6103  
Compl. ¶ 77, 126; Decl. ¶ 5.
7. (b)(3)/26 USC 6103  
Compl. ¶¶ 5, 81.  
(b)(3)/26 USC 6103  
Compl., 82, 126, Decl. ¶ 5, Exhibit E.
8. (b)(3)/26 USC 6103  
Compl. ¶ 5,  
86. (b)(3)/26 USC 6103  
Compl. ¶ 87, 126; Decl. ¶ 5..
9. (b)(3)/26 USC 6103  
Compl. ¶ 5, 91.  
(b)(3)/26 USC 6103  
Compl. ¶ 92, 126; Decl. ¶ 5, Exhibit E.
10. (b)(3)/26 USC 6103  
Compl. ¶ 5,  
96. (b)(3)/26 USC 6103  
Compl., ¶ 97, 126; Decl. ¶ 5..

11. (b)(3)/26 USC 6103  
 (b)(3)/26 USC 6103 Compl., ¶¶ 5, 101.  
 Compl., ¶ 11 102, 126, Decl., ¶ 5, Exhibit E.
12. (b)(3)/26 USC 6103  
 (b)(3)/26 USC 6103 Compl. ¶¶  
 5, 106.  
 Compl. ¶ 107, 126; Decl. ¶ 5.
13. (b)(3)/26 USC 6103  
 (b)(3)/26 USC 6103 Compl. ¶¶ 5, 111.  
 Compl. ¶ 112, 126, Decl. ¶ 5, Exhibit E.
14. (b)(3)/26 USC 6103  
 Compl. ¶¶ 68, 78, 88, 98, 108.
15. (b)(3)/26 USC 6103  
 Compl. ¶¶ 73, 83, 93, 103, 113.
16. On or about November 5, 2009, the Director of OPR requested Respondent to provide within 60 days (b)(3)/26 USC 6103  
 (b)(3)/26 USC 6103 Compl. ¶ 116. Respondent did not provide (b)(3)/26 USC 6103  
 (b)(3)/26 USC 6103 within 60 days. Compl. ¶ 117, Exhibit E. USC  
 6103
17. Respondent's failure to provide (b)(3)/26 USC 6103  
 (b)(3)/26 USC 6103 within 60 days was willful. Compl. ¶ 118.
18. By letter dated February 2, 2010, Complainant requested that Respondent submit (b)(3)/26 USC 6103 by February 16, 2010. Compl. Exhibit F. On February 16, 2010, Respondent submitted (b)(3)/26 USC 6103 to Complainant and OPR, but did not furnish (b)(3)/26 USC 6103. Compl. ¶ 124, Exhibit G. As of August 13, 2010, Respondent (b)(3)/26 USC 6103  
 (b)(3)/26 USC 6103. Compl. ¶ 126; Decl. ¶ 5. Therefore, the February 16, 2010 submission was false or misleading. Compl. ¶ 127.
19. Respondent's false or misleading representation regarding (b)(3)/26 USC 6103  
 (b)(3)/26 USC 6103 was willful. Compl. ¶ 128.

## Discussion and 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 Department and the public from persons unfit to practice before the IRS. Any practitioner may be disbarred or suspended from practice before the IRS, after notice and an opportunity for a hearing, if the practitioner is shown to be incompetent or disreputable, or refuses to comply with any regulation in 31 C.F.R. Part 10. 31 U.S.C. § 330 (b); 31 C.F.R. § 10.50 (a).

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

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

\* \* \*

(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); Circular No. 230 (7-2002). As to alleged disreputable conduct occurring on or after September 26, 2007, Sections 10.51 (a) (4) and (a) (6) provide:

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

\* \* \*

(4) Giving false or misleading information ... to the Department of [the] Treasury or any officer or employee thereof... in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading.

\* \* \*

(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 tax.

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

The Rules provide at 31 C.F.R. § 10.20 (b) as follows in pertinent part:

When a proper and lawful request is made by the Director of the Office of Professional Responsibility, a practitioner must provide the Director of the Office of Professional Responsibility with any information the practitioner has concerning an inquiry by the Director of the Office of Professional Responsibility into an alleged violation of the regulations in this part by any person... unless the practitioner believes in good faith and on reasonable grounds that the information is privileged.

A practitioner may be sanctioned under § 10.50 if the practitioner "willfully violates any of the regulations (other than § 10.33) contained in [31 C.F.R. Part 10]." 31 C.F.R. § 10.52(a) (1); Circular No. 230 (4-2008); see also, 31 C.F.R. § 10.52(a); Circular No. 230 (7-2002).

It is noted that the Complaint alleges that Respondent (b)(3)/26 USC 6103, yet alleges that (b)(3)/26 USC 6103. Complaint ¶¶ 4-13, 126 (emphasis added). Other documents in the case file indicate that Respondent (b)(3)/26 USC 6103. Decl. ¶ 5, Exhibit E (As of August 13, 2010, (b)(3)/26 USC 6103). The case file does not explain this discrepancy between the allegations. Accordingly, the Findings of Fact above reflect (b)(3)/26 USC 6103 rather than the individual allegations of (b)(3)/26 USC 6103.

Respondent is an attorney engaged in practice before the IRS. As such, he (b)(3)/26 USC 6103. *Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991), citing *United States v. Pomponio*, 429 U.S. 10, 12 (1976). Findings of Fact 4 through 7, 14 and 15 support the conclusion that Respondent (b)(3)/26 USC 6103. Findings of Fact 8 through 13, 14 and 15 support the conclusion that Respondent (b)(3)/26 USC 6103. Findings of Fact 18 and 19 support the conclusion that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51(a)(4).

Finding of Fact 16 supports the conclusion that Respondent violated 31 C.F.R. § 10.20(b), and together with Finding of Fact 17 supports the conclusion that Respondent willfully violated a regulation for which he may be sanctioned pursuant to 31 C.F.R. § 10.52(a) (1).

For Respondent's disreputable conduct and willful failure to comply with a regulation in Part 10, Respondent may be censured, suspended or disbarred under 31 C.F.R. § 10.50. In the Complaint, Complainant requests that Respondent be disbarred from practice before the IRS. The provision of the rules that 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 an IRS disciplinary 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.

Practice before the IRS is a privilege, and one cannot partake of that privilege without also taking on the responsibilities of complying with the regulations that govern such practice. Suspension is imposed in furtherance of the IRS' regulatory duty to protect the public interest and the Department by conducting business with responsible persons only.

(b)(3)/26 USC 6103  
[REDACTED] as an attorney before the IRS, reflected in [REDACTED] (b)(3)/26 USC 6103 [REDACTED] showed a disregard for the standards established for the benefit of the IRS and the public. Respondent showed further disregard for requirements set forth by IRS when he did not timely respond to a request from the Director to provide [REDACTED] (b)(3)/26 USC 6103 [REDACTED], in violation of 31 C.F.R. § 10.20(b). and when Respondent made a false or misleading representation to OPR regarding [REDACTED] (b)(3)/26 USC 6103 [REDACTED], in violation of 31 C.F.R. § 10.51 (a)(4).

Complainant's request for an order disbaring Respondent from practice before the IRS was predicated upon Complainant's allegations of twenty-two counts of violation, ten of which have herein been found barred by the statute of limitations in 28 U.S.C. § 2462. Nevertheless, Respondent's liability for the remaining twelve counts, based on [REDACTED] (b)(3)/26 USC 6103 [REDACTED], willful failure to provide [REDACTED] (b)(3)/26 USC 6103 [REDACTED], and willfully providing false or misleading information, warrants the disbarment of Respondent from practice before the IRS. Such a sanction is commensurate with the seriousness of the disreputable conduct found herein, and allows the Director of the Office of Professional Responsibility complete discretion to determine whether or when Respondent may be reinstated.

**ORDER**

It is hereby **ORDERED** that Respondent [REDACTED] (b)(3)/26 USC 6103, 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<sup>5</sup>

Dated: November 5, 2010  
Washington, D.C.

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

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<sup>5</sup> This decision is issued by the Chief Administrative Law Judge of the United States Environmental Protection Agency. The Administrative Law Judges of the Environmental Protection Agency are authorized to hear cases pending before the United States Department of the Treasury, pursuant to an Interagency Agreement dated October 1, 2008.

In the Matter of (b)(3)/26 USC 6103, Respondent  
Complaint No. 2010-03

CERTIFICATE OF SERVICE

I certify that a true copy of **Decision And Order On Default**, dated November 5, 2010 was sent this day in the following manner to the addressees listed below:

/s/

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Maria Whiting-Beal  
Staff Assistant

Dated: November 5, 2010

Copy by First Class Regular Mail to:

Russ E. Eisenstein, Attorney  
Internal Revenue Service  
Office of Chief Counsel  
General Legal Services  
Chicago, IL 60606-5232

Copy By First Class Regular Mail and  
Certified Mail Return Receipt To:

(b)(3)/26 USC 6103  
Address Redacted  
(b)(3)/26 USC 6103