UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY	)	
Complainant,	)	
v.	)	**Complaint No. 2010-07**
(b)(3)/26 USC 6103	)	
Respondent.	)	

DECISION AND ORDER ON COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

I. Background

On April 8, 2010, 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"), initiated this proceeding by issuing a Complaint against Respondent (b)(3)/26 USC 6103 pursuant to 31 U.S.C. § 330 and Section 10.60 of the regulations codified at 31 C.F.R. Part 10 ("Rules") governing the practice of attorneys, certified public accountants, enrolled agents and other practitioners before the IRS.[1]

The Complainant alleges that Respondent is an Enrolled Agent engaged in practice before the IRS (as defined by 31 C.F.R. § 10.2(a)(4)). The Complainant alleges six counts of violation against Respondent: two counts for (b)(3)/26 USC 6103 and four counts of (b)(3)/26 USC 6103. The Complaint alleges further that (b)(3)/26 USC 6103 in accordance with law

[1] All 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.

constitutes disreputable conduct, as defined by 31 C.F.R. § 10.51.[2] As a sanction, the Complaint seeks to have Respondent disbarred from practice before the IRS pursuant to 31 C.F.R. §§ 10.51 and 10.70, with reinstatement thereafter being at the sole discretion of OPR. The Complaint further specifies that, at a minimum, reinstatement should not be granted unless Respondent [redacted] (b)(3)/26 USC 6103 .

On June 1, 2010, Respondent (appearing *pro se*) filed an Answer requesting that she not be disbarred.[3] Respondent's Answer did not deny the allegations in the Complaint that she [redacted] (b)(3)/26 USC 6103 A prehearing Order was issued thereafter, requiring each party to submit a Prehearing Memorandum by a certain date. In accordance with the Prehearing Order, Complainant filed a Prehearing memorandum on June 30, 2010, but Respondent failed to file her Prehearing Memorandum. She also did not respond to this Tribunal's Order To Show Cause regarding this failure and why a default judgment should be entered against her.

On July 19, 2010, Complainant filed a Motion for Summary Judgment ("Motion" or "Mot."). On July 22, 2010, the undersigned issued an Order staying the scheduled hearing, so as to allow time for Respondent to respond to Complainant's Motion for Summary Judgment and for a ruling thereon. According to the Prehearing Order, Respondent's response to Complainant's Motion for Summary Judgment was due fifteen days after service of the Motion, which would be July 29, 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 For Summary Judgment.[4]

II. Standards for Summary Adjudication

(b)((3)/26 USC 6103

[2] The pertinent paragraph of 31 C.F.R. was previously codified as [redacted], which is cited in Counts 1 through 4. The pertinent paragraph is currently codified as [redacted] (b)(3)/26 USC 6103, which is cited in Counts 5 and 6.

[3] As noted in this Tribunal's June 1, 2010, Notice of Receipt of Ex Parte Communication, Respondent's Answer appeared in the form of regular correspondence and lacked a certificate of service. Complainant's Motion for Summary Judgment refers to this correspondence from Respondent, dated May 19, 2010, as Respondent's "Answer."

[4] The Prehearing Order (p.3) directs 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. The Prehearing Order states that "No motion shall be considered without such a statement." Complainant's Motion for Summary Judgment does not contain such a statement. However, Complainant's June 21, 2010 Settlement Status Report states that Respondent did not respond to Complainant's proposed settlement agreement and did not respond to three voice mail messages left May 17, May 24 and June 11, 2010. Similarly, Respondent has not responded to two voice mail messages left by the undersigned's staff.

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 FRCP 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 FRCP "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 U.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 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* 10A 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.").

III. Complaint's Motion

Complainant states that "[s]ummary judgment is appropriate in this manner, as the undisputed facts of the case show that Respondent (b)(3)/26 USC 6103 Disbarment is the appropriate sanction for such disreputable conduct." Mot. at 3.

Complainant notes that Respondent does not deny any of the allegations on the Complaint that she [redacted]. Mot. At 2-3. Attached to the Motion are [redacted]. Mot., Attachments 1-7. They show that Respondent [redacted]. *Id.*

Complainant asserts that [redacted]. Citing *United States v. Pomponio*, 429 U.S. 10, 12 (1996) and *Cheek v. United States*, 498 U.S. 192, 201 (1991), Complainant notes that the United States Supreme Court has articulated a definition of "willful" in the context of criminal violations of the Revenue Code as a "voluntary, intentional violation of a known legal duty." Complainant reasons that "[a]s Respondent's conduct [redacted], a determination of the appropriate [redacted] is unnecessary." Mot. At 5. Complainant states further that "as an Enrolled Agent, Respondent was aware of [redacted]. Respondent does not allege that she was unaware of [redacted] . . . . There is also no dispute that Respondent [redacted] . . ." *Id.*

Respondent's May 19, 2010, Answer (at p.2) states, "[redacted], I could not function!" Respondent alleges her inability to function was based on her emotional and physical collapse as a result of her husband suddenly abandoning their 27 year marriage in or about the year 2000. Answer at 1.

Complainant argues that "Respondent's claim that any violations [redacted] due to her inability to 'function' is without merit." Mot. At 5. First, Complainant asserts that Respondent has proffered no evidence to support her assertion that, during the time period in issue, she was physically or emotionally incapable [redacted]. *Id.* At 6. "Respondent's assertion that her 2000 divorce left her unable to function for more than seven years is simply not credible. This is especially true because Respondent actually [redacted]." *Id.*, Mot. Attachment 3.

Secondly, Complainant argues that "even assuming all of Respondent's contentions regarding her physical and/or emotional state during the period in question to be true, such facts would not justify a finding that [redacted]." *Id.* In extreme circumstances, some courts have found "reasonable cause" to justify [redacted]. However, Complainant contends that Respondent's Answer includes indications that she does not meet the requisite standard of complete incapacity. Complainant also points to Respondent's statements indicating that "serving as a tax practitioner provided a substantial portion of her livelihood." Mot. At 7. Complainant argues that Respondent's

ability both to prepare client's tax returns and [redacted] prove that Respondent was not incapacitated to a degree sufficient to justify or excuse [redacted].

IV. Discussion

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 therefore, 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).[5] [redacted] *Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991).

[5] Previously codified, with slightly different language, as § 10.51(f). See note 2, *supra*.

B. Willfulness

Respondent has not denied any of the allegations regarding [redacted], with one exception. Respondent's Answer asserts that [redacted] but rather she could not function due to her emotional and physical collapse as a result of her husband suddenly abandoning their 27 year marriage.

The general rule of law is that, to be excused from [redacted], a person's incapacity must be virtually complete, such that they are unable to conduct any work. *Roberts Metal Fabrication v. United States*, 147 B.R. 965, 968 (1992) (to find "reasonable cause" for failure to file, illness must be present at time return is customarily prepared and render taxpayer physically or mentally incapable of preparing a return or conducting business activity); *Meyer v. Comm'r,* 85 T.C.M. (CCH) 760 (2003) taxpayer had severe health problems and nervous breakdown, took leave of absence from job); *Shaffer v. Comm'r*, 68 T.C.M. (CCH) 1455 (1994) (taxpayer placed on disability retirement); *Dir., Office of Prof'l Responsibility v.* [redacted], Complaint No. 2009-26 (Decision on Appeal, May 28, 2010)(where respondent prepared returns for other taxpayers, medical conditions [redacted]).

As pointed out in Complainant's Motion, Respondent's Answer contains certain statements indicating that her conduct was [redacted] and her incapacity was not complete. First, as Complainant notes, Respondent's Answer indicates that she was able to do work for her clients. Respondent's Answer states "I could only do bare minimum, that meant my clients came 1st and I was last!" Answer at 1. Attachment 9 to Complainant's Motion (a FAX from Respondent to IRS) includes a statement from Respondent indicating that, if she loses her Enrolled Agent license, "I will not be able to support myself." Respondent's Answer (p.1) contains a similar statement: "This is my only form for making a living, to support myself . . . " Second, Respondent's [redacted]

[redacted]. *Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4 Cir. 1991), citing *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

C. Respondent's Failure to Respond to Motion

Respondent failed to respond to the Prehearing Order and to the Motion for Summary Judgment, and failed to provide this Tribunal with any evidence, or any indication of the evidence she can present at hearing, to support her assertions in her Answer. As noted above, according to Rule 56(e)(2) of the Federal Rules of Civil Procedure:

> When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Accordingly, summary judgment may be granted in favor of Complainant if the undisputed material facts, as supported by the "pleadings, . . . admissions, and any other admissible evidence," demonstrate Complainant's entitlement to judgment as a matter of law. 31 C.F.R. § 10.76(a)(2); *Champion v. Artuz*, 76 F.3d 482, 486 (2nd Cir, 1996). Based on Respondent's failure to set out specific facts supporting her assertion that (b)(3)/26 USC 6103, summary judgment against her is appropriate.

D. Statute of Limitations

Complainant's Motion (n.2) 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 and 2. 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 3 through 6 are unaffected by this potential issue and suffice to support the sanction imposed herein.

E. Sanction

A 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 113, 116 (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. Disbarment and suspension are 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 as an enrolled agent before the IRS, reflected by (b)(3)/26 USC 6103 , shows a disregard for the standards established for the benefit of the IRS and the public.

Complainant seeks an order disbarring Respondent and the record supports the finding that (b)(3)/26 USC 6103 as alleged in the Complaint warrants disbarment. The sanction of disbarment 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 under what conditions Respondent may be reinstated.

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 (b)(3)/26 USC 6103 as alleged in the Complaint.

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

ORDER

It is hereby **ORDERED** that:

1. Complainant's Renewed Motion for Summary Judgment is **GRANTED**; and

2. Respondent (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
U.S. Environmental Protection Agency[6]

Dated: August 17, 2010
Washington, D.C.

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 therfor.

[6] 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.

In the Matter of (b)(3)/26 USC 6103, Respondent
Complaint No. 2010-07

CERTIFICATE OF SERVICE

I certify that a true copy of **Decision And Order On Complainant's Motion For Summary Judgment**, dated August 17, 2010, was sent this day in the following manner to the addresses listed below:

/s/
Maria Whiting-Beale
Staff Assistant

Dated: August 17, 2010

Copy by First Class Regular Mail to:

Erin J. Davidson, Attorney
Internal Revenue Service
Office of Chief Counsel
General Legal Services
[Redacted]
San Francisco, CA *[Redacted]*

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

(b)(3)/26 USC 6103
[Redacted]
(b)(3)/26 USC 6103