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

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY, U.S. DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE,	)	Complaint No. IRS 2013-00007
	)	**DECISION AND ORDER**
Complainant	)	
v.	)	
(b)(3) / 26 USC 6103,	)	
Respondent	)	

I. Introduction

On April 15, 2013, Complainant initiated this proceeding by filing a Complaint against Respondent (b)(3) / 26 USC 6103 under the authority of 31 C.F.R. part 10 (Circular 230).[1] Complainant alleged that Respondent engaged in disreputable conduct under 31 C.F.R. § 10.51 (2008 & 2011) based upon the revocation of his (b)(3) / 26 USC 6103 The Complaint has requested the sanction of disbarment from practice before the Internal Revenue Service ("IRS"). Respondent disputes the charges and

[1] Portions of Circular 230 were amended on June 12, 2014. *See* 79 Fed. Reg. 33685 (June 12, 2014); Circular 230 (Rev. 6-2014). However, these proceedings were conducted under the prior version of Circular 230 and Respondent's past conduct is governed by the regulatory provisions in effect at the time the conduct occurred. *See* 31 C.F.R. § 10.91 (2014). Thus, regulatory citations will reference the applicable revisions to Circular 230 as codified in the 2008 or 2011 Code of Federal Regulations ("C.F.R."). *See* 72 Fed. Reg. 54540 (Sept. 26, 2007); 76 Fed. Reg. 32286 (June 3, 2011); *see also* Circular 230 (Rev. 4-2008); Circular 230 (Rev. 8-2011).

asserts as a threshold matter that Complainant lacks jurisdiction. For the reasons discussed in detail herein, Respondent is subject to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility ("OPR") in accordance with 31 U.S.C. § 330 and 31 C.F.R. part 10 and his disreputable conduct, as established by clear and convincing evidence, warrants a suspension for forty-eight (48) months.

II. Procedural History

Complainant originally initiated disciplinary action against Respondent on March 4, 2011, pursuant to the regulation governing expedited suspensions at 31 C.F.R. § 10.82 (2008). OPR sought an emergency suspension based upon the revocation of Respondent's California CPA license by the California Board of Accountancy ("CBA") which became effective on March 14, 2011. As part of that license revocation proceeding, a state Administrative Law Judge ("ALJ") identified six separate bases for imposing discipline, including a finding that Respondent willfully practiced and held himself out as a CPA during periods of time when his license to practice had lapsed. Respondent failed to respond to OPR's expedited suspension complaint, and a Decision by Default issued, suspending Respondent from practice before the IRS beginning [redacted]. (b)(6)

On March 14, 2013, within the two-year period authorized by the disciplinary regulations, Respondent requested the issuance of a complaint in accordance with 31 C.F.R. § 10.60. *See* 31 C.F.R. § 10.82(g) (2011). Complainant sent Respondent notice in a Supplemental Allegation Letter (dated March 25, 2013) of the additional allegations that could be included in any complaint issued under § 10.60 and allowed Respondent 14 days to respond. On April 15, 2013, Complainant issued a formal Complaint, instituting the above-captioned proceeding.[2]

When initially filed, the Complaint contained six separate counts of alleged disreputable conduct. Shortly after filing, however, Complainant made a motion to withdraw Counts 5 and 6 which this tribunal granted on May 14, 2013. The four remaining counts allege that Respondent engaged in disreputable conduct under 31 C.F.R. § 10.51 (2008 & 2011) based upon the revocation of his CPA license by the CBA (Count 1) and [redacted] (b)(3) / 26 USC 6103

[2] Pursuant to an inter-agency agreement, the Department of the Interior's Office of Hearings and Appeals ("OHA") has authorization to adjudicate cases pending before the United States Department of the Treasury.

(b)(3) / 26 USC 6103 (Counts 2 through 4). The Complaint seeks the sanction of disbarment from practice before the IRS.

As part of Respondent's Answer, he acknowledged that the CBA revoked his CPA license, but disagreed with the CBA's reasoning and noted that he was actively pursuing judicial review of the revocation decision. With respect (b)(3) / 26 USC 6103 counts, Respondent asserted in his Answer that he met the filing requirements for (b)(3) / 26 USC 6103 counts, Respondent denied that his actions were willful, citing his father's illness and the CBA's proceedings against him.

Complainant filed a timely Motion for Summary Adjudication which Respondent opposed. Based upon a review of the pleadings and the administrative record, this tribunal concluded that genuine issues of material fact existed which required an evidentiary hearing.

During the pendency of this case, Respondent separately pursued appeals in the State of California related to his license revocation by the CBA. He initially petitioned the California Superior Court for a writ of administrative mandamus which the court denied, concluding that the CBA's findings were supported by the weight of the evidence and that the license revocation was not an abuse of discretion. (b)(6) (2013). On September 27, 2013, the Fourth District of the California Court of Appeals affirmed, finding that the CBA had not abused its discretion by revoking Respondent's license. *Id.* at 355-58. On January 21, 2014, the California Supreme Court denied Respondent's request for review,[3] thereby concluding Respondent's judicial appeals related to the revocation of his CPA license by the State of California.

Two weeks later, on February 4 and 5, 2014, this tribunal held an evidentiary hearing. Complainant presented the testimony of three witnesses and entered

(b)(6)

thirteen exhibits into evidence designated as Exhibits A-M.[4] Respondent testified on his own behalf and entered one exhibit into evidence designated as Exhibit 8. The post-hearing briefing process closed on June 16, 2014, and the matter is now ripe for determination.

III. Principles of Law

Pursuant to 31 U.S.C. § 330, the Secretary of the Treasury may regulate the practice of representatives appearing before the Department of the Treasury and

> [a]fter 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;
> > (2) is disreputable;
> > (3) violates regulations prescribed under this section; or
> > (4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.

31 U.S.C. § 330(b); *see also* 31 C.F.R. § 10.50(a) (2008 & 2011).

Incompetent and disreputable conduct, for which a practitioner may be sanctioned, includes:

> (6) Willfully failing to make a Federal tax return in violation of the Federal tax laws . . . .
>
> . . . .
>
> (10) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant or actuary by any duly constituted authority of any State, territory, or possession of the United

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[4] The Complaint (Exhibit A) includes eleven attachments. Citation to those attachments shall be to Exhibit A, followed by a hyphen and then the attachment number along with any relevant page or paragraph number (e.g., A-1 at ¶ 1).

> States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.

31 C.F.R. § 10.51(a)(6) & (10) (2008 & 2011).

The key consideration in a disciplinary proceeding is the practitioner's fitness to practice. *See Harary v. Blumenthal*, 555 F.2d 1113, 1116 (2d Cir. 1997). "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." *Dir., Office of Prof'l Responsibility v. Ross*, Complaint No. 2011-01 at 7 (Order Granting Complainant's Motion for Summary Judgment, June 7, 2011). OPR's disciplinary proceedings serve the primary purpose of protecting the public interest and ensuring that the Department of the Treasury conducts business with responsible persons. *See Ross* at 7; *cf. In re Weinstein*, 459 P.2d 548 (Or. 1969), *cert. denied*, 398 U.S. 903 (1970) (involving attorney discipline).

Any sanction imposed during this process must "take into account all relevant facts and circumstances." 31 C.F.R. § 10.50(d) (2008), 31 C.F.R. § 10.50(e) (2011). Sanctions may include censure, suspension, or disbarment, and the standard of proof differs depending on the nature of the sanction. 31 C.F.R. §§ 10.76(b), 10.79 (2011). When the requested sanction is disbarment or a suspension in excess of six months, an allegation of fact must be "proven by clear and convincing evidence in the record." 31 C.F.R. § 10.76(b) (2011). The clear and convincing standard is an intermediate standard and has been defined as evidence "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established . . . as well, as evidence that proves the facts at issue to be 'highly probable.'" *Jimenez v. Daimler Chrysler Corp.*, 269 F.3d 439, 450 (4th Cir. 2001) (internal citations omitted); *see also Addington v. Texas*, 441 U.S. 418 (1979) (explaining that the clear and convincing evidence standard falls somewhere between proof by a preponderance of the evidence and proof beyond a reasonable doubt).

IV. Findings of Fact

The findings of fact that follow are based on a thorough review of the pleadings, exhibits, testimony, and the parties' arguments. Each exhibit received into evidence, although not perhaps specifically discussed, has been considered in rendering this Decision.

Jurisdiction and Respondent's CPA License

1. On February 2, 1990, the CBA issued a CPA license to Respondent (No. CPA 54698).[5] Ex. A at ¶ 4; Ex. B at ¶ 4; *see also* Ex. A-1 at ¶ 2.

2. Since issuance of his license in 1990, Respondent has experienced a number of lapses in the validity of his license to practice. More recently, Respondent had a valid license to practice between September 12, 2005, and July 31, 2007. His license to practice lapsed on July 31, 2007, and was renewed on January 31, 2008. Respondent's license lapsed again on July 31, 2009, and according to his Answer, was subsequently renewed in November of 2010.[6] Ex. A-1 at ¶ 2; Ex. B at ¶ 5; Ex. M at 26; Tr. 247, 308-10.

3. Respondent has engaged in past practice before the IRS as a CPA as defined by 31 C.F.R. § 10.2(a)(4). Ex. A at ¶¶ 1-2; Ex. B at ¶¶ 1-2.

4. The CBA revoked Respondent's CPA license effective March 14, 2011, and his license status remained "revoked" as of the date of the hearing. Ex. A-4; Tr. 50-51.

Count 1 (Revocation of Respondent's CPA License)

5. The CBA initiated its investigation of Respondent in March 2008 "to review his compliance with continuing education requirements and to obtain a description of his practice activities while his license was delinquent." Ex. A-1 at ¶ 4.

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[5] Respondent previously held a CPA license (b)(6) issued on January 30, 1981. That license expired on July 31, 1983, and was ultimately cancelled on August 1, 1988, for failure to renew within five years. Ex. A-1 at ¶ 3.

[6] Although the Proposed Decision discussing Respondent's license revocation indicated that Respondent's license was not renewed after it expired on July 31, 2009, it appears that the hearing record for the state proceeding closed on (b)(6) (b)(6). *See* Ex. A-1 at 1-2 (Introduction & ¶ 2); *see also* (b)(6) (b)(6) (indicating that the certified history of Respondent's CPA licensure contained in the record of the state proceeding went through August 9, 2010).

6. The initial accusations against Respondent alleged, among other things, that Respondent practiced and held himself out as a CPA without a valid license in September and October of 2007. (b)(6) [redacted]

7. In May of 2010, a former client filed a consumer complaint regarding Respondent with the CBA. Ex. A-1 at ¶ 11e.

8. The first amended accusations, filed on September 8, 2010, alleged eight causes for discipline, including that Respondent practiced and held himself out as a CPA without a valid license in September and October of 2007 and in February of 2010. Ex. A-1 at ¶ 1; *see also* (b)(6) [redacted]

9. On November 2, 2010, a state ALJ held a disciplinary hearing, attended by Respondent, to adjudicate the accusations. Ex. A-1 at 1; Ex. B at ¶ 7.

10. On December 2, 2010, the state ALJ issued a Proposed Decision finding cause to suspend or revoke Respondent's CPA license based upon six of the eight causes alleged. Specifically, the ALJ found that Respondent: (1) willfully practiced and held himself out as a CPA in September and October of 2007 and in February of 2010, when he failed to have a valid license; (2) knowingly and willfully submitted untrue statements to the Board; (3) knowingly and willfully practiced under the name of (b)(6) [redacted] which name was not registered with the CBA; (4) engaged in acts constituting dishonesty, fraud, gross negligence, or repeated negligent acts by misrepresenting his status as a CPA to client(s) and misrepresenting to a specific client that its 2008 federal tax return had been filed; (5) knowingly and willfully failed to respond to inquiries by the CBA; and (6) advertised or used other forms of solicitation which were false, fraudulent, misleading, or in violation of the California Business and Professions Code by using and advertising the unregistered name of (b)(6) [redacted] and holding himself out as a CPA. *See* Ex. A-1 at 7-8 (Legal Conclusions ¶¶ 1-9).

11. The ALJ's Proposed Decision ordered that Respondent's CPA license be revoked and that Respondent be required to reimburse the CBA a total of $14,001.77 for its investigation and prosecution costs. Ex. A-1 at 9 (Order).

12. The CBA adopted the Proposed Decision and ordered Respondent's CPA license revoked effective March 14, 2011. Ex. A-3; Ex. A-4; Ex. B at ¶ 9; Tr. 50-51.

13. Pursuant to 31 C.F.R. § 10.82 (2008), OPR issued a Decision by Default, suspending Respondent from practice before the IRS effective May 4, 2011, based upon the revocation of Respondent's CPA license by the CBA. Exs. A-5 to A-8; Ex. B at ¶ 15.

14. Respondent petitioned the California Superior Court for a writ of administrative mandamus. The Superior Court denied his petition, concluding that the CBA's findings were supported by the weight of the evidence and that the license revocation was not an abuse of discretion. *See* (b)(6) [redacted]

15. On (b)(6) [redacted], the Fourth District of the California Court of Appeals affirmed the California Superior Court, finding that the CBA had not abused its discretion by revoking Respondent's license. (b)(6) [redacted] (b)(6) [redacted]

16. On (b)(6) [redacted], the California Supreme Court denied Respondent's request for review. Tr. 243-44.

Count 2 (b)(3) / 26 USC 6103 [redacted]

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

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

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

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

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

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(b)(3) / 26 USC 6103

Count 3 (b)(3) / 26 USC 6103

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Count 4 (b)(3) / 26 USC 6103

(b)(3) / 26 USC 6103

[redacted]

Page Denied - (b)(3) / 26 USC 6103

[redacted]

V. Analysis

Based upon these findings of fact, and for the reasons set forth in detail below, Respondent has engaged in incompetent and disreputable conduct as defined by 31 C.F.R. § 10.51(a)(6) & (10) (2008 & 2011) for which he may be sanctioned.

A. Jurisdiction

Under 31 U.S.C. § 330(a)-(b), the Secretary of the Treasury has authority to "regulate the practice of representatives" before the Department, and may suspend or disbar a representative shown to be incompetent or disreputable. For purposes of OPR's disciplinary authority, jurisdiction exists if: (1) the practitioner is authorized to practice before the IRS and (2) the practitioner has in fact practiced before the IRS. *Dir., Office of Prof'l Responsibility v. Ohendalski*, Complaint No. 2007-10- at 3 (Decision on Appeal, June 2008). CPAs, who have not been suspended or disbarred from practice before the IRS, may engage in practice before the IRS. *See* 31 C.F.R. 10.3(b) (2008 & 2011). The regulations define a CPA as "any person who is duly qualified to practice as a certified public accountant in any state, territory, or possession of the United States . . ." 31 C.F.R. § 10.2(a)(2) (2008 & 2011).

When Respondent filed his Answer to the Complaint, he did not raise the issue of jurisdiction as an affirmative defense or otherwise deny the jurisdictional allegations pled in the Complaint. The first paragraph of the Complaint alleged that "Respondent has engaged in practice before the IRS, as defined by 31 C.F.R. § 10.2(a)(4), as a certified public accountant." Ex. A ¶ 1. Respondent neither admitted nor denied the allegation, but stated instead that: "Respondent has not engaged in practice before the IRS, as defined by C.F.R. sec. 10.2(a)(4) at any time after calendar year 2009." Ex. B at ¶ 1. By answering in this manner, Respondent conceded that he had engaged in practice as a CPA before the IRS prior to that date. In response to the second paragraph of the Complaint, he wrote: "Respondent accepts and stipulates to the disciplinary authority of the Secretary of the Treasury and the Office of Professional Responsibility." Ex. B at ¶ 2.

Pursuant to 31 C.F.R. § 10.64(b) (2011), Respondent had an obligation to specifically admit or deny each allegation set forth in the Complaint and to affirmatively state "any special matters of defense." To the extent that an allegation is not denied in the answer, it "is deemed admitted and will be considered proved;

no further evidence in respect of such allegation need be adduced at hearing." 31 C.F.R. § 10.64(c) (2011).

Despite the admissions in his Answer, Respondent completely reversed his position regarding jurisdiction in pleadings filed just days before the hearing. He continued to elaborate on those jurisdictional arguments during the hearing and as part of the post-hearing briefing process. Although his written submissions and arguments are not a model of clarity, Respondent appears to be making three distinct claims: (1) Complainant cannot prove that he ever practiced before the IRS because counsel did not introduce into evidence any tax returns signed by Respondent; (2) Complainant (and by extension this tribunal) lost jurisdiction over Respondent as a result of the lapses in the validity of his CPA license and later when the CBA revoked his license; and (3) Complainant cannot assert jurisdiction over Respondent as a tax-return preparer based upon the recent appellate court decision in *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).

With respect to the first argument, Complainant did not have an obligation to submit examples of signed tax returns (or other documentary evidence) in order to show practice before the IRS given that Respondent never specifically denied this allegation in the Complaint. As noted above, Respondent admitted to past practice before the IRS in his Answer by only denying that he practiced after "calendar year 2009." Ex. B at ¶ 1. At hearing, Respondent modified his position, stating that "after July 31st, 2007, there's nothing in the record that says I prepared a tax return and I know there's not because I didn't prepare any." Tr. 295-96; *see also* Tr. 77-79. Although much of Respondent's testimony focused on when he stopped practicing, the exact year when Respondent last prepared a tax return is irrelevant so long as he engaged in some past practice as a CPA before the IRS. By not denying that he had engaged in past practice when he filed his Answer, the allegation was deemed admitted, and Complainant had no obligation to proffer additional evidence on this point. *See* 31 C.F.R. § 10.64(c) (2011). To require the Complainant to offer evidentiary proof related to allegations admitted in the Answer, as advocated by Respondent, would abrogate the regulatory scheme and add unnecessary expense and delay to the hearing process.

As to Respondent's second claim, Respondent apparently believes if one accepts the CBA's findings that he practiced and held himself out as a CPA during periods when he failed to have a valid license, then the Complainant and this tribunal "lost" jurisdiction because he was not a CPA authorized to practice before

the IRS. Tr. 244-46. However, Respondent cannot evade jurisdiction under the circumstances presented herein.

As demonstrated by the record, California issued Respondent a CPA license on February 2, 1990, and the CBA did not revoke Respondent's license until March 14, 2011. Ex. A-4; Tr. 50-51. Although Respondent had a number of gaps in the validity of his license, Respondent apparently renewed or otherwise reinstated his license to practice after each lapse, including the most recent renewals which occurred in January of 2008 and again in November of 2010. Ex. A-1 at ¶ 2; Ex. B at ¶ 5; Ex. M at 26; Tr. 247, 308-10. The revocation of Respondent's CPA license for cause in March of 2011 triggered Complainant's authority to initiate discipline under the expedited suspension procedures at 31 C.F.R. § 10.82(b) (2008).

At hearing, Respondent focused on the lapse in validity of his CPA license that began on July 31, 2007, and argued that this marked the date when he became ineligible to practice. *See, e.g.*, Tr. 6, 17, 20, 67, 77, 241, 244, 285-88. In doing so, he ignored the two subsequent license renewals. *See* Ex. A-1 at ¶ 2; Ex. B at ¶ 5; Ex. M at 26; Tr. 247, 308-10. He also ignored the findings and conclusions of the state ALJ who adjudicated his license revocation. In the Proposed Decision (adopted by the CBA), the ALJ found that Respondent willfully practiced and held himself out as a CPA during two periods of license delinquency. The first lapse occurred between July 31, 2007, and January 31, 2008, followed by a period of renewal that lasted for about 18 months before his license expired again on July 31, 2009. Ex. A-1 at ¶ 2. The state ALJ found that Respondent willfully practiced and held himself out as a CPA during September and October of 2007 and also in February of 2010. Ex. A-1 at 7 (Legal Conclusion ¶ 1).

Although Respondent represented that his CPA license was renewed again in November of 2010, he implied at hearing that the CBA processed the renewal solely for the purpose of revoking his license. Ex. B at ¶ 5; Tr. 247. However, Respondent misunderstands California law which does not permit a licensee to avoid discipline by allowing his license to expire and specifically authorizes the initiation or continuation of disciplinary proceedings during any periods of time when a license could have been renewed, restored, reissued, or reinstated. *See* Cal. Bus. & Prof. Code § 118(b); Ex. A-1 at ¶ 2 (citing § 118(b)). In California, an expired license to practice can generally be renewed within five years of the expiration date. *See* Cal. Bus. & Prof. Code § 5070.6. Accordingly, the CBA retained jurisdiction to revoke Respondent's license during the time periods at issue. *See* Ex. A-1 at ¶ 2.

Likewise, Complainant did not "lose" jurisdiction over Respondent due to the lapses in the validity of his state CPA license or because he allowed his license to expire for a period of time during the pendency of the CBA's disciplinary process. The regulations governing practice before the IRS specifically allow for reciprocal discipline of practitioners based upon the suspension or revocation of a license by the state authority. *See* 31 C.F.R. §§ 10.51(a)(10), 10.82(b)(1) (2008). In addition, while not alleged as part of the pending Complaint, discipline has also been imposed against a practitioner who continued to hold himself out as a CPA after his license had been revoked. *See Dir., Office of Prof'l Responsibility v. Edgar*, Complaint No. 2013-00004 (Initial Decision and Order, Nov. 8, 2013), *aff'd* (Decision on Appeal, April 18, 2014) (imposing the sanction of disbarment based upon the revocation of the respondent's Massachusetts state CPA license and the false submission of two power of attorney forms indicating that he was a duly authorized CPA after the license revocation).

Finally, Respondent asserts that to the extent he performed work as a tax-return preparer (rather than as a CPA), he is no longer subject to Circular 230 based upon the recent appellate decision in *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014). That decision involved a challenge to the 2011 regulatory amendments to Circular 230 which imposed new rules on tax-return preparers, requiring that they register with the IRS by paying a fee, passing a qualifying exam, and completing continuing education courses. *Loving*, 742 F.3d at 1015. The Circuit Court upheld an injunction preventing the IRS from implementing various provisions of Circular 230 that regulate tax-return preparers, finding that the IRS's authority to regulate the practice of representatives of persons before the Department of the Treasury under 31 U.S.C. § 330 did not encompass the authority to regulate tax-return preparers. *Loving*, 742 F.3d at 1016-1022. While Respondent may perceive an advantage in re-defining his status in light of *Loving*, the CBA has already determined that he practiced and held himself out as a CPA. Consequently, the *Loving* decision does not impact OPR's assertion of jurisdictional authority over Respondent as a CPA who engaged in past practice before the IRS.

Therefore, under the circumstances presented herein, disciplinary jurisdiction over Respondent exists pursuant to 31 U.S.C. § 330 and 31 C.F.R. part 10 (Circular 230). This discussion will now turn to the underlying merits of the four counts set forth in the Complaint.

B. Count 1 (Revocation of Respondent's CPA License)

Even though Respondent expressed disagreement with the findings of the CBA, he does not deny that his CPA license was revoked on March 14, 2011. Tr. 50-51. Since then, Respondent's license revocation has been upheld by the California Superior Court and the Fourth District of the California Court of Appeals. *See* [redacted], [redacted (b)(6)]. On January 21, 2014, the California Supreme Court denied Respondent's request for review, thereby concluding Respondent's state judicial challenges. Tr. 243-44.

The revocation of Respondent's license by the duly constituted state authority constitutes disreputable conduct under 31 C.F.R. § 10.51(a)(10) (2008) by clear and convincing evidence for which Respondent may be sanctioned. *See also Dir., Office of Prof'l Responsibility v. Ross*, Complaint No. 2011-01 (Order Granting Complainant's Motion for Summary Judgment, June 7, 2011) (finding that suspension of a CPA certificate by the state board constituted disreputable conduct warranting discipline); *Dir., Office of Prof'l Responsibility v. Chistensen*, Complaint No. 2012-000005 at 10 (Decision and Order Regarding Sanction, July 23, 2013) (noting that the revocation of respondent's CPA licenses in Washington and Oregon provided clear and convincing evidence that respondent committed acts deemed incompetent and disreputable under Circular 230).

C. Counts 2-4 (Failure to [redacted (b)(3) / 26 USC 6103])

Counts 2 through 4 of the Complaint allege that Respondent engaged in [redacted (b)(3) / 26 USC 6103]

Respondent filed an untimely motion to dismiss these counts as "supplemental charges" that did not serve as a basis for his original expedited suspension from practice before the IRS. *See* Respondent's Motion to Withdraw Supplemental Charges, With Prejudice (filed January 27, 2014). This issue has previously been addressed as part of this tribunal's January 10, 2014, order denying summary adjudication, Ex. F at 7, and to the extent that Respondent's motion seeks reconsideration, his request is denied.

Respondent argues that Complainant did not comply with the proper procedures for adding these counts. In support, he points to 31 C.F.R. § 10.65 (2011) which regulates the procedure for adding charges after the filing of a complaint.

However, § 10.65 has no applicability because Complainant included these three counts as part of the original Complaint issued on April 15, 2013. Ex. A. Prior to issuing that Complaint, OPR detailed these charges in a Supplemental Allegation Letter dated March 25, 2013, and afforded Respondent 14 days to respond. *See* Ex. A-11; *see also* Ex. 8. In addition, on April 8, 2013 (prior to issuance of the Complaint) a teleconference occurred between Respondent and a representative of OPR. *Compare* Ex. A at ¶ 18 *with* Ex. B at ¶ 18. Although Respondent argues that the April 8, 2013, teleconference was limited in scope, the written notice (along with the opportunity to respond) provided by OPR adequately complied with 31 C.F.R. § 10.60(c) (2011) such that Counts 2 through 4 are properly before this tribunal for adjudication.

The obligation to make a Federal individual income tax return is triggered when an individual's gross income reaches a certain threshold level based upon factors such as the individual's age and filing status (e.g., single, married filing jointly, married filing separately). *See* 26 U.S.C. § 6012; *see, e.g.*, Ex. J at 3 (instructions for 2009). As defined by statute, "gross income" includes "all income from whatever source derived." 26 U.S.C. § 61(a). At hearing and in post-hearing submissions, Respondent argues that gross income is difficult to define and maintains that he cannot be held accountable for any failure to file absent a calculation of his tax liability for the years at issue, including a computation of the (b)(3) / 26 USC 6103 *See* Tr. 51-71; Respondent's Proposed Findings and Conclusions Reply Brief at unpaginated 11-12, 15-16 (filed May 14, 2014).

Whether a taxpayer has a duty to file an individual income tax return is a separate issue from whether or not taxes are owed. Tr. 70-71; *see also* Tr. 148-49. In

(b)(3) / 26 USC 6103

(b)(3) / 26 USC 6103

(b)(3) / 26 USC 6103

(b)(3) / 26 USC 6103

When considering whether Respondent's failures were willful, case law has defined that term as "a voluntary, intentional violation of a known duty." See *Dir., Office of Prof'l Responsibility v. Ashley*, Complaint No. 2013-00003 at 5 (Decision and Order of Disbarment, Sept. 9, 2013) (citing *Cheek v. United States*, 498 U.S. 192, 201 (1991)).

(b)(3) / 26 USC 6103

By way of defense, Respondent asserts that he did not act willfully due to the

(b)(3) / 26 USC 6103

though he prepared unsigned drafts that became part of the record. *See* Tr. 80-83, 87-88; *see also* Ex. L. Thus, his personal circumstances do not mitigate the willfulness of his actions. *See, e.g., Dir., Office of Prof'l Responsibility v. Petrillo*, Complaint No. 2009-21 at 8-9 (Order Granting Complainant's Motion for Summary Judgment, Nov. 16, 2010), *aff'd* (Decision on Appeal, April 22, 2011) (upholding a summary adjudication on the question of willfulness when claimed medical, financial, marital, and other personal difficulties did not prevent a taxpayer from representing clients, preparing other returns, and carrying on numerous other activities during the time periods in question).

Accordingly, the record demonstrates by clear and convincing evidence that [redacted] (b)(3) / 26 USC 6103 [redacted], deadline given that his suspension before the IRS became effective on May 4, 2011. However, for purposes of this Decision and the sanction imposed [redacted] (b)(3) / 26 USC 6103 [redacted] constitutes disreputable conduct under 31 C.F.R. § 10.51(a)(6) (2008) for which Respondent may be sanctioned.

VI. Appropriate Sanction

Respondent's license revocation and his pattern [redacted] (b)(3) / 26 USC 6103 demonstrate, by clear and convincing evidence, a lack of fitness to practice. As part of the CPA license revocation decision, which has been upheld on appeal, the state ALJ identified six separate bases for imposing discipline. In addition to concluding that Respondent willfully practiced and held himself out as a CPA when he failed to have a valid license, the ALJ's Proposed Decision also made findings directed at Respondent's honesty in dealings with the CBA and his clients.

Specifically, the ALJ found that Respondent "knowingly and willfully submitted untrue statements to the Board," misrepresented his status as a CPA to client(s), and misrepresented to a particular client that its 2008 Federal tax return had been filed. *See* Ex. A-1 at 7-8 (Conclusions of Law at ¶¶ 4, 6); *see also* [redacted] (b)(6) Honesty and truthfulness are critical to fitness for practice before the IRS. As explained by Karen Hawkins, the director of OPR, the

misrepresentation of credentials can mislead clients about an individual's ability and level of practice before the agency and can put the IRS in the position of sharing confidential taxpayer information with an individual that may not be entitled to receive that information. Tr. 219.

Although California allows a person whose license has been revoked to petition for reinstatement one year after the date of the decision (unless a longer period has been specified by the CBA), reinstatement is not automatic. *See* Cal. Bus. & Prof. Code § 5115; *see* [redacted] (b)(6) (citing § 5115). The record in this proceeding indicates that Respondent's license status remained "revoked" at the time of hearing. Tr. 50-51.

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

lengthy suspension or disbarment, especially when combined with other misconduct. *See, e.g., Dir., Office of Prof'l Responsibility v. Ohendalski*, Complaint No. 2007-10 (Decision on Appeal, June 2008) (imposing suspension of 48 months for [redacted] (b)(3) / 26 USC 6103 *Dir., Office of Prof'l Responsibility v. Coston*, Complaint No. 2010-19 (Decision on Appeal, Oct. 14, 2011) (imposing disbarment for [redacted] (b)(3) / 26 USC 6103 counts of failing to respond to OPR's inquiries); *Dir., Office of Prof'l Responsibility v. Barr*, Complaint No. 2009-09 (Decision on Appeal, June 16, 2011) (imposing [redacted] (b)(3) / 26 USC 6103

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

troubling for a tax practitioner. Respondent's lack of respect for the tax laws is

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

The Complainant has requested the sanction of disbarment from practice before the IRS. While serious, Respondent's acts of misconduct (and the pertinent aggravating factors) warrant a suspension from practice for a period of forty-eight (48) months. *See* 31 C.F.R. § 10.79 (2011) (describing suspensions). Under the circumstances, the period of suspension runs from the effective date of Respondent's expedited suspension. *See Dir., Office of Prof'l Responsibility v. Chistensen*, Complaint No. 2012-000005 at 12 n.8 (Decision and Order Regarding Sanction, July 23, 2013) (explaining that disbarment would run from the date of the expedited suspension). Any reinstatement after the period of suspension is properly conditioned on [redacted] (b)(3) / 26 USC 6103 [redacted] otherwise becoming authorized to practice.

VII. Conclusions of Law

The following conclusions of law are based upon proof established by clear and convincing evidence:

1. At all times material hereto, Respondent was subject to the disciplinary authority of the Secretary of the Treasury and OPR in accordance with 31 U.S.C. § 330 and 31 C.F.R. part 10 (Circular 230).

2. Respondent engaged in incompetent and disreputable conduct within the meaning of 31 C.F.R. § 10.51(a)(10) (2008) based upon the revocation of his California CPA license.

3. Respondent engaged in incompetent and disreputable conduct within the [redacted] (b)(3) / 26 USC 6103 [redacted]

4. The proper sanction for Respondent's conduct is a suspension of forty-eight (48) months, with reinstatement after the period of suspension conditioned on [redacted] (b)(3) / 26 USC 6103 [redacted] otherwise becoming authorized to practice.

VIII. Order

Based upon the foregoing findings of fact and conclusions of law, Respondent is suspended from practice before the IRS for a period of forty-eight (48) months. Any reinstatement to practice after the period of suspension is conditioned on [redacted] (b)(3) / 26 USC 6103 otherwise becoming authorized to practice.

Harvey C. Sweitzer
Administrative Law Judge

Dated: September 22, 2014,
Salt Lake City, Utah

Pursuant to 31 C.F.R. § 10.77, this Decision 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 Notice of Appeal must be filed in duplicate with the Director, Office of Professional Responsibility, 1111 Constitution Ave. NW, SE:OPR 7238IR, Washington D.C. 20224, and shall include a brief that states the party's exceptions to this Decision and supporting reasons for any exceptions.

See page 24 for distribution.

Appendix: List of Witnesses and Exhibits Received

Complainant's Witnesses:

[redacted], Respondent
Michael Green
Karen L. Hawkins

Complainant's Exhibits:

A. Complaint (with 11 attachments)
B. Answer
C. Complainant's Motion for Summary Adjudication
D. Respondent's Reply to Complainant's Request for Summary Judgment Motion
E. Complainant's Reply to Respondent's Opposition
F. Motion for Summary Adjudication Denied; Genuine Issues of Material Fact Remain for Hearing

[redacted] (b)(3) / 26 USC 6103 - All redactions on this pg. [redacted]

J. IRS Publication 501: Exemptions, Standard Deduction, and Filing Information for [redacted]
K. IRS Publication 501: Exemptions, Standard Deducti[redacted] and Filing Information for [redacted]
L. Draft (unfiled) returns prepared by Respondent for [redacted]
M. Deposition of Respondent

Respondent's Witnesses:

[redacted], Respondent

Respondent's Exhibits:

8. Records of Communications with Keith Ott

Certificate of Service

I hereby certify that I have served the foregoing Order titled ***Decision and Order*** (Complaint No. IRS 2013-00007) upon the following parties to this proceeding at the fax numbers and addresses indicated below:

By Fax and Certified Mail:

Timothy E. Heinlein, Esq.
Senior Counsel
Office of Chief Counsel
Internal Revenue Service
100 First Street, Suite 1800
San Francisco, California 94105
(Counsel for Complainant)
Fax: 213-894-0774

[redacted]
[redacted]
(b)(3) / 26 USC 6103, (b)(6) [redacted]
(Respondent)
Fax: (b)(6) [redacted]

Dated: September 22, 2014,
at Salt Lake City, Utah.

Brooke Gordon
Legal Assistant