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

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,	)	
Complainant,	)	
v.	)	**Complaint No. 2009-09**
(b)(3)/26 USC 6103,	)	
Respondent.	)	

DECISION AND ORDER ON DEFAULT

A Complaint, dated February 25, 2010, was issued by Bridgette M. Gibson, Area Counsel, GLS (General Legal Services) Dallas, and James M. Donovan, Jr., Senior Counsel, Office of Chief Counsel, on behalf of Karen Hawkins in her official capacity as Director of the Office of Professional Responsibility ("OPR"), United States Department of the Treasury, Internal Revenue Service ("IRS"), pursuant to 31 C.F.R. § 10.60 and the authority of 31 U.S.C. § 330 ("Complaint").[1] The Complaint charges Respondent, a certified public accountant, with disreputable conduct under 31 C.F.R. § 10.51 sufficient to warrant suspension from practice before the IRS for forty-eight (48) months. Specifically, the Complaint alleges in six counts that Respondent (b)(3)/26 USC 6103 (b)(3)/26 USC 6103. The Rules Applicable to Disciplinary proceeding regarding Practice Before the Internal Revenue Service at 31 C.F.C. Part 10 ("Rules") apply to this proceeding.[2]

[1] 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)(l)," 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)(1). Complainant has established that James M. Donovan, Jr., is a "designated representative of the Director." Complaint ("Compl") at 2.

[2] The Rules are published in Treasury Department Circular 230 (www.irs.gov). For the Rules applicable to violations occurring before July 26, 2002, see Circular No. 230 (7-94); for those occurring thereafter but before September 26, 2007, see Circular No. 230 (7-2002); and for those occurring thereafter, see Circular No. 230 (4-2008). See, 31 C.F.R. § 10.91 (2007) (practitioners "will be judged by the regulations in effect at the time the conduct occurred.")

On February 26, 2010, the Complaint was sent to Respondent via certified mail, return receipt requested, at Respondent's last known address of record with the IRS, Address Redacted, (b)(3)/26 USC 6103. See, Certificate of Service attached to the Complaint; Compl. ¶ 3. When the certified mailing was returned to Complaint as unclaimed, Complaint sent the Complaint to Respondent via regular U.S. mail on March 25, 2010, and again on May 5, 2010. See declaration of James M. Donovan, Jr.; Exhibits 2 and 3 attached to Complaint's Motion for a Decision by Default. According to the Rules, service of a complaint by certified mail is proven by the "returned post office receipt duly signed by the respondent." 31 C.F.R. § 10.63(a)(2)(I). The Rules also provide that if the certified mail is not claimed or returned undelivered, "service may be made on the respondent, by mailing the complaint to the respondent by first class mail" and "[s]ervice by the method will be considered complete upon mailing." 31 C.F.R. § 10.63(a)(2)(ii). Complainant served Respondent via first class mail in the manner in which the Rules Direct.

The Rules required that in the Complaint or an accompanying document, OPR must "notify the respondent of the time for answering the complaint," 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). 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*.

The Complaint stated in part:

> Pursuant to 31 C.F.R. § 10.62, Respondent's answer to this complaint must be filed with the Honorable Susan L. Biro, Chief Administrative Law Judge, Office of Administrative Law Judges, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, DC 20460, and a copy served on James M. Donovan, 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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> * * *
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> Failure to file an answer to the complaint may result in a decision by default being rendered against Respondent.

Compl. at 1-2. Service of the Complaint on Respondent was complete upon mailing it via regular mail on May 5, 2010. To date, no answer to the Complaint has been filed with the undersigned.

On May 25, 2010, Complainant's Motion for a Decision by default ("Motion") was filed, wherein Complainant seeks a decision by default against Respondent for his failure to answer the allegations in the Complaint, and an order suspending Respondent for forty-eight (48) months. A copy thereof was served on Respondent by certified mail

on May 19, 2010. See, Certificated [sic] of Service attached to Motion. The Rules provide that a nonmoving party may oppose a motion for default judgment "within 30 days of the filing of a motion for decision by default for failure to file a timely answer" 31 C.F.R. § 10.66(b). To date, respondent has not filed a Response to the Motion, and therefore, is deemed not to oppose the Motion.

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, May 5, 2010, is Junes 4, 2010. 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. Thus, a decision by default may be entered against Respondent.

Without further procedure, pursuant to 31 C.F.R. § 10.64(d), Complainant's Motion for a Decision by Default is granted in part, and 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 at 31 C.F.R. Part 10. Redacted – Unpublished ALJ Opinion (Order granting respondent's motion for summary disposition after finding the complaint barred by Section 2462*)*; Redacted – unpublished ALJ 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 1461. 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.

Disbarment or suspension of a professional license has been held to be a "penalty" within the meaning of Section 2462. *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 a "penalty" encompassed by Section 2462). *See also, 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 "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 (b)(3)/26 USC 6103 . In Count 2, Complainant alleges that Respondent (b)(3)/26 USC 6103 . In Count 3, Complainant alleges that Respondent (b)(3)/26 USC 6103 Because the Complaint was filed on February 26, 2010, all claims in the Complaint that accrued before February 26, 2005, in accordance with the five-year statute of limitations in Section 2462, are barred. Therefore, Counts 1, 2 and 3, having first accrued no later than on (b)(3)/26 USC 6103, (b)(3)/26 USC 6103, and (b)(3)/26 USC 6103, respectively, 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(b) as a certified public accountant. Compl. ¶1; 31 C.F.R. § 10.2(a)(2).

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 .

5. (b)(3)/26 USC 6103

6. (b)(3)/26 USC 6103

7. (b)(3)/26 USC 6103

Discussion and Conclusions

Respondent as a certified public accountant engaged in practice before the IRS, is imbrued with a far greater awareness of tax law, IRS rules, tax policy, and other related matters than the average person. As such, at all times relevant hereto, he (b)(3)/26 USC 6103 . Indeed, the record shows that Respondent, (b)(3)/26 USC 6103 . Thus, (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).

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, refuses to comply with any regulation in 31 C.F.R. Part 10, or, with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. 31 U.S.C. § 330(b); 31 C.F.R. § 10.50(a).

As to alleged incompetence and 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 ....

31 C.F.R. § 10.51(f) (Rev. 2005), Circular No. 230 (7-2002).

[redacted] (b)(3)/26 USC 6103 [redacted]. Findings of Fact 4, 5 and 6 support the conclusion that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. [redacted] (b)(3)/26 USC 6103. Respondent is therefore subject to discipline under the Rules, and may be sanctioned for incompetence and disreputable conduct.

In the Complaint, Complainant requests that Respondent be suspended from practice before the IRS for a period of forty-eight (48) months. 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 a 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. [redacted] as a certified public accountant practicing before the IRS, reflected in [redacted], shows a disregard for the standards established for the benefit of the IRS and the public.

Complainant seeks an order suspending Respondent for forty-eight (48) months. That request was predicated upon Complaint's allegations of six counts of disreputable conduct against Respondent, three of which have herein been found barred by the statute of limitations in 28 U.S.C. § 2462. Respondent's liability for [redacted]

ORDER

It is hereby **ORDERED** that Respondent [redacted], be **suspended indefinitely** 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[3]

Dated: June 28, 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.

[3] 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.