UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,	)	
Complainant	)	
v.	)	**Complaint No. 2009-21**
(b)(3)/26 USC 6103 **,**	)	
Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

I. Factual and Procedural Background

On June 29, 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 Governing the Practice of Attorneys before the IRS, codified at 31 C.F.R. Part 10 ("Rules").[1]

The Complaint alleges that Respondent is an attorney engaged in practice before the IRS (as defined by 31 C.F.R. § 10.2(a)(4) and sets forth thirteen (13) counts of violation against him. Specifically, the Complaint alleges that Respondent (b)(3)/26 USC 6103 The Complaint alleges further that (b)(3)/26 USC 6103

[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.

[2] Odd numbered counts from 1 to 13 are for (b)(3)/26 USC 6103 . Even numbered counts from 2 to 12 are for (b)(3)/26 USC 6103 .

(b)(3)/26 USC 6103 and constitutes disreputable conduct, as defined by 31 C.F.R. § 10.51.[3] As sanction therefor, the Complaint seeks to have Respondent disbarred from practice before the IRS pursuant to 31 C.F.R. §§ 10.50 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 (b)(3)/26 USC 6103 .

On July 30, 2010, Respondent, through his attorney, filed his Answer to the Complaint. Respondent's Answer did not deny the allegations in the Complaint (b)(3)/26 USC 6103 . However, the Answer did assert that "(b)(3)/26 USC 6103 ; but rather due to medical, factual and financial circumstances beyond the control of respondent." Answer ("Ans."), ¶¶ 6, 9, 12, 15, 18, 21, 24, 27, 30, 33, 36, 39 and 42.

A Prehearing Order was issued August 2, 2010, requiring each party to submit a Prehearing Memorandum by a certain date. Pursuant to the Prehearing Order, Complainant filed a Prehearing Memorandum on August 24, 2010.[4] However, Respondent failed to file his Prehearing Memorandum by the date specified in the Prehearing Order. Thus, on August 31, 2010, the undersigned issued an Order to Show Cause to Respondent regarding his failure and inquiring why a default judgment should not be entered against him. On September 7, 2010, Respondent responded to this Tribunal's Order to Show Cause, noting that his counsel's office had mishandled the Preheating Order and failed to properly calendar it. Respondent then filed his Prehearing Memorandum on September 21, 2010.

On August 27, 2010, Complainant filed a Motion to Depose Respondent and Extend Summary Judgment Deadline. That Motion was granted by an Order issued September 15, 2010 and the deposition was held on September 28, 2010. In September 2010, the parties also filed a set of Joint Stipulated Facts, Exhibits & Testimony. Subsequently, due to the unavailability of its only witness, Complainant filed on September 27, 2010, an Unopposed Motion for Continuance, which was also granted by an Order of this Tribunal, changing the hearing date from October 26, 2010, to November 30, 2010.

On October 7, 2010, Complainant filed a Motion for Summary Judgment ("Motion" or "Mot"). Respondent filed a response to the Motion for Summary Judgment on October 12, 2010.

II. Standards for Summary Adjudication

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

[3] The pertinent paragraph of 31 C.F.R. was previously codified as (b)(3)/26 USC 6103, which is cited in Counts 1 and 2, and Same, which is cited in Counts 3 through 12. The pertinent paragraph is currently codified as Same, which is cited in Count 13.

[4] Complainant's counsel originally believed that the term "filed," as used in this Tribunal's Prehearing Order, meant the date when the document is placed in the mail. The undersigned's staff attorney has communicated with Complaint's attorney to clarify that, as used in this Tribunal's Prehearing Order, the term "filed" means the date when the document is received by this Tribunal.

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 PRCP 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 tria1." 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 the 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* l0A 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. Relevant Statutes, Regulations and Standards

At all times relevant hereto, Section 330(b) of Title 31 of the United States Code has provided that -

> After notice and opportunity for a proceeding, the Secretary [of the Treasury] may suspend or disbar from practice before the Department [] a representative who-
>
> * * *
>
> (2) is disreputable[.]

31 U.S.C. § 330(b) (2). See also, 31 C.F.R. § 10.50 (2001, 2002) ("Pursuant to 31 U.S.C. 330(b), the Secretary of the Treasury after notice and an opportunity for a proceeding, may suspend or disbar any practitioner from practice before the Internal Revenue Service. The Secretary may take such action against any practitioner who is shown to be incompetent or disreputable ...); 31 C.F.R. § 10.50(a) (2003-2007) (The Secretary of the Treasury, or his or her 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 ...); 31 C.F.R. § 10.50(a) (2008) (" 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) .... ").

The term "disreputable" is not defined in the statute, however examples of disreputable conduct are included in the set of regulations promulgated in connection therewith, known as "Circular 230," set forth at 31 C.F.R. Part 10 (§§ 10.0-10.93). Such regulations, initially enacted in 1936, have been amended from time to time. In regard to the violations set forth in Counts 1 and 2 as to (b)(3)/26 USC 6103, the definition of disreputable conduct in the version of Circular No. 230 in effect from June 20, 1994 until July 25, 2002 applies (hereinafter referred to as the "1994 Regulations"). See, 59 Fed. Reg. 31523-29 (June 20, 1994). As to the violations set forth in Counts 3-12 pertaining to (b)(3)/26 USC 6103, the definition in the regulations in effect for the period July 26, 2002 until September 25, 2007 applies (hereinafter referred to as the "2002 Regulations"). *See*, 67 Fed. Reg. 48760-80 (July 26, 2002). In regard to the [redacted] (b)(3)/26 USC 6103 violation set out in Count 13, the definition in the regulations effective beginning September 26, 2007 applies (hereinafter referred to as the "2007 Regulations"). See, 72 Fed. Reg. 54540-55 (Sept. 26, 2007).

In the 1994 Regulations, Section 10.51 thereof provides in pertinent part that:

> Disreputable conduct for which an attorney ... may be disbarred or suspended from practice before the Internal Revenue Service includes, but is not limited to:
>
> * * *
>
> (d) Willfully failing to make [sic] Federal tax return in violation of the revenue laws of the United States, or evading, attempting to evade, or participating in any way in evading or attempting to evade any Federal tax or payment thereof ... or concealing assets of himself or another to evade Federal taxes or payment thereof;

31 C.F.R. § 10.51(d) (1994).

In the 2002 Regulations, the subsection above (10.51(d)) was reordered as 10.51(f) and revised to provide in pertinent part as follows:

> (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) (2003).

In the 2007 Regulations, subsection 10.51(f) was recast as 10.51(a) (6) and revised to read as follows:

> (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) (2007).

Thus, at all times relevant hereto, disreputable conduct included (b)(3)/26 USC 6103 .

In determining the penalty for engaging in disreputable conduct, the regulations currently provide that "[t]he sanction imposed ... shall take into account *all relevant facts and circumstances*." 31 C.F.R. § 10.50(d)(2010) (italics added). The regulations, however, do not provide any guidance as to what facts and circumstances are relevant or any standards for determining when it would be appropriate to impose one particular sanction (censure, suspension or disbarment) rather than another.

Finally, as to the standard of proof required in disciplinary cases, the applicable regulation states in pertinent part that—

> If the sanction is a monetary penalty, disbarment or a suspension of six months or longer duration, an allegation of fact that is necessary for a finding against the practitioner must be proven by clear and convincing evidence in the record.

31 C.F.R. § 10.76 (2010).

IV. Complainant's Summary Judgment Motion

Complainant asserts that Respondent has engaged in disreputable conduct, as a matter of law, because there are no genuine issues of material fact regarding (b)(3)/26 USC 6103 (b)(3)/26 USC 6103 . Mot. at 1. Complainant further asserts that there is no genuine issue of material fact as to disbarment being the appropriate legal remedy. Mot. at 20.

In support thereof, Complainant cites to and attaches to its Motion (b)(3)/26 USC 6103 , noting that Respondent has admitted to the alleged violations shown therein in his Answer. Mot., Attachment 2; Mot. at 1. (b)(3)/26 USC 6103 reflect (a) that (b)(3)/26 USC 6103 (Mot., Attachment 2, pp. 2-13); (b) that, (b)(3)/26 USC 6103 (Mot., Attachment 2, pp. 14-15); and (c) that Respondent (b)(3)/26 USC 6103 (Mot., Attachment 2, pp. 2-13). Respondent admitted the information reflected (b)(3)/26 USC 6103 in his Answer to the Complaint. *See*, Ans. ¶¶ 5, 11, 17, 23, 29, 35 (as to (b)(3)/26 USC 6103), Ans. ¶ 41 (as to (b)(3)/26 USC 6103), and Ans. ¶¶ 8, 14, 20, 26, 32, 38 (as to (b)(3)/26 USC 6103).

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

Additionally, for purposes of the Summary Judgment Motion, Complainant states that it is not disputing the existence or seriousness of the circumstances or illnesses alleged by Respondent in his Answer. Mot. at 4. However, Complainant asserts that, despite Respondent's divorce and illnesses, numerous facts elicited from Respondent's deposition testimony prove that Respondent's [redacted] These include: Respondent's acknowledgment that there was never a time when he was not capable of and did not in fact prepare tax returns for family and friends (Depo., at 14: 16-18); Respondent's admission that [redacted] he prepared tax returns for other people and/or performed legal work for clients (*Id.*, at 19: 16-20: 1,27:5-12,60:8-61: 1,68:7-14, 79:3-11, 82:20-83:2, 86:2-10); and Respondent's current paid and volunteer legal work, including a $4,000 per month retainer (*Id*., at 5:12-6:20, 8:9-9:6, 9:9-15). Further, during the period [redacted] as alleged in the Complaint, Respondent paid for the following significant expenditures: tuition, books, room and board for his two daughters to attend college and a technical school (*Id*., at 21:3-17, 22:3-15,22:21-24:2); cars and automobile insurance for his three children (*Id*., at 22:21-23:6, 65:12-67:9); a Yamaha motor scooter (*Id.*, at 105:6-21); and a 2001 BMW convertible car (*Id*., at 105:22-106:4). "Furthermore, in the Fall of 2003 - during the time period Respondent claims to have been the most incapacitated - he contracted to build a new house and purchased the house when it was completed." Mot. at 5, citing Depo., at 58: 15- 59: 19. Respondent also, during this period, provided funds to help a friend buy a sport utility vehicle. Depo., at 108:3-11. "All of these facts show an ongoing pattern of Respondent preferring to spend money on things that would give him personal satisfaction, [redacted]." Mot. at 16. Complainant argues that [redacted] constitute "disreputable conduct" under 31 C.F.R. § 10.51.

Furthermore, acknowledging that the applicable regulations do not specifically define what it meant by [redacted] Complainant nevertheless construes [redacted] under 31 C.F.R. § 10.51. Mot. at 14. In support thereof, Complainant quotes a [redacted] and cites several Federal Circuit Court decisions involving [redacted]. Complainant argues that "because Respondent [redacted]" Mot. at 16.

As to sanction, Complainant requests that Respondent be disbarred from practicing before the IRS, asserting that a hearing is unnecessary to impose this sanction. In support thereof, Complainant makes the following arguments: "The Director of OPR is the official with responsibility for regulating practice before the IRS; therefore, her proposed sanction is entitled to deference." Mot. at 17. [redacted] *Id.* Respondent's alleged medical and financial problems in 2003 do not merit mitigation of the sanction, as the violations occurred over a much broader time period. Many persons experience divorce or other emotionally distressing experiences, yet are still [redacted]. *Id*., at 18. Allowing tax practitioners to [redacted] without appropriate sanctions could set an example that could undermine the [redacted] tax practitioners [redacted]. *Id*. "Surely the IRS cannot be expected to retain the faith of the taxpaying public in its integrity if those who are allowed to practice before it [redacted]

(b)(3)/26 USC 6103 ..... In order to adequately remedy Respondent's disreputable conduct, and sufficiently discourage others from similar disreputable conduct, permanent disbarment is warranted." *Id.*, at 19.

Complainant buttresses its position as to the sanction by citing several cases that either imposed disbarment, or found that disbarment would be appropriate, (b)(3)/26 USC 6103 . *See, Hubbard v. United States*, 545 F. Supp.2d 1 (D.D.C. 2008) (IRS practitioner disbarred for failure to file both individual and business tax returns for four years); *Dir.*, OPR *v.* (b)(3)/26 USC 6103, IRS Complaint No. 2008-03. http://www.irs.gov/taxpros/actuaries/article/0,,id=183923,00.html (Decision on Appeal, Apr. 10, 2009) (practitioner disbarred (b)(3)/26 USC 6103 "When confronted by (b)(3)/26 USC 6103 I have uniformly imposed a sanction of disbarment."); Dir., OPR *v.* Same, IRS Complaint No. 2008-19, http://www.irs.gov/taxpros/actuaries/article/0,,id=183923,00.html (Decision on Appeal, May 26, 2010)((b)(3)/26 USC 6103 supported disbarment, but Appellate Authority deferred to OPR's requested sanction of 48-month suspension); *Dir .*, *OPR v.* (b)(3)/26 USC 6103, IRS Complaint No. 2008-12, http://www.irs.gov/taxpros/actuaries/article/0,,id=183923,00.html (Decision on Appeal, Jan. 20, 2010)(found that (b)(3)/26 USC 6103 warranted disbarment, but deferred to OPR's requested sanction of 48-month suspension).

"In addition, this is not (b)(3)/26 USC 6103 ," Complainant asserts. "He was previously suspended from January 1993 to September 1997 because of violation of 31 C.F.R. (b)(3)/26 USC 6103." Mot., at 17-18, citing Depo., 95: 15-96:4.

IV. Respondent's Response to Complainant's Motion

On October 12, 2010, Respondent filed a brief three page Response to Complainant's Summary Judgment Motion ("Response" or "Resp.") in which he makes the following arguments:

First, "Respondent contends that a genuine dispute exists with respect to the characterization and impact of the referenced medical and personal events, and resulting psychological impact on the specific individual in this case. Each individual has a particular and unique response to a trying condition or period and/or series of negative events. Further, the ability to manage others[']business and financial affairs does not necessarily comport with or reflect the ability to handle one's own similar affairs - especially in the midst of protracted trying events." Resp. at 1. Respondent suggests that "[t]he trier of fact should be allowed to observe and examine the testimony of the respondent and his witnesses in furtherance of the impact of the referenced disabilities on the alleged (b)(3)/26 USC 6103 ... and whether Respondent (b)(3)/26 USC 6103 ." Resp. at 2.

Second, "even though Respondent would ostensibly have (b)(3)/26 USC 6103 an attractive and significantly (b)(3)/26 USC 6103 of the period of disability, Respondent chose to wait until he was fully on his financial feet (b)(3)/26 USC 6103 ." *Id.*

Third, Respondent asserts that disbarment is overly punitive. Respondent cites *Dir., OPR v.* [redacted], IRS Complaint No. 2007-28, http://www.irs.gov/taxpros/actuaries/article/0,,id=183923,00.html (ALJ, June 2008)(Decision Granting Complainant's Motion for Summary Judgment), *appeal dismissed*, http://www.irs.gov/taxpros/actuaries/article/0,,id=183923,00.html (Decision on Appeal, Dec. 9, 2009), where a penalty of only 36 months suspension was imposed for [redacted], even though respondent [redacted] was otherwise engaged in her own tax practice. Resp. at 3.

In sum, Respondent argues that a live fact-finding hearing is necessary to correct mischaracterizations of Respondent's personal difficulties and the issue of [redacted].

V. Discussion

A. [redacted]

It is undisputed in this case that Respondent [redacted]. See. Mot. Attachment 2. pp. 2-13. Ans. ¶¶ 5, 11, 17, 23, 29, 35; and Stips. Nos. 5, 9, 13, 17, 21, 25 (indicating Respondent [redacted]. Untimely filing a Federal income tax return has been held to constitute "failing to make a Federal tax return in violation of the revenue laws of the United States." *Owrutsky v. Brady*, No. 89-2402. 1991 U.S. App. LEXIS 2613 (4th Cir. 1991)(italics added). Further, the record unequivocally establishes that Respondent [redacted]. *See*, Mot. Attachment 2, pp. 14-15, Ans.¶ 41, Stip No. 27. Thus, [redacted], as applicable. As a result the only open question is whether there is a genuine issue of material fact as to whether [redacted] as required by 10 C.F.R. § 10.51.

According to case law, "willfully" means "a voluntary, intentional violation of a known legal duty." 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)," *Director*, OPR *v.* [redacted], C.P.A., IRS Complaint No. 2006-23, http://www.irs.gov/taxpros/actuaries/article/0,,id=183923,00.html (Decision on Appeal,. May 14. 2008). In this case, Respondent does not dispute that [redacted], but he does suggest that [redacted], on the basis of his personal circumstances, specifically arising from his divorce and health conditions.[6] Resp. at 2. However, the general rule of law is that, to be excused from liability for tax failures, 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 that an illness qualifies as "reasonable cause" for failure to file, "the illness must be present at the time the

[6] In his Response, Respondent's arguments regarding [redacted] are all directed towards [redacted], but the Tribunal reads them to the extent applicable as directed to [redacted].

return is customarily prepared and must be of such a degree as to render the taxpayer physically or mentally incapable of preparing a return or conducting any business activity and the taxpayer must not conduct other business."); *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.* (b)(3)/26 USC 6103, IRS Complaint No. 2009-26, http://www.irs.gov/taxpros/actuaries/articlel/0,,id=183923,00.html (Decision on Appeal, May 28, 2010)(where respondent prepared returns for other taxpayers, (b)(3)/26 USC 6103).

As pointed out in Complainant's Motion, despite Respondent's divorce and illnesses, it is undisputed that (b)(3)/26 USC 6103 Respondent was gainfully employed preparing tax returns for other people and representing clients in legal matters, and made decisions and contractual arrangements regarding a variety of expensive purchases, including a house and several automobiles. Further, the record shows that, during this time, (b)(3)/26 USC 6103 Depo., pp. 4-9. Even taking Respondent's assertions regard his personal circumstances as true, they would not support a finding that Respondent (b)(3)/26 USC 6103. Rather, the evidence clearly and convincingly establishes that there is no genuine issue of fact as to whether Respondent was mentally and/or physically capable (b)(3)/26 USC 6103 He clearly was.[7] Thus, (b)(3)/26 USC 6103 On such basis, Respondent is hereby found to have engaged in disreputable conduct under 10 C.F.R. 10.50, as defined by 10 C.F.R. § 10.51and as alleged in Counts 1, 3, 5, 7, 9, 11, and 13.

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

Complainant's Motion fails to cite any controlling authority defining what constitutes (b)(3)/26 USC 6103 within the specific context of a professional disciplinary action brought under 31 C.F.R. § 10.51. Rather, the cases cited therein interpret 26 U.S.C. § 6672, a tax provision authorizing imposition of a civil penalty on an employer who "willfully attempts in any manner to evade or defeat" payment over of an employees' withheld portion of employment taxes. Moreover, the cited cases seem to focus (b)(3)/26 USC 6103 For example, in *Buffalow v. United States*, 109 F.3d 570 (9th Cir. 1997), in quoting the statute, the Circuit Court actually omits from its quote the clause containing (b)(3)/26 USC 6103 *Id.*, at 573.

This Tribunal is also unaware of any case law directly interpreting (b)(3)/26 USC 6103 (b)(3)/26 USC 6103, although there are many cases interpreting (b)(3)/26 USC 6103 (b)(3)/26 USC 6103. Specifically, in the context of criminal felony (in contrast to a misdemeanor) (b)(3)/26 USC 6103 has been held to require an affirmative act of deception, beyond mere "passive" non-filing and non-

[7] Obviously, (b)(3)/26 USC 6103, Respondent need not (b)(3)/26 USC 6103, but could have sought out the assistance of another, just as his clients did.

payment. See e.g., *Spies v. United States*, 317 U.S. 492 (1943), *Sansone v. United States*, 380 U.S. 343 (1965). Similar distinctions have been made in certain civil contexts. S*ee, e.g., First Trust & Sav. Bank v. United States*, 206 F.2d 97.99 (8th Cir. 1953), *Niedringhaus v. Commissioner*, 99 T.C. 202, 210 (T.C. 1992). However, in other civil contexts, some courts have found that a willful (voluntary, conscious and intentional) failure to file and pay taxes, without an affirmative act or commission, can constitute tax evasion. *See, e.g., United States v. Toti*, 149 B.R. 829. 1993 U.S. Dist. LEXIS 718 (E.D. Mich. 1993) (Under 11 U.S.C. § 523(a)(1)(C), bankruptcy does not discharge tax debts that debtor "willfully attempted in any manner to evade or defeat ..."). *But see, Howard v. United States*, 167 B.R. 684, 687, 1994 Bankr. LEXIS 721, **11-13 (Bankr. M.D. Fla. 1994) (proof of an affirmative act necessary to satisfy the 11 U.S.C. § 523(a)(1)(C) willfulness requirement.).

However, this Tribunal need not address and resolve (b)(3)/26 USC 6103 . Even without considering (b)(3)/26 USC 6103 alone suffices to support the sanction imposed herein.

C. Sanction

The issue in a disbarment proceeding is essentially whether the practitioner in question is fit to practice. *Harary v. Blumenthal*, 555 F. 2d 1113, 1116 (2d Cir. 1977). Complainant's Motion cites four cases either imposing disbarment, or finding that disbarment would be appropriate, (b)(3)/26 USC 6103 . *See. Hubbard v. United States*, 545 F. Supp. 2d 1 (D.D.C. 2008) (IRS practitioner disbarred for failure to file both individual and business tax returns for four years); *Dir., OPR v.* (b)(3)/26 USC 6103 , IRS Complaint No. 2008-03, http://www.irs.gov/taxpros/actuaries/article/0"id=183923,00.html (Decision on Appeal, Apr. 10, 2009) ((b)(3)/26 USC 6103 "When confronted by (b)(3)/26 USC 6103 , I have uniformly imposed a sanction of disbarment."); Dir., OPR v. Same , IRS Complaint No. 2008-19, http://www.irs.gov/taxpros/actuaries/article/0,,id=183923,00.html (Decision on Appeal, May 26, 2010)((b)(3)/26 USC 6103 supported disbarment, but Appellate Authority deferred to OPR's requested sanction of 48-month suspension); *Dir., OPR v.* (b)(3)/26 USC 6103 , IRS Complaint No. 2008-12, http://www.irs.gov/taxprosiactuaries/article/0,,id=183923,00.html (Decision on Appeal, Jan. 20, 2010)((b)(3)/26 USC 6103 warranted disbarment, but deferred to OPR's requested sanction of 48-month suspension).

In support of his position that a punishment of disbarment is "overly punitive and unwarranted," Respondent cites Director, *OPR v.* (b)(3)/26 USC 6103 , Dir., IRS Complaint No. 2007-28, http://www.irs.gov/taxpros/actuaries/article/0,,id=83923,00.html (ALJ, June 2008)(Decision Granting Complainant's Motion for Summary Judgment), *appeal dismissed*, http://www.irs.gov/taxpros/actuaries/article/0,,id=183923,00.html (Decision on Appeal, Dec. 9, 2009), where a penalty of only 36 months suspension was imposed (b)(3)/26 USC 6103 , even though Respondent (b)(3)/26 USC 6103 was otherwise engaged in her own tax practice. However, this Tribunal notes that the facts of the (b)(3)/26 USC 6103 case were far more favorable to the practitioner than those here. (b)(3)/26 USC 6103

(b)(3)/26 USC 6103. In addition, there was no evidence in (b)(3)/26 USC 6103 of any prior disciplinary history, whereas Respondent (b)(3)/26 USC 6103 was previously suspended by the IRS for 4 1/2 years for (b)(3)/26 USC 6103. Mot., Attachment 1, pp. 95-96. Finally, even with those more favorable circumstances, Appellate Authority in (b)(3)/26 USC 6103 stated, in dictum: "I find (b)(3)/26 USC 6103 to be a very serious offense. If this case were not being dismissed [upon the grounds of the appeal being untimely filed), I would give serious consideration to imposing the 48 month suspension requested by the Director of the Office of Professional Responsibility." *Director*, OPR *v.* (b)(3)/26 USC 6103, Complaint No. 2007-28. http://www.irs.gov/taxpros/actuaries/article/0,,id=183923,00.html, (Decision on Appeal, Dec. 9. 2009).[8]

In this case, even taking as true and crediting to the fullest extent possible all the mitigating circumstances which can be drawn from the record as to Respondent's health and marital circumstances as a result of which he "endured a significant period of emotional and physical trauma" from which he now claims he has "emerged" and "is on the path (b)(3)/26 USC 6103," that he has supportive friends and clients, his extended career and charitable work, such circumstances would not be sufficient to mitigate the penalty of disbarment in this case because of (a) the length of time Respondent (b)(3)/26 USC 6103;[9] (b) his prior recent history of disciplinary action; and (c) (b)(3)/26 USC 6103, all of which are not in dispute. As indicated by the cases cited by Complainant and others, it has been held that disbarment is the appropriate sanction under far more favorable circumstances than presented here. As such, holding oral hearing on the issue of penalty is found unnecessary.

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 shows a disregard for the standards established for the benefit of the IRS and the public. *Poole v. United States*, No. 840300, 1984 U.S. Dist. LEXIS 15351, *8 (D.D.C. June 29, 1984) (disbarring a certified public accountant for failure to file tax returns for three consecutive years, stating "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."). *See also, Owrutsky v. Brady*, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. 1991)(attorney disbarred from practice before the IRS for failing to file timely tax returns for six consecutive years, even though he obtained refunds or had no tax liability for any of those years).

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[8] The Appellate Decision says the initial decision was entered August 29, 2008, rather than June 2008 as cited by Respondent.

[9] Complainant's Motion (n.1) notes, and makes several strong arguments against, the potential application of a five year statute of limitations under 28 U.S.C. § 2462 to Counts 1 through 6, involving (b)(3)/26 USC 6103. 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 Respondent's liability on Counts 7, 9, 11 and 13 (b)(3)/26 USC 6103) would independently suffice to support the sanction imposed herein, particularly in light of Respondent's prior disciplinary history.

Therefore, it is hereby found the sanction of disbarment is commensurate with the seriousness of the disreputable conduct found.

VI. Conclusions

With regard to Respondent's liability for engaging in disreputable conduct by (b)(3)/26 USC (b)(3)/26 USC 6103 as alleged in the Complaint, 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 on Counts 1, 3, 5, 7, 9, 11, and 13. No judgment is entered with regard to the remaining Counts.

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

ORDER

It is hereby **ORDERED** that:

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

2. Respondent is hereby found to have engaged in disreputable conduct within the meaning of 31 C.F.R. 10.50 as alleged in Counts 1, 3, 5, 7, 9, 11, and 13 of the Complaint; and therefore,

3. Respondent [redacted], is hereby **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 . Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[10]

Dated: November 16, 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 therefor.

[10] 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.