United States
Department of the Treasury

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,
Complainant-Appellee,

COMPLAINT NO. 2015-00904

v.

DOCKET NO. OPR-111569-17

WILFRED I. AKA,
Respondent-Appellant

DECISION ON APPEAL

Pursuant to General Counsel Order No. 9 (January 19, 2001) and Office of Chief Counsel Notice CC-2014-008 (September 8, 2014), I decide disciplinary appeals to the Secretary of the Treasury filed under 31 C.F.R. Part 10 (Practice Before the Internal Revenue Service (IRS), hereinafter referred to as Circular 230 - all references are to Circular 230 as in effect for the periods at issue). This is such an appeal from a Decision by Default entered into this proceeding by Administrative Law Judge Parlen L. McKenna. By this Appeal, Respondent-Appellant Wilfred I. Aka ("Respondent") contests the granting of a Decision by Default in this matter.

In my capacity as Appellate Authority, I review the entire administrative record in the proceeding. Under Circular 230, the Appellate Authority's standard of review differs depending upon whether the issue being reviewed is a purely factual issue or a mixed question of fact and law (in either instance, reviewable under a "clearly erroneous" standard), or a purely legal issue (which the Appellate Authority reviews de novo). § 10.78 of Circular 230. The Appeal of the granting of a Decision by Default in this case is a mixed question of fact and law.

Background

This proceeding was commenced on October 28, 2016, when Timothy E. Heinlein, an attorney acting as the authorized representative of the Complainant-Appellee Office of Professional Responsibility (henceforth, "OPR" or "Complainant") filed a Complaint ("Complaint") against Respondent under the authority of 31 C.F.R part 10[1] (Circular

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[1] Portions of Circular 230 were amended on June 12, 2014. See 79 Fed. Reg. 33685 (June 12, 2014); Circular 230 (Rev. 6-2014). The savings clause contained at 31 C.F.R. § 10.91 of the revised regulations provides that any proceeding under this part based on conduct engaged in prior to June 12, 2014 which is instituted after that date shall apply the procedural rules of the revised regulations contained in Subparts D and E. Conduct engaged in prior to the effective dates of these revisions will be judged by the regulations in effect at the time the conduct occurred.

230), proposing that Respondent be suspended from practice before the Internal Revenue Service for a period of 36 months, pursuant to Circular 230 § 10.50, as the Respondent was incompetent or disreputable. Specifically, Complainant determined that Respondent should be sanctioned pursuant to Circular 230 § 10.51(a)(10), as Respondent was disbarred from "further practice before the United States Tax Court, a duly constituted authority of any state, territory or possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any federal agency, body or board."

The Complaint was signed by Complainant's counsel on October 28, 2016; the Certificate of Service attached to the Complaint notes that it was served on Complainant via certified mail on October 28, 2016, and by first class mail on that same date. Chief Administrative Law Judge Parlen L. McKenna, of the United States Coast Guard ("the ALJ"), was also served with a copy of the Complaint by certified mail. Complainant has stated that Respondent received a copy of this Complaint on November 3 or 4, 2016 (see Complainant's Opposition to Respondent's Motion for Leave to File First Amended Answer to IRS Complaint, paragraph 7); however, in the record there does not appear to be a certified mail return receipt signed by Respondent and returned by the Post Office.

Respondent submitted a document entitled "Response to IRS Complaint" ("Response"), signed on December 2, 2016. It appears Respondent intended this to serve as his Answer to the Complaint. The Certificate of Service accompanying this Response states that the ALJ was served with a copy via email and fax on that date; it shows the Complainant's counsel was served by email and fax as well.

Four days later, on December 6, 2016, the ALJ conducted a prehearing teleconference with both parties in this matter. In the Memorandum and Order of Prehearing Conference prepared by the ALJ following that conference, it was noted that the parties discussed various deficiencies contained in the Response, and why the Response was deficient as an Answer under the provisions of Circular 230. Complainant indicated an intention to move for Decision by Default. Respondent requested permission for leave to file a Motion to File an Amended Answer that complied with the Regulations. The ALJ noted that while such a motion was "not authorized under the IRS Regulations," the Respondent could file whatever motions he wished, and the ALJ would so rule.

The very next day, December 7, 2016, Respondent filed via email and fax a Motion for Leave to File First Amended Answer to IRS Complaint ("Motion for Leave to Amend"), with an attached "First Amended Answer to IRS Complaint" ("Amended Answer").

On December 16, 2016, Complainant filed Complainant's Motion for A Decision by Default ("Motion for Default Decision"). Complainant alleged:

a) that the Complaint was properly served by both certified and first class mail on Respondent on October 28, 2016;

b) that an Answer was due to be filed by November 28, 2016, which is 30 calendar days from the date of mailing of the Complaint served by first class mail, as the date of service of the Complaint;
c) that Respondent's Response, filed on December 2, 2016 was deficient and did not constitute an Answer under the rules, as it was not signed under oath; and,
d) that with no adequate Answer having been filed, entry of a Default Decision was proper.

Also on December 16, 2016, Complainant filed Complainant's Opposition to Respondent's Motion for Leave to File First Amended Answer to IRS Complaint (Opposition to Motion for Leave to Amend). In this document, Complainant opposed allowing the Amendment because the original Response was filed late (i.e., more than 30 days after service by first class mail), and it failed to conform to the mandatory elements of an Answer as set out in 31 C.F.R. § 10.64. The Complainant argued that, "having missed the deadline to file an Answer, Respondent now effectively seeks the ALJ's authorization for an after the fact extension of time to answer."

In the Decision by Default granting Complainant's motion, the ALJ found that the Complaint was properly served on October 28, 2016, and Respondent's "Answer was therefore due on or before November 28, 2016." The ALJ further determined that the Response filed by Respondent was not a valid Answer, as it did not comply with the regulations. Based on his determination that Respondent did not file a timely Answer, the ALJ denied the Motion for Leave to Amend.

Thus, both the granting of the Decision by Default and the denial of the Motion or Leave to Amend are based upon the ALJ's determination that the Respondent's Answer was due by November 28, 2016, and the Respondent failed to meet that deadline by filing a timely and sufficient Answer.

Law and Analysis

Service of the Complaint in this matter is governed by Circular 230 § 10.63(a), which states, in relevant part:

> (a) *Service of complaint.*
>
> (1) *In general.* The complaint or a copy of the complaint must be served on the respondent by any manner described in paragraphs (a) (2) or (3) of this section.
>
> (2) *Service by certified or first class mail.*
>
> (i) Service of the complaint may be made on the respondent by mailing the complaint by certified mail to the last known address (as determined under section 6212 of the Internal Revenue Code and the regulations thereunder) of the respondent. Where service is by certified mail, the returned post office

> receipt duly signed by the respondent will be proof of service.
>
> (ii) If the certified mail is not claimed or accepted by the respondent, or is returned undelivered, service may be made on the respondent, by mailing the complaint to the respondent by first class mail. Service by this method will be considered complete upon mailing, provided the complaint is addressed to the respondent at the respondent's last known address as determined under section 6212 of the Internal Revenue Code and the regulations thereunder.

As noted in the provision quoted above, Circular 230 provides two methods for service of the Complaint by mail. Section 10.63(a)(2)(i) provides that service may be made by certified mail, in which case the service date is the date of the signature on the returned receipt to the Post Office. There is no returned receipt bearing this date in the record. Circular 230 § 10.63(a)(2)(ii) next provides "If the certified mail is not claimed or accepted by the respondent, or is returned undelivered, service may be made on the respondent by mailing the complaint to the respondent by first class mail." (emphasis added). If first class mail is used as the method of service under this section, then service is complete (and the period within which to Answer commences) upon mailing.

The ALJ determined that the simultaneous mailing of the Complaint by both certified mail and first class mail was proper, and that the service of the Complaint was properly considered complete on the mailing date of the first class letter. I find this to be clearly erroneous, as the service by first class mail was done before the complaint served by certified mail had not been claimed or accepted by the respondent, or was returned undelivered to the Complainant. As a result, the simultaneous service of the Complaint by first class mail was premature and could not properly commence the period within which to file.

Courts generally assume that the words of a statute mean what an ordinary or reasonable person would understand them to mean. Moreover, some courts adhere to the principle that if the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. See Cases and Materials on Legislation: Statutes and the Creation of Public Policy (3d. ed. 2001).William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett; as cited in "A Guide to Reading, Interpreting and Applying Statutes", by Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006.

The plain wording of the service by mail provisions of Circular 230 § 10.63(a)(2) specifically indicate that first class mail service was to follow an unsuccessful return of service by certified mail ("If the certified mail is not claimed..."). Indeed, if simultaneous service were acceptable, as found in the Decision by Default, the service date by first class mail, because it would be effective immediately upon mailing, would always trump

the service date by certified mail. Service by certified mail would be virtually meaningless under such a reading.

The clear reading of the service by mail provisions of Circular 230 is a preference to first serve the Complaint by certified mail, by which actual receipt can be proven and the period within which to Answer commencing to run on that date of actual receipt. In the absence of such proof of receipt, first class mail to the last known address may *then* be used under the provisions, due to the apparent refusal or failure of the served party to accept the certified mail service. The use of first class mail allows the disciplinary process to move forward despite the failure for successful proof of personal service and actual receipt by certified mail; for that reason, the first class mailing date may be used to commence the period within which to Answer (as a result, this second mailing date would necessarily be some time after the initial attempt to serve by certified mail had failed).

Under the ALJ's reasoning, the introductory clause to § 10.63(a)(2)(ii) is rendered meaningless; that is, the initial conditions regarding the failure to claim or accept the certified mail, or the return of that mail undelivered, are unnecessary. That clause would be reduced essentially to read merely as "Or". Such reductionism is contrary to well-established approaches to statutory construction. Even if the service by mail provisions of Circular 230 are ambiguous, the "Rule to Avoid Surplusage" of statutory construction would be applicable here. This rule is based on the principle that each word or phrase in the statute is meaningful and useful, and thus, an interpretation that would render a word or phrase redundant or meaningless should be rejected. United States v. Menasche, 348 U.S. 528, 538–39 (1955) (quoting Inhabitants of Montclair Twp. v. Ramsdell, 107 U.S. 147, 152 (1883)), Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 59 (2007); Scheidler v. Nat'l Org. for Women, 547 U.S. 9, 21 (2006), and TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001).

The simultaneous service approach supporting the computation of the Answer due date contained in the Default Decision treats the clause "If the certified mail is not claimed or accepted by the respondent, or is returned undelivered," as unnecessary surplusage, and is ignored by the ALJ. The only correct reading of this provision which gives meaning to this clause is to require unsuccessful service by certified mail to occur first, and only then may service by first class mail be used in order for the proceedings to continue, without requiring proof of actual receipt.

Complainant cites to the case of Dir., Office of Professional Responsibility v. Coston, Complaint No. 2010-19 (February 4, 2011), in support of simultaneous mailing as sufficient service of the Complaint. While it is true that the Complaint in Coston appears to have been served through simultaneous mailing by both certified mail and first class mail, that case is entirely different from this one. In Coston, the unresponsive practitioner did not respond to the Complaint served by certified mail, nor that served by first class mail, nor to OPR's warning of intention to move for entry of default, nor even to the entry of default. No Answer at all was filed in Coston. Indeed, even the appeal in that case was filed by Complainant, as appellant in the matter. No action at all was

undertaken with respect to either the Complaint nor the manner of service, so this issue of service by mail was not considered in Coston. In contrast, in this case, the date of service and the timeliness of the Response are squarely at issue.

Having determined that the Default Decision erroneously computed the deadline for the filing of Respondent's Answer, the question then becomes: what was the correct deadline for the filing of an Answer? While it is improper to compute the Answer filing deadline based upon the simultaneous mailing date of the first class mail copy of the Complaint, it is clear that the Respondent actually received a copy of the Complaint. For that reason, the period within which an Answer was due to be filed may be easily computed.

The parties are in agreement that the Respondent received the Complaint on November 3 or 4, 2016. Had there been a returned receipt, therefore, it would have reflected a service no earlier than November 3, 2016. This would be the earliest date from which to commence the period within which the Respondent had to Answer. Thirty days from November 3, 2016, is Saturday, December 2nd; the due date for the Answer would be moved to the next business day, or Monday, December 5, 2016. The Respondent's Response was filed via mail and fax on Saturday, December 2, 2016, before the expiration of the due date on December 5. Accordingly, I determine that the Response was filed within the time an Answer was due to be filed, and was timely.

The timeliness of the Response does not entirely resolve the issues with respect to the Decision by Default. As noted by the Complainant in his Opposition for Leave to Amend, the Response was defective, and perhaps fatally so. In response to these issues, Complainant filed his Motion for Leave to Amend, which was opposed by Complainant. The ALJ denied the Motion for Leave to Amend on February 10, 2017, stating "because Respondent did not file an Answer, his Motion for Leave must be denied." This reasoning is based on the erroneous conclusion that the Response was untimely.

I have determined that the Response was timely filed. Generally, Motions to Amend pleadings are freely granted. Here, the Motion for Leave to Amend was sought very soon after the prehearing teleconference between the ALJ and the parties where the Complainant identified several deficiencies with the contents of the Response. Principles of fair play, as well as the general inclination to allow such timely amendments as freely granted, argue strongly in support of permitting the Respondent a good-faith opportunity to address those defects. Circular 230 §§ 10.67 and 10.69 both allow for amendment of pleadings and the filing of motions by the parties.

Here, given that the amendment was submitted within a few days of the original filing, no significant delay or any prejudice whatever would have resulted from allowing the Respondent an attempt to address the Complainant's issues with respect to the sufficiency of the Response through the filing of an Amended Answer. Accordingly, I determine that it was clearly erroneous and an abuse of discretion to deny the Respondent's Motion for Leave to Amend and that the Amended Answer should have been filed and entered into the Record.

I have determined that the Response filed in this case was submitted within the time required by Circular 230, and that it was error for the ALJ to deny Respondent's Motion for Leave to Amend Answer, and to not allow the Respondent to file the Amended Answer. However, this still does not end consideration of the appropriateness of the entry of Decision by Default in this case.

Respondent's Appeal seeks to set aside the entry of the Decision by Default in his case. There is a general disfavor with Decision by Defaults; there is instead a strong preference favoring resolution of genuine disputes on their merits. Jackson v. Beech, 636 F.2d 831 (D.C. Cir. 1980). Other circuits have expressed similar sentiments, using similar approaches. Harvey v. United States, 685 F.3d 939 (10th Cir. 2012); Colleton Preparatory Academy v. Hoover Universal, Inc., 616 F.3d 412 (4th Cir. 2010); United States v. Signed Personal Check No. 730, 615 F.3d 1085 (9th Cir. 2010).

Moreover, where there has been error, there is an obligation for an appellate court to reverse, unless it affirmatively appears from reviewing the entire record that the aggrieved party suffered no prejudice. In instances of entry of default, where the defaulted party has not raised a meritorious claim under which it might prevail, the reversal or vacating of a default order is meaningless and inefficient. In short, there is no cause to reverse a default order where the underlying claim is not disputed, or is established. See Wokan v. Alladin International, Inc., 485 F.2d 1232 (3d Cir. 1973); Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corp., 383 F.2d 249 (4th Cir. 1967).

This is an Appeal from a granting of a Decision by Default suspending Respondent from practice before the Internal Revenue Service for 36 months because Respondent's disbarment from practice before the United States Tax Court, a duly constituted Federal court, constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. 10.51(a)(10). Although the Decision by Default was based upon errors regarding the service date and the denial of the Motion for Leave, principles of efficiency and judicial economy argue against the reversal of an entry of default where the underlying claims are undisputed or established.

I find that to be the case here.

I find that it has been clearly established, and even agreed by the parties, that the United States Tax Court is a federal court, and the Respondent has been disbarred from practice before that Court. Respondent was represented in the proceedings before the Tax Court, and he provided information and responses to the allegations. The Tax Court's Memorandum Sur Order directing the disbarment is a recitation of at least seven cases where Respondent engaged in conduct that failed to provide competent representation to his clients, failed to take reasonable steps to expedite litigation, failed to treat the opposing party and counsel with fairness, engaged in conduct prejudicial to the administration of justice, and engaged in conduct unbecoming a member of the Tax Court bar. The Tax Court noted that Respondent had "a long history of being

unresponsive to Court orders and attempts by opposing counsel to contact him." It also noted that Respondent failed to acknowledge that his actions were in any way deficient, nor did Respondent express contrition. Finally, it noted that even a public reprimand in 2011 failed to improve Respondent's professionalism.

In his Notice of Appeal, Respondent does not contest the fact of the disbarment; he notes, though, that at that time, his Tax Court case was on Appeal to the United States Court of Appeals for the District of Columbia Circuit. That Appeal to the Circuit Court is now completed. During the pendency of this Appeal, I granted Complainant's motion to file the D.C. Circuit's Opinion affirming the Tax Court's entry of disbarment against Respondent. That Opinion affirming the Tax Court is now part of the record, and respondent's argument on this point is meritless.

Respondent next alleges that disbarment of practice before the Service is prohibited as an "automatic disbarment", citing In Re Winthrop Drake Thies, 662 F.2d 771 (D.C.Cir., 1980). In Thies, the appellate court reversed the Tax Court's disbarment of an attorney based upon his automatic disbarment from practice by a state bar following a criminal conviction. However, the circumstances of the Thies case are quite different from Respondent's. In Thies, the state bar's automatic disbarment, relied upon by the Tax Court, involved no hearing, and was based upon a felony conviction. Respondent's case is far different, as the underlying disbarment by the Tax Court involved an extensive hearing, with Respondent's involvement, represented by his counsel, with detailed factual findings made. The Tax Court's disbarment, on which OPR's suspension is based, is far from the "automatic" disbarment found to be wanting in Thies; respondent's argument on this ground is also rejected.

Thus, the Respondent has not raised any meritorious defense, either in his Response or in his Amended Answer, and either before the ALJ or on Appeal, with respect to the underlying grounds for disbarment. Indeed, the Respondent recognizes that the disbarment occurred. For this reason, the granting of a Decision by Default, and the denial of the Motion for Leave to Amend amount to harmless error, which did not cause prejudice to the Respondent. It would be both inefficient and unwise to reverse the Default Decision granted in this case, only to require the ALJ to enter an Opinion ordering the suspension based upon the uncontested merits.

The Appellate Authority reviews the sanction sought by the Complainant and imposed by the Administrative Law Judge in light of the charges proved and in light of other aggravating and mitigating circumstances. The Appellate Authority does so *de novo*, with the full authority of the Secretary of the Treasury and the Internal Revenue Service (the charging agency). In doing so, the Appellate Authority can affirm, decrease, or increase the sanction imposed by the ALJ. Director, OPR v. Hurwitz, Complaint No. 2007-12 (April 21, 2009); Director, OPR v. Chandler, Complaint No. 2006-23 at 3 (April, 2008). It is not disputed that Respondent has been disbarred by the United States Tax Court, a federal court, and the recital of conduct described by that Court in its order of disbarment are well established. Accordingly, I concur with the suspension from practice for a period of 36 months, as imposed by the ALJ.

I have considered all other arguments made by the parties with respect to this matter, and to the extent not mentioned herein, I find them to be irrelevant or without merit.

Conclusion

For the reasons stated, I hereby determine that Respondent Wilfred I. Aka is suspended from practice before the IRS for a period of 36 months, and may seek reinstatement as provided by § 10.81 of Circular 230.

This constitutes FINAL AGENCY ACTION in this proceeding.

/s/ Thomas J. Travers
Thomas J. Travers
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of the
Secretary of the Treasury)

November 15, 2017
Lanham, MD