

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

STEPHEN A. WHITLOCK  
DIRECTOR,  
OFFICE OF PROFESSIONAL  
RESPONSIBILITY,  
Complainant

v.

WILFRED I. AKA,  
Respondent

Complaint Number: 2015-00904  
Docket Number: 16-IRS-0001

HON. PARLEN L. MCKENNA,  
Presiding

**ORDER GRANTING COMPLAINANT'S MOTION FOR DECISION BY  
DEFAULT AND DENYING RESPONDENT'S MOTION FOR LEAVE TO FILE  
FIRST AMENDED ANSWER TO IRS COMPLAINT**

The Internal Revenue Service, Office of Professional Responsibility (Complainant) initiated this administrative proceeding by issuing a Complaint against Mr. Wilfred I. Aka (Respondent) pursuant to 31 C.F.R. Part 10 and 31 U.S.C. § 330. The Complaint sought to suspend Respondent from practice before the Internal Revenue Service for thirty-six (36) months for alleged disreputable conduct. Specifically, Complainant alleges Respondent engaged in disreputable conduct based upon his disbarment from practice as an attorney before the United States Tax Court.

Complainant now moves for a Decision by Default (Default Motion), arguing that Respondent did not file a timely Answer. Respondent opposes the Default Motion and moves for leave to file an Answer that complies with the relevant regulations. (Motion for Leave). After a thorough review of the pleadings, motions, and supporting documentation, I find that Respondent has not complied with the clearly established regulations concerning the content and timeliness of his Answer and has therefore

defaulted. Respondent's Motion for Leave is **DENIED**; and, Complainant's Default Motion is **GRANTED**. As such, the factual allegations contained in the Complaint are deemed admitted and Respondent is hereby **SUSPENDED** from practice before the IRS for **THIRTY-SIX (36) MONTHS**.

## MOTIONS

### 1. Complainant's Default Motion

Complainant argues that Respondent was properly served with the Complaint on October 28, 2016 and his Answer was therefore due on or before November 28, 2016. Further, Complainant contends that Respondent's December 2, 2016 *Response to IRS Complaint* (Response) was not a valid Answer because it did not comply with the regulations. Specifically, he did not admit or deny each allegation of the Complaint, did not contain a statement of facts, and did not provide a statement averring that the statements in the Answer are true and correct and are subject to perjury penalties. See 31 C.F.R. §§ 10.64(b) and (e). Complainant therefore concludes that Respondent is in default and, as such, has admitted the allegations of the Complaint. Complainant contends that the requested thirty-six (36) month suspension from practice before the IRS is appropriate and supported by prior IRS case law.

In opposition to the Default Motion, Respondent argues that his Response was timely and that it met the requirements of 31 C.F.R. § 10.64(c). Respondent attempts to demonstrate that various portions of his Response can be interpreted as either admitting or denying the allegations of the Complaint. Respondent further argues that including the phrase "respectfully submitted" above the signature line "means the same" as "under penalty of perjury." Respondent alternatively argues that his December 7, 2016 *First*

*Amended Response to the IRS Complaint* meets the requirements of 31 C.F.R. § 10.64 and should therefore be admitted as his Answer. Finally, Respondent argues that a default judgment is not appropriate because there is no prejudice to Complainant to allow the case to proceed and the case law Complainant relies upon is not analogous to the present situation.

## **2. Respondent's Motion for Leave**

Respondent argues I should grant his Motion for Leave because 1) such motions should be freely granted to have the claim determined on the merits; 2) Complainant will not be unfairly prejudiced by allowing the amended Answer; and 3) Respondent's failure to timely file his Answer and conform to the requirements of 31 C.F.R. § 10.64 was caused by Respondent's oversight, inadvertence and neglect because he is *pro se* and inexperienced in disbarment/suspension matters.

Complainant opposes Respondent's Motion for Leave arguing that Respondent has not stated good cause for his failure to file a timely and conforming Answer. Complainant further argues that all Respondent's arguments are predicated on the false assertion that his December 2, 2016 Response was a timely filed pleading. As such, Respondent's Motion for Leave is not seeking to amend a previous timely, but substantively deficient pleading. Rather, Respondent is attempting to get a *post hoc* extension after his time to file an Answer expired.

### ANALYSIS OF THE PARTIES' MOTIONS

Pursuant to 31 C.F.R. § 10.64(a), “[t]he respondent’s answer must be filed with the Administrative Law Judge, and served on the Internal Revenue Service, within the time specified in the Complaint unless, on request or application of the respondent, the time is extended by the Administrative Law Judge.” Further, “[t]he answer must be written and contain a statement of facts that constitute the respondent’s grounds of defense. General denials are not permitted. The respondent must specifically admit or deny each allegation set forth in the complaint, except that the respondent may state that the respondent is without sufficient information to admit or deny a specific allegation.” 31 C.F.R. § 10.64(b). The regulations also provide that “[t]he answer must be signed by the respondent . . . and must include a statement directly above the signature acknowledging that the statements made in the answer are true and correct and that knowing and willful false statements may be punishable under 18 U.S.C. 1001.” 31 C.F.R. § 10.64(e). Further, “[f]ailure 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).

On October 28, 2016, Complainant filed and served the Complaint in this matter. The Complaint clearly sets forth that Respondent’s answer must be filed with the Administrative Law Judge and a copy served on OPR within thirty (30) calendar days from date of service of the complaint. See Complaint at p. 2. Thirty (30) calendar days from October 28 is November 27. November 27, 2016 fell on a Sunday, meaning

Respondent's answer was due no later than November 28, 2016. Respondent did not submit a response until December 2, 2016. See Response to IRS Complaint.

In his Motion for Leave, Respondent states "[t]he original answer was due on December 2, 2016." See Motion for Leave at p.2. In the December 6, 2016 prehearing teleconference Respondent stated he received the Complaint on November 3 or 4, 2016. See Exhibit 2 to Complainant's Motion for a Decision by Default (Declaration of Timothy E. Heinlein at ¶ 4). Respondent mistakenly argues that if he received the Complaint on November 3 or 4th, "the due date of the Response/Answer would be December 4, 2016, plus a mailing period of 3 days." See Respondent's Opposition to IRS Complainant's Motion for a Decision by Default at p. 3. Respondent goes on to argue that because December 4 fell on a weekend, the actual due date would be December 5, 2016, plus a 3 day mailing period. Thus, Respondent argues that the actual due date for his Answer is December 8, 2016. Id.

Respondent mistakenly relies on the Federal Rules of Civil Procedure which are not applicable to these proceedings. IRS disciplinary actions are governed by Title 31 C.F.R. Part 10, Subpart D. See 31 C.F.R. § 10.0 (subpart D of this part contains the rules applicable to disciplinary proceedings). The rules set forth in 31 C.F.R. Part 10, Subpart D do not provide additional time to respond after service by mail.

As stated above, the Complaint set forth that Respondent must file his Answer with the Administrative Law Judge and serve same upon Complainant within 30 days of the date of service of the Complaint. See Complaint at p.2 (emphasis added).

Respondent conflates receiving the Complaint with the date of service. Relevant regulations establish that "[w]here service is by certified mail, the return post office

receipt duly signed by the respondent will be proof of service” and “[s]ervice [by first class mail] will be considered complete upon mailing, provided the complaint is addressed to the respondent at the respondent’s last known address . . . .” 31 C.F.R. § 10.63 (a)(2)(i) and (ii) (brackets added). Complainant sent the Complaint via certified mail and first class mail to Respondent at two different addresses including to Respondent’s last known address of record with the IRS. See Complaint at ¶ 3; *Certificate of Service* attached to the Complaint; see also Exhibit 2 to *Complainant’s Motion for a Decision by Default (Declaration of Timothy E. Heinlein* at ¶ 2). As such, Complainant properly served the Complaint and Respondent’s Answer was due on or before November 28, 2016. Respondent failed to file a timely Answer.

Further, Complainant is correct that Respondent’s December 2, 2016 Response did not comply with the regulatory requirements for an Answer found in 31 C.F.R. §§ 10.64 (b) and (e). Respondent’s argument that the substance of his Response admits or denies most of the allegations in the Complaint is not persuasive. Respondent’s claim that inserting the phrase “respectfully submitted” is substantially similar to a sworn statement under penalty of perjury is similarly not persuasive. Respondent’s explanation that he signed his Response in the same manner as Complainant signed the Complaint is absurd. Respondent had the affirmative duty to include the required language in his Answer; Complainant has no such duty. Also, Respondent’s claim during the prehearing conference that his Response should be read as a general denial is not compelling and does not satisfy the requirements for a proper Answer as general denials are prohibited by the regulations. See 31 C.F.R. § 10.64(b). The regulations state that Respondent “must” conform his Answer to the regulations. As such, I find that Respondent’s Response to

the Complaint was not compliant with the relevant applicable regulations and therefore is not considered an Answer.

Respondent's lack of good cause for failing to file a timely Answer is troubling as is his excuse that he is *pro se* and inexperienced. Respondent is an attorney and, as such, reading regulations and filing an Answer are tasks which any attorney should be able to accomplish. Respondent needs no special experience in disbarment proceedings to admit or deny the factual allegations set forth in the Complaint. Additionally, Respondent does not explain what "oversight, inadvertence, or excusable neglect" caused his failure to file a timely Answer. As such, I cannot agree that his failure to timely file an Answer was excused or justified.

Finally, because Respondent did not file an Answer, his Motion for Leave must be denied. Respondent asserts that motions such as his should be freely granted. Respondent's argument improperly rests on the factual fallacy that he filed a timely pleading. The factual situation of this case is different because Respondent did not file a timely Answer. Further, this is not simply a case where Respondent's request to amend a pleading would cause delay. Respondent has failed to follow the established regulations regarding the timeliness and substance of his Answer. Respondent's failure to file his Answer in time has clearly established consequences. Therefore, Respondent's Motion for Leave is **DENIED**. Respondent is in default and this case is subject to the rules established in 31 C.F.R. § 10.64(d). As such, Complainant's Motion for Decision by Default is hereby **GRANTED**.

## SANCTION

### **1. Evidentiary Standard and Standard of Proof**

The applicable evidentiary standard provides that the rules of evidence prevailing in a court of law and equity are not controlling, but the judge may exclude evidence that is irrelevant, immaterial, or unduly repetitions. See 31 C.F.R. § 10.73(a).

The standard of proof differs depending on the nature of the sanction. If the sanction is censure or a suspension of less than six months' duration, the judge applies the preponderance of the evidence standard. See 31 C.F.R. § 10.76(b). In contrast, for a monetary penalty, disbarment, or suspension of six months' or longer, the judge applies the clear and convincing standard. Id. The clear and convincing standard 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, and, 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 quotation marks, citations omitted); see also *Addington v. Texas*, 441 U.S. 418 (1979) (explaining that clear and convincing evidence is an intermediate standard somewhere between proof by a preponderance of the evidence and proof beyond a reasonable doubt).

Here the Complainant seeks to suspend Respondent for thirty-six (36) months and is therefore governed by the clear and convincing standard.

### **2. Findings of Fact**

Pursuant to 31 C.F.R. § 10.64(d), Respondent's failure to file a timely Answer results in an admission of the allegations of the complaint and a waiver of hearing. The following findings of fact were proposed by Complainant and are hereby set forth below.



These proposed findings of fact mirror the allegations in the Complaint and are therefore deemed admitted by virtue of Respondent's failure to file a timely Answer. After a thorough review, they are accepted and incorporated herein.

1. Respondent has engaged in practice before the IRS, as defined by 31 C.F.R. § 10.2(a)(4) (2011) (Circular 230 8-2011), as an attorney and certified public accountant.
2. Respondent is subject to the disciplinary authority of the Secretary of the Treasury and of the OPR.

3. Respondent's last known address of record with the IRS is

(b) (6)

(b) (6)

(b)(6)  
(b)(7)(C)

(b)(6)  
(b)(7)(C)

4. On November 5, 2014, the United States Tax Court (Tax Court) issued an Order to Show Cause (Tax Court OSC) to Respondent, which directed him to show cause why he should not be suspended or disbarred from practice before the United States Tax Court or otherwise disciplined.
5. Respondent submitted three documents in response to the Tax Court's Order to Show Cause: (1) Response to Order to Show Cause, received by the Tax Court on December 1, 2014; (2) revised Response to Order to Show Cause, received by the Tax Court on March 10, 2015, which was accepted as Respondent's testimony at his disciplinary hearing; and, (3) Respondent's Hearing Brief, to which Respondent attached his own declaration and various declarations and letters from clients and acquaintances attesting to his competence and fitness.
6. Respondent was represented by counsel at a disciplinary hearing held on March 31, 2015, at which time Respondent provided testimony concerning the allegations set forth in the Tax Court OSC.

7. On or around July 23, 2015, the Tax Court's Committee on Admissions, Ethics and Discipline issued a Memorandum Sur Order finding by clear and convincing evidence that Respondent engaged in misconduct warranting the imposition of discipline as follows:

We find that [Respondent] failed to provide competent representation to the clients in the subject seven cases, contrary to the requirements of Rule 1.1. of the Model Rules. We find that [Respondent] did not act with reasonable diligence and competence in representing those clients contrary to the requirements of Rule 1.3 of the Model Rules of Professional Conduct. Furthermore, we find that [Respondent] failed to take reasonable steps to expedite litigation, as required by Model Rule 3.2, he failed to treat opposing party and counsel with fairness, as required by Model Rule 3.4, he engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d), and he engaged in conduct unbecoming a member of the Bar of this Court, in violation of Rule 202(a)(4) of Tax Court Rule of Practice and Procedure.

8. On August 6, 2015, the Tax Court issued an Order of Disbarment, in relevant part disbarring Respondent from further practice before the Tax Court, requiring Respondent to withdraw as counsel in all pending cases in which he appears as counsel of record, and prohibiting Respondent from holding himself out as a member of the Bar of the United States Tax Court.

9. On January 6, 2016, The Complainant issued Respondent an Order to Show Cause (OPR Order to Show Cause) pursuant to authority under Title 31 Code of Federal Regulations, Subtitle A, Part 10, and Delegation Order Number 25-16 (Rev. 1-2014), requiring Respondent to show cause why he should not be indefinitely suspended from practice before the Internal Revenue Service (IRS), in accordance with the provisions at 31 C.F.R. § 10.82.

10. The OPR Order to Show Cause dated January 6, 2016 notified Respondent of the deadline and procedures for filing a response; that an expedited suspension by default may be rendered if Respondent failed to file a response as required; that Respondent could request a conference to address the merits of the show cause period within which a response must be filed or, if a conference were requested, immediately following the conference.

11. Respondent's response to the OPR Order to Show Cause was due on or before February 8, 2016.

12. Respondent failed to respond to the OPR Order to Show Cause due no later than 30 calendar days following the date the show cause order was served.

13. To date, Complainant has not received a response from Respondent to the OPR Order to Show Cause dated January 6, 2016.

14. On February 19, 2016, the Office of Professional Responsibility issued an ORDER FOR INDEFINITE SUSPENSION, effective February 19, 2016, suspending Respondent from practice before the IRS pursuant to 31 C.F.R. § 10.82(f) (Rev. 6-2014).

15. By letter dated August 29, 2016, Respondent made a written demand that Complainant issue a complaint pursuant to Circular 230 § 10.60.

16. On August 6, 2015, the Tax Court disbarred the Respondent from further practice before the Tax Court, required Respondent to withdraw as counsel in all pending cases in which he appeared as counsel of record, and prohibited Respondent from holding himself out as a member of the Bar of the United States Tax Court.

17. The Tax Court is a "duly constituted authority of any State, territory, or possession of the United States, including a Commonwealth, or the District of Colombia, any Federal

court of record or any Federal agency, body or board” as that phrase is used in 31 C.F.R. § 10.51(a)(10) (Rev. 6-2014).

18. Respondent’s disbarment from practice as an attorney before the Tax Court by the Tax Court constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. § 10.51 generally, and a violation of § 10.51(a)(10) (Rev. 6-2014) more particularly, for which Respondent may be censured, suspended or disbarred from practice before the IRS.

### ANALYSIS

Having found the above proposed findings of fact deemed admitted, I further find that Complainant’s proposed thirty-six (36) month suspension from practice before the IRS is reasonable. Respondent’s admitted actions as set forth in the Complaint unquestionably constitute disreputable conduct pursuant to 31 C.F.R. § 10.51, and reflect adversely on Respondent’s fitness to practice before the IRS and represent others before that agency. As set forth in Complainant’s Default Motion, Respondent’s disbarment from practice as an attorney before the Tax Court is a serious matter that could warrant a stricter sanction including indefinite suspension or disbarment. *See Dir., Office of Professional Responsibility v. Bohn*, Complaint No. 2012-00002 (Decision Granting Motion for Summary Adjudication in Part; Order Imposing Sanction of Disbarment), December 7, 2012; *see also Dir., Office of Professional Responsibility v. Ross*, Complaint No. 2011-01 (Order Granting Complainant’s Motion for Summary Judgment), June 7, 2011.

**ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. At all relevant times, Respondent engaged in practice before the IRS and is subject to the disciplinary authority of the OPR Director under the rules and regulations contained in 31 C.F.R. Part 10.
2. Respondent's failure to file an Answer on or before November 28, 2016 constitutes an admission of the allegations of the complaint and a waiver of hearing pursuant to 31 C.F.R. § 10.64(d).
3. Respondent's disbarment from practice before the United States Tax Court constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. § 10.51 generally, and a violation of § 10.51(a)(10) (Rev. 6-2014) more particularly, for which Respondent may be censured, suspended or disbarred from practice before the IRS.
4. Complainant has proven by clear and convincing evidence Respondent's above described conduct warrants Respondent's suspension from practice before the IRS in light of all the relevant facts and circumstances.

**WHEREFORE:**

**ORDER**

**IT IS HEREBY ORDERED** that Respondent's Motion for Leave to File First Amended Answer to IRS Complaint is **DENIED**.

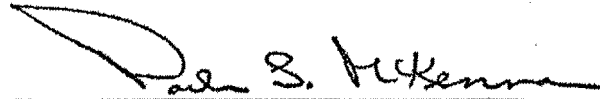
**IT IS HEREBY FURTHER ORDERED** that Complainant's Motion for Decision by Default is **GRANTED**.

**IT IS HEREBY FURTHER ORDERED** that pursuant to 31 C.F.R. § 10.64(d), the allegations of the Complaint are **ADMITTED**.

**IT IS HEREBY FURTHER ORDERED** that Respondent, Wilfred I. Aka, is **SUSPENDED** from practice before the IRS for **THIRTY-SIX (36) MONTHS**. Any reinstatement of Respondent thereafter is conditioned upon the provisions contained in 31

C.F.R. §§ 10.79 (relating to the effect of suspension) and 10.81 (relating to petitions for reinstatement) (Rev. 6-2014).

**PLEASE TAKE NOTICE THAT** this Decision and Order may be appealed pursuant to 31 C.F.R. § 10.77, summarized below.



**Hon. Parlen L. McKenna**  
**Administrative Law Judge**

Dated: February 10, 2017 at Alameda CA

**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, Officer 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.**

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the forgoing *Order Granting Complainant's Motion for Decision by Default and Denying Respondent's Motion for Leave to File First Amended Answer to IRS Complaint* (Complaint No. 2015-00904, Docket No. 16-IRS-0001) upon the following parties and entities in this proceeding as indicated in the manner described below:


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Done and dated: February 10, 2017  
Alameda, California.

  
Cindy June Melendres  
Paralegal Specialist to the  
Hon. Parlen L. McKenna