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

KAREN L. HAWKINS, DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY, INTERNAL REVENUE SERVICE, Complainant, v. (b)(3)/26 USC 6103, Respondent.	)	Complaint No. IRS 2012-00006[1] ORDER GRANTING COMPLAINANT'S MOTION TO AMEND THE COMPLAINT AND MOTION FOR DEFAULT DECISION

PRELIMINARY STATEMENT

On September 5, 2012, the Director, Office of Professional Responsibility (OPR), Internal Revenue Service (IRS), Department of the Treasury issued a Complaint pursuant to 31 C.F.R. §§ 10.60 and 10.91 and 31 U.S.C. § 330. Respondent (b)(3)/26 USC 6103 is a Certified Public Accountant (CPA) who practiced before the IRS.

The Complaint sought Respondent's disbarment from practice before the IRS because of Respondent's alleged incompetence and disreputable conduct as defined by 31 C.F.R. § 10.51. The disbarment would prevent Respondent from practicing before the IRS without the explicit approval of OPR. In order to obtain reinstatement, the practitioner needs to demonstrate (at a minimum) that he is likely to conduct himself in accordance with the requirements of 31 C.F.R. Part 10 and that his reinstatement would

[1] Docket No. 12-IRS-0002 assigned by the ALJ Docketing Center pursuant to Notice of Assignment of Administrative Law Judge dated September 11, 2012.

not be contrary to the public interest. Any such reinstatement would be at the sole discretion of OPR.

On December 10, 2012, Complainant filed a Motion to Amend Complaint and served it on Respondent by Certified Mail, Return Receipt Requested, to Respondent's last known address on record with the IRS, as well as, on Respondent's representative, Mr. Paul William Raymond, Esq. Complainant attached to the Motion a copy of the Amended Complaint and a copy of the September 4, 2012 Supplemental Allegation Letter. The Amended Complaint notified Respondent that he was required to file and serve an answer by January 4, 2013, and failure to file an answer may result in a decision by default being rendered against him. To date, Respondent has not filed an answer to the Amended Complaint.

On February 7, 2013, counsel for Complainant filed a Motion for a Decision by Default (Default Motion). This Motion was served upon Respondent by regular mail addressed to Respondent at his last known mailing address on file with the IRS, as well as, Respondent's representative. To date, Respondent has not filed a response to Complainant's Default Motion.

For the reasons provided below, Complainant's Motion to Amend the Complaint and Motion for a Decision by Default are **GRANTED**.

PRINCIPLES OF LAW

OPR's Ability to Discipline IRS Practitioners

Under 31 U.S.C. § 330(a), the Secretary of the Treasury holds authority to "regulate the practice of representatives of persons before the Department of the Treasury," including the power to suspend or disbar an individual from practice for a

number of reasons as long as the individual is first provided with "notice and opportunity" for hearing before an administrative law judge. Id. at § 330(b).

Circular 230 and Delegation Order No. 25-16 (2012) delegates the Director of OPR the authority to bring proceedings to suspend or disbar practitioners before the IRS. See 31 C.F.R. § 10.50(a). Under 31 C.F.R. § 10.50(e), any sanctions imposed "shall take into account all relevant facts and circumstances."

Consequences for Respondent's Failure to Respond

The Amended Complaint and the Motion for Decision by Default were both properly served in accordance with the service rules found at 31 C.F.R. § 10.63. Respondent has not filed an opposition or an answer to the Amended Complaint, nor has he replied to the Motion for Decision by Default.[2] IRS regulations at 31 C.F.R. § 10.64(d) 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. A decision by default constitutes a decision under §10.76.

The undersigned did not extend the time for Respondent to file an Answer and so the provisions of Section 10.64(d) apply. Respondent's failure to respond will therefore be deemed an admission of all the allegations in the Amended Complaint by Default and a waiver of a hearing.[3]

[2] As attached to Complainant's Motion, electronic mail communications between Complainant's counsel and Respondent's counsel clearly indicated Respondent intended to concede this case and proceed to default without filing any response or opposing Complainant's suggested sanction. See Motion for Decision by Default at Exh. 3.

[3] As scheduled in the Prehearing Conference Report and Scheduling Order (Dec. 3, 2012), Respondent was directed to file a response to the Supplemental Letter; IRS counsel could file a Motion to Amend the Complaint no later than December 10, 2012; and Respondent had until January 4, 2013 to file a response to such Motion and/or file a statement of non-opposition and an Amended Answer.

Evidentiary Standard and Standard of Proof

The applicable evidentiary standard states 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 repetitious. 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).

Given that Complainant seeks to disbar Respondent, the clear and convincing standard applies. If Respondent is disbarred, he will not be permitted to practice before the IRS until authorized to do so by the IRS pursuant to 31 C.F.R. § 10.81.

FINDINGS OF FACT

1. At all material times, Respondent has been a CPA engaged in practice before the IRS.

2. On March 19, 2009, Respondent and the United States of America filed a Plea Agreement with the United States District Court (Plea Agreement), pleading guilty to one count of: (1) willfully filing a tax return knowing that it contained false information as to any material matter; and (2) acting for the purpose of evading tax laws and not as a result of accident or negligence.

3. By that Plea Agreement, Respondent admitted he was in fact guilty of the offense as described in Count 1 of the Indictment.

4. Respondent stipulated in the Plea Agreement that "beginning in 1999, [he] submitted tax returns to the IRS for clients who lived and worked in California . . . in which he reported that the income was foreign earned income, claiming that California was not part of the United States . . . and therefore not subject to taxation . . . [Respondent] aided and assisted in the preparation and presentation to the Internal Revenue Service of materially false and fraudulent . . .tax returns for [Taxpayers in Count 1 of the Indictment]. As [Respondent] well knew, the IRS considered California part of the United States for tax purposes." ("Form 2555 Position").

5. On April 01, 2009, the United States District Court for the Central District of California issued an Order finding a factual basis for the Plea Agreement. Respondent was convicted of one count of filing a false tax return in violation of 26 U.S.C. § 7207 for the Taxpayers described in Count 1 of the Indictment.

6. On July 30, 2009, Complainant served Respondent with the Notice of Expedited Proceeding and Complaint No. 2006-15646-XP proposing his suspension from practice before the Internal Revenue Service pursuant to 31 C.F.R. § 10.82(b)(2).

7. On or about September 02, 2009, Respondent answered the Notice of Expedited Proceeding and Complaint No. 2006-15646-XP with a response dated August 26, 2009 ("Answer") and requested a conference with the Director, Office of Professional Responsibility.

8. On July 8, 2011, the California Board of Accountancy (CBA) brought an Accusation against Respondent. The CBA found six causes for discipline and concluded that Respondent's conduct was serious.

9. On August 02, 2012, the CBA suspended Respondent's license for one year, effective September 01, 2012, and set a probationary period of five years.

10. On August 06, 2012, Respondent requested pursuant to 31 C.F.R. §10.82(g) that Complainant issue a complaint under 31 C.F.R. §10.60.

11. On September 4, 2012, Complainant sent Respondent a supplemental allegation letter raising additional allegations of misconduct under Circular 230 and requested a response within 10 days, pursuant to § 10.20(a)(3).

12. Allegations contained in the September 4, 2012 letter were incorporated by reference into Complainant's Amended Complaint.

13. Respondent failed to respond to specific requests for information included in the September 4, 2012 supplemental allegation letter.

14. Respondent used a contingent fee structure based upon the expected income tax refunds for client returns prepared using the Form 2555 Position.

15. Respondent charged unconscionable fees for preparation of tax returns using the Form 2555 Position.

16. Respondent represented to IRS Criminal Investigation Special Agents that he charged a "little flat fee" for the preparation of Forms 1040 for clients using the Form 2555 Position and denied charging a contingent, or percentage, fee based on the anticipated refund for preparing a Form 1040 return using the Form 2555 Position.

17. Respondent represented to the CBA that he ceased using Form 2555 after he became aware of the first IRS audit.

18. Contrary to his representation to the CBA, Respondent continued preparing tax returns for clients using the Form 2555 Position, in the 2002 and 2003 tax filing seasons, after learning of an IRS audit for a client using the Form 2555 Position.

19. Respondent advised at least fifty-two clients to include the Form 2555 Position on federal income tax returns for tax years 1998 through 2002, for which [redacted] (b)(3)/26 USC 6103 .

20. Respondent obstructed the IRS examination and collection activities for clients whose returns were prepared with the Form 2555 Position, (b)(3)/26 USC 6103 [redacted], and for a 2006 IRS collection matter for clients who had not used the Form 2555 Position, by repeatedly raising numerous frivolous arguments, aside from the Form 2555 Position, that have been long-rejected by both the IRS, case law, and the Internal Revenue Code (IRC).

21. Respondent threatened lawsuits for damages, and lawsuits against IRS employees, personally, (b)(3)/26 USC 6103 [redacted]

(b)(3)/26 USC 6103

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22. Respondent signed and submitted to the IRS, a Power of Attorney ("Form 2848") for taxpayer clients that listed both the Respondent and an un-enrolled individual as the two representatives.

23. An un-enrolled return preparer is not authorized to represent taxpayers before the IRS in collection matters.

ANALYSIS

Here, Respondent had the opportunity to oppose IRS counsel's attempt to amend the Complaint but failed to do so. Respondent was specifically directed to either file an opposition to such efforts or file a statement of non-opposition and an amended answer. See Prehearing Conference Report and Scheduling Order (Dec. 3, 2012). Under 31 C.F.R. § 10.68, Complainant's Motion to Amend the Complaint is therefore **GRANTED** and the operative complaint is the Amended Complaint.

Title 31 C.F.R. § 10.68(b) prescribes "if a non-moving party does not respond within 30 days to a filing of a motion for decision by default for failure to file a timely answer . . . the nonmoving party is deemed not to oppose the motion." Here, Respondent has not filed a response and has affirmatively stated that he would not oppose Complainant's efforts to resolve this case through default proceedings. Therefore, in accordance with 31 C.F.R. §§ 10.64(d) and § 10.76, the allegations in the Amended Complaint are hereby deemed **ADMITTED** by default. See also 31 C.F.R. § 10.64(c) ("Every allegation in the complaint that is not denied in the answer is deemed admitted

and will be considered proved; no further evidence in respect of such allegation need be adduced at a hearing").

Respondent's actions as set forth in the Amended Complaint (the allegations of which are now deemed admitted by default and stated in the Findings of Fact above) unquestionably constitute disreputable conduct pursuant to 31 C.F.R. § 10.51, and reflect adversely on Respondent's fitness to practice before the IRS. Furthermore, upon review of the facts presented in the record as a whole, the undersigned finds Complainant's proposed penalty of disbarment is appropriate given the egregiousness of Respondent's overall conduct associated with his adopting the Form 2555 Position.

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 preparation and submission of tax returns on behalf of clients who lived and worked in California in which he reported that the income was foreign earned income because California was not part of the United States and therefore not subject to taxation and Respondent's aid and assistance in the preparation and presentation to the IRS of materially false and fraudulent tax returns, as evidenced by the Plea Agreement, constitutes disreputable conduct under 31 C.F.R. § 10.51, (2002 1994).
3. Respondent's conviction of one count of filing a false tax return in violation of 26 U.S.C. § 7207 constitutes disreputable conduct pursuant to 31 C.F.R. § 51(a)(1) (2007).

4. Respondent's failure to respond to specific requests for information included in the September 4, 2012 Supplemental Allegation Letter is a violation of 31 C.F.R. § 10.20(a)(3) (2011).

5. Respondent's use of a contingent fee structure based upon the expected income from tax refunds constitutes incompetent and disreputable conduct under 31 C.F.R. § 10.27(b)(1) (2007) (previously enacted as § 10.27(b)(2) (2002) and § 10.28(b) (1994)).

6. Respondent charged unconscionable fees for preparation of tax returns using the Form 2555 Position, which constitutes disreputable conduct under 31 C.F.R. § 10.27(b)(1) (2007) (previously enacted as §10.27(b)(2)(2002) and § 10.28(a) (1994)).

7. Respondent's representations to Special Agents of IRS Criminal Investigation that Respondent charged a "little flat fee" for the preparation of Forms 1040 for clients using the Form 2555 Position and that Respondent denied charging a contingent, or percentage, fee based on the anticipated refund for preparing a Form 1040 return with the Form 2555 Position constitute disreputable conduct under 31 C.F.R. § 10.51(a)(4) (2007) (previously enacted as § 10.51(d) (2002) (1994)).

8. Respondent's false representation to the CBA that he ceased using the Form 2555 Position after he became aware of the first IRS audit, when Respondent continued preparing tax returns for clients using the Form 2555 Position after learning of an IRS audit for a client with the Form 2555 Position, constitutes disreputable conduct under 31 C.F.R. § 10.51(a)(4) (2011).

9. Respondent's advice, with respect to at least fifty-two tax returns for tax years 1998 through 2002, to include the Form 2555 Position on federal income tax returns, constitutes participating in evading or attempting to evade any Federal tax, or knowingly counseling or suggesting to a client an illegal plan to evade Federal taxes in violation of 31 C.F.R. § 10.51(f) (2002) (previously enacted as §10.51(d)(1994)).

10. Respondent's advocacy of positions that have been determined to be frivolous by the IRS, case law, and a reading of the definition of the term United States in IRC § 7701, constitutes giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws in violation of 31 C.F.R. § 10.51(l) (2002) (previously enacted as 10.51(j) (1994)).

11. Respondent's lack of outside research into the Form 2555 Position constitutes disreputable conduct for which a practitioner may be sanctioned as such conduct does not meet the due diligence standard in preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to IRS matters in violation of 31 C.F.R. §10.22(a)(1) (2007) (2002) (previously enacted as § 10.22(a) (1994)).

12. Respondent's preparation of at least fifty-two tax returns for tax years 1998 through 2002 with the Form 2555 Position constitutes disreputable conduct as the Form 2555 Position does not meet the realistic possibility of success standard of

being sustained on its merits and so constitutes a violation of 31 C.F.R. §10.34(a)(1) (2002) (previously enacted as § 10.34(a)(1)(i) (1994)).

13. Respondent's pattern of obstructing IRS examination and collection activities by repeatedly raising numerous frivolous arguments, aside from the Form 2555 Position, all of which have been long-rejected by both the IRS, case law, and the IRC: (1) for clients whose returns were prepared with the Form 2555 Position; (2) [redacted] (b)(3)/26 USC 6103 [redacted], and (3) for the 2006 IRS collection matter of Respondent's clients who had not used the Form 2555 Position constitutes disreputable conduct in that Respondent unreasonably delayed the prompt disposition of matters before the IRS in violation of 31 C.F.R. §10.23 (2002) (1994).

14. This pattern of obstruction constitutes a lack of due diligence in preparing or assisting in the preparation of documents relating to IRS matters and in determining the correctness of written representations to the Department of the Treasury in violation of 31 C.F.R. § 10.22(a)(1) (2002) (previously enacted as §10.22(a) (1994)) and 31 C.F.R. § 10.22(a)(2) (2002) (previously enacted as § 10.22(b) (1994)) and constitutes a pattern of giving false opinions, knowingly, recklessly, or through gross incompetence in violation of 31 C.F.R. § 10.51(a)(13) (2007) (previously enacted as §10.51(l) (2002) and §10.51(j) (1994)).

15. Respondent's threats of lawsuits for damages, and lawsuits against IRS employees personally for [redacted] (b)(3)/26 USC 6103 [redacted] constitute incompetence or

disreputable conduct by directly or indirectly attempting to influence the official action of any officer or employee of the IRS by the use of threats, false accusations, duress or coercion in violation of 31 C.F.R. § 10.51(a)(9) (2011).

16. Respondent's submission to the IRS of a signed Form 2848 listing Respondent as the second representative in an IRS collection matter with an un-enrolled individual constitutes knowingly aiding an un-enrolled individual, during a period of ineligibility of such person, to practice before the IRS in violation of 31 C.F.R. § 10.51(j) (2002) (previously enacted as § 10.51(h) (1994)).

17. Complainant has proven by clear and convincing evidence Respondent's above-described conduct warrants Respondent's disbarment from practice before the IRS.

WHEREFORE:

ORDER

IT IS HEREBY ORDERED Complainant's Motion to Amend the Complaint is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that Complainant's Motion for a Decision by Default is **GRANTED** and that (b)(3)/26 USC 6103 is disbarred from practice before the Internal Revenue Service from the date of this decision and order, reinstatement thereafter being pursuant to the provisions contained in 31 C.F.R. Part 10, section 10.81 and at minimum requiring the practitioner to demonstrate that he is likely to conduct himself in accordance with the requirements of 31 C.F.R. Part 10 and that his reinstatement would not be contrary to the public interest.

IT IS SO ORDERED.

/s/ Parlen L. McKenna_____
Hon. Parlen L. McKenna
Acting Chief Administrative Law Judge

Dated: March 1, 2013
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, Office of Professional Responsibility, 1111 Constitution Ave. NW, SE:OPR 7238IR, Washington D.C. 20224, and shall include a brief that states the party's exceptions to this Decision and supporting reasons for any exceptions.

CERTIFICATE OF SERVICE

I hereby certify that I have served the forgoing ***Order Granting Complainant's Motion to Amend the Complaint and Motion for Default Decision*** (Complaint No. IRS 2012-00006, Docket No. 12-IRS-0002) upon the following parties and entities in this proceeding as indicated at the addresses below:

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Done and dated March 1, 2013 at
Alameda, California

/s/ Cindy J. Melendres
Cindy J. Melendres
Paralegal Specialist to the
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