

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

BASSETT H. BROWN & MARCELA M. BROWN,	)	
	)	CLC
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 28934-10.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

On January 30, 2015, we entered our order and decision in this case. On September 14, 2017, we filed petitioners' motion for leave to file out of time motion to vacate decision for fraud on the court, which we granted. We have before us now petitioners' motion to vacate decision for fraud on the court (motion). The motion is supported by a declaration by petitioner husband (Dr. Brown) and by a legal memorandum. Respondent objects to our granting the motion. Petitioners have responded to respondent's objection. We will deny the motion. Unless otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended and in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Background

Commencement of the Case and Mr. Aka's Appearance

This case commenced when, we filed the petition on December 27, 2010. The petition was signed by both petitioners but not by any counsel. It showed petitioners' mailing address as being on a particular street in St. Helena, California (St. Helena address). Petitioners assigned error to respondent's determinations of both deficiencies in petitioners' 2006 and 2007 Federal income taxes and to accuracy-related penalties for those years. Petitioners' principal claim was that

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they had evidence to support business expenses disallowed by respondent. On December 27, 2010, we also filed an entry of appearance for petitioners by attorney Wilfred I. Aka.

### Trial of the Case and Disposition

Numerous proceedings occurred before we recalled this case for trial on May 14, 2013, in Los Angeles, California, and conducted an evidentiary hearing on May 14 and 15, 2013. Previously, on March 2, 2012, the parties had filed a stipulation of settled issue (stipulation), which was executed for petitioners by both Mr. Aka and Dr. Brown. By the stipulation, petitioners agreed that: (a) they would be liable for the section 6662(a) accuracy-related penalty for tax years 2006 and 2007 if there were a substantial understatement of income tax in those tax years, (b) they were not entitled to farm rental expenses of \$21,595 for tax year 2006, (c) they received unreported interest income of \$2,700 for tax year 2006, (d) they were not entitled to a Schedule A deduction for taxes of \$10,000 for tax year 2006, and (e) they were entitled to an above-the-line deduction of \$886, in tax year 2006, for paying a penalty on the early withdrawal of savings related to the unreported income.

At the commencement of the evidentiary hearing on May 14, 2013, Mr. Aka appeared for petitioners. We identified the remaining issues for trial as Schedule C income and the substantiation of deductions. We asked whether the accuracy-related penalties were provided for in the stipulation, and respondent's counsel answered that they were. Dr. Brown was the first witness to testify, called shortly after that colloquy, and we assume that he was in the courtroom to hear both the colloquy and our prior identification of the issues left for trial. Transcripts of the trial show Dr. Brown present on both days of trial.

At the conclusion of the trial, recognizing Mr. Aka's shortcomings, we encouraged Dr. Brown to supplement Mr. Aka as petitioners' counsel with someone with the skills perhaps to reach a settlement with respondent. It appears that petitioners did not take our advice. If no settlement was reached, we ordered petitioners to file an opening brief on or before August 13, 2013. We did not receive petitioners' opening brief on or before that date, and, by order dated September 3, 2013, we extended the due date for petitioners' opening brief to September 17, 2013, and said that, if petitioners did not file their brief on or before September 17, 2013, we would preclude them from filing an opening brief. On October 17, 2013, we received from Mr. Aka a motion to extend time to file petitioners' opening brief to October 17, 2013. While the motion was pending, Mr.

Aka filed an opening brief on October 20, 2013, three days after the end of the requested extension. By order dated October 25, 2013 (October 25 order), we struck petitioners' opening brief as untimely and ordered them, by November 6, 2013, to supplement their pending motion. We ordered that additional service of the October 25 order be upon petitioners personally at the St. Helena address. Concerned that petitioners may not have been aware of Mr. Aka's many failings to meet Court imposed deadlines, we listed those failings in the order. Petitioners failed to comply with the October 25 order, and we denied the pending motion.

On August 18, 2014, we filed our Memorandum Opinion, Brown v. Commissioner, T.C. Memo. 2014-167, relying in part on the stipulation, without benefit of any brief for petitioners, and substantially upholding the deficiencies that respondent had determined and sustaining the accuracy-related penalties. In our Memorandum Opinion, at \*11 through \*13, we described Mr. Aka's failure to cooperate in the preparation of the case for trial, by not responding to the Government's motion to compel stipulation under Rule 91(f), by failing to respond to the Court's order to show cause why matters should not be deemed stipulated, and by not responding to the government's informal request for production of documents. We also pointed out that Mr. Aka had not complied with our orders related to briefing petitioners' case. As stated, we entered our order and decision on January 30, 2015.

On September 28, 2015, we filed petitioners' notice of appeal to the United States Court of Appeals for the Second Circuit, which notice was executed only by petitioners and shows their address as the St. Helena address. On March 14, 2016, the Court of Appeals issued its mandate dismissing petitioners' appeal for lack of jurisdiction.

#### Order of Disbarment

On August 6, 2015, following our initial disposition of this case, we served on Mr. Aka an Order of Disbarment, ordering, among other things, his disbarment from further practice before the Tax Court. Previously, on July 23, 2015, we issued a Memorandum Sur Order, in which we found that Mr. Aka had engaged in misconduct warranting the imposition of discipline. We found that he failed to provide competent representation to his clients, including petitioners, contrary to the requirements of Rule 1.1, Model Rules of Professional Conduct (Model Rules). We also found that Mr. Aka did not act with reasonable diligence and competence in representing those clients contrary to the requirements of Model Rule 1.3, that he failed to take reasonable steps to expedite litigation, as required by Model Rule

3.2, that he failed to treat opposing party and counsel with fairness, as required by Model Rule 3.4, that he engaged in conduct prejudicial to the administration of justice in violation of Model Rule 8.4(d), and that he engaged in conduct unbecoming of member of the Bar of this Court, in violation of Rule 202(a)(4).

Mr. Aka appealed our Order of Disbarment, which order was affirmed. Aka v. United States Tax Court, 854 F.3d 30 (D.C. Cir. 2017).

### The Motion

We may vacate or revise a decision. See Rule 162. By the motion, petitioners ask us to vacate our decision in this case on the grounds that Mr. Aka's "egregious and willful conduct" during litigation of this case "resulted in fraud on the Court, opposing counsel and Petitioners." Petitioners aver what they believe to be Mr. Aka's fraud on the Court. The averments reflect in substantial part the description of Mr. Aka's failings and other unacceptable conduct in our Memorandum Opinion, which we describe above. They claim, for instance, that, "[d]uring the litigation of the case, Mr. Aka was uncooperative to Respondent's discovery requests, forcing Respondent to file motions to compel stipulations and production of documents. Mr. Aka repeatedly missed deadlines. He failed to timely respond to the Court's orders and failed to set forth an adequate explanation for such failures." Because of his uncooperativeness, they claim,

he waived Petitioners' critical rights and issues without consulting with Petitioners. For example, Mr. Aka, by signing stipulations agreeing to certain facts in the case, including that Petitioners would agree to penalties if any tax liability resulted from the litigation. [Sic] Mr. Aka misrepresented Petitioners' positions and applicable defenses to penalties (e.g., reliance on professionals). Petitioners did not, and would not, agree to such a stipulation.

### Parties' Arguments

#### Petitioners' Argument

The essence of petitioners' argument is that Mr. Aka "was incompetent" and, "[t]o cover up his incompetence, he lied to the Court, Respondent and his clients". Petitioners elaborate:

[Mr. Aka's] conduct as an officer of the court, was intentionally false and willfully blind to, or [with] reckless disregard for, the truth. \* \* \* Mr. Aka's statements to the Court regarding his persistent failures to follow the Court's rules were intentionally false, in reckless disregard of the truth, a positive concealment while under a duty to disclose and was [sic] meant to deceive the Court. Mr. Aka's conduct caused damage to Petitioners' case and improperly influenced the Court in reaching its decision.

Petitioners accuse Mr. Aka of "outright lies" in excusing his failures to obey our orders "because he was out of the country, his computer 'crashed,' or he \* \* \* [had] no ability to access the Court's website". In sum, petitioners argue: "Mr. Aka knowingly misled the Court as to the substance of Petitioners' case. His actions prevented the Petitioners' presentation of a defense to the deficiencies asserted by Respondent. \* \* \* Had Petitioners been aware of Mr. Aka's misconduct and misrepresentations before the Decision was entered, the outcome would be significantly different for Petitioners."

While acknowledging that "[t]he signature on the Stipulation of Settled issues \* \* \* is that of Dr. Brown", petitioners argue that he does not remember signing it. Petitioners also claim that they do not remember receiving the October 25 order.

#### Respondent's Abutments

Respondent disagrees that there was any fraud on the Court. "To prove fraud on the Court," respondent argues, "petitioners must establish that 'an intentional plan of deception designed to improperly influence the Court in its decision has had such an effect on the Court.' Abatti v. Commissioner, 86 T.C. 1319, 1325 (1986)." And while respondent acknowledges Mr. Aka's misconduct leading to his disbarment, respondent argues that his misconduct did not rise to the level of fraud on the court.

Indeed, Mr. Aka failed to meet the Court's deadlines, ignored the Court's procedures and rules, and failed to cooperate with respondent's counsel. Yet, these actions do not show a plan to influence the Court in the decision entered in this particular case. Rather, they were sufficient grounds for attorney reprimand and disbarment.

Respondent points out that the Court, at the conclusion of the trial, recognizing Mr. Aka's shortcomings, advised petitioners to supplement their representation, yet they continued to rely on him, and, thus, they must bear the risk that his inadequate representation imposed.

Respondent rebuts petitioners' claim that Mr. Aka stipulated to deficiencies and penalties that petitioners wanted to contest by pointing out that Dr. Brown executed the stipulation.

Finally, respondent argues that no different result would have followed absent Mr. Aka's unprofessional conduct. Respondent points out that, in T.C. Memo. 2014-167, we held that petitioners had failed to prove the following: (a) that, for 2006, Dr. Brown did not have unreported Schedule C income, (b) that, for that year, petitioners were entitled to Schedule C expenses beyond those conceded by respondent, (c) that, for 2007, petitioners over-reported Dr. Brown's Schedule C gross receipts, and (d) that, for that year, petitioners were entitled to Schedule C expenses. In response to petitioners' apparent belief that Mr. Aka failed to provide respondent and the Court with substantiation that petitioners or their agents gave him, respondent points out that Dr. Brown did not testify at trial that he had additional records supporting his case. Moreover, respondent adds, petitioners have not in support of their motion proffered or even identified the specific evidence that they assert Mr. Aka failed to present at trial that would have carried their burden of proof.

### Discussion

Fraud on the court is a narrow exception to the general rule that a decision of this Court becomes final 90 days after it is entered. See Abatti v. Commissioner, 859 F.2d 115, 118 (9th Cir. 1988), aff'g 86 T.C. 1319 (1986); secs. 7481 and 7483; Rule 162. "Fraud on the court is an unconscionable plan or scheme which is designed to improperly influence the court in its decisions." Merriam v. Commissioner, T.C. Memo. 2005-17, 2005 WL 225286, at \*5 (citing Abatti, 107 F.3d at 118), aff'd, 107 F.3d 877 (9th Cir. 1997). "With specific facts which plainly impugn the official record, the moving party must establish by clear and convincing evidence that decision resulted from fraud on the court." Id.; accord United States v. Estate of Stonehill, 660 F.3d 415, 443-444 (9th Cir. 2011). Moreover, in order to prove fraud upon the court, a petitioner seeking to vacate a decision must establish both (1) an intentional plan of deception designed to improperly influence the Court in its decision and (2) that the deception "had such an effect on the Court." Drobny v. Commissioner, 113 F.3d 670, 678 (7th Cir.

1997) (quoting Murdock v. Commissioner, 72 T.C.M. 1324, 1996 WL 677505 (1996)), aff'g T.C. Memo. 1995-209; see also Chao v. Commissioner, 92 T.C. 1141, 1144 (1989) (motion to vacate denied because same result would have been reached even in the absence of the alleged fraud upon the court). Finally, not all fraud in a judicial proceeding is fraud on the Court; a decision will not necessarily be set aside because a taxpayer appearing in this Court was misled or defrauded by his attorney. See Chao v. Commissioner, 92 T.C. at 1144, see also Anderson v. Commissioner, 693 F.2d 844, 846 (9th Cir. 1979).

Applying those rules to the case at hand, we concede that Mr. Aka may have been untruthful with the Court in excusing his failures to obey our orders because he was out of the country, his computer crashed, or he had no ability to access the Court's website. Nevertheless, even accepting that his excuses were untruthful, we believe that Mr. Aka lied not to influence the outcome of the case one way or the other but to avoid reprimand by the Court and to excuse his failures to obey our orders. And while there may be evidence that Mr. Aka failed to introduce--though petitioners have failed to identify any--and certainly he failed effectively to argue their case (we struck petitioners' brief as untimely), those factors did not work any corruption on our decision making. We were aware of Mr. Aka's inadequacies and warned petitioners of them. We decided this case on the evidence the parties, acting through their counsel, presented to us. We were not deceived, and certainly we were not improperly influenced or corrupted by Mr. Aka's thin excuses. Petitioners have failed to prove that Mr. Aka's untruths resulted in a fraud on the Court.

We are also mindful of the laundry list of grounds for disbaring Mr. Aka, but we do not see among those grounds a conclusion that Mr. Aka defrauded the Court in representing petitioners in this litigation. Colloquially, Mr. Aka might be described as a "fraud" as a lawyer, but petitioners, not the Court, were the victim of that fraud. Dr. Brown sat through the whole trial, and, if he was paying attention, he would have understood why we told him at the close of the trial that Mr. Aka needed help. Petitioners were further put on notice of Mr. Aka's deficiencies by the October 25 order, which they claim not to remember receiving, although it was sent to the St. Helena address. That address appears on both the petition and their post-trial notice of appeal, both documents executed by them alone. Given Dr. Brown's failure to remember his own signature on the stipulation, petitioners have not convinced us that they were not further put on notice of Mr. Aka's deficiencies by the October 25 order. Dr. Brown is an accomplished man, and he had ample opportunity to realize Mr. Aka's failure to represent him adequately. Granting the motion, vacating our decision, and conducting a further evidentiary hearing in this

case would divert the Court's attention from the claims of other taxpayers seeking it. Neither respondent nor the Court need bear the burden of Mr. Aka's unsatisfactory performance.

And finally, with respect to petitioners' claim that Mr. Aka stipulated to things they would never agree to: While Dr. Brown does not remember signing the stipulation, he concedes that he did sign it. Moreover, he was in Court when the Court identified the issues remaining for trial as Schedule C income and the substantiation of deductions and respondent's counsel identified the penalties as being provided for in the stipulation. If any of that came as surprise to Dr. Brown, the transcript of the hearing does not show that he voiced any objection, asked to confer with his counsel, Mr. Aka, or otherwise registered surprise. If Dr. Brown was not paying attention, then the risk that the stipulation may have misrepresented petitioners' desires with respect to the litigation is one petitioners must bear. Mr. Aka effected no fraud on the Court in, along with Dr. Brown, executing the stipulation as to the issues remaining for trial and that the accuracy-related penalties depended on whether there were substantial understatements of income tax, which we found that there were. See T.C. Memo. 2014-167, at \*21-22.

On the premises stated, it is

ORDERED that the motion is denied.

**(Signed) James S. Halpern  
Judge**

Dated: Washington, D.C.  
October 11, 2018