

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF PROFESSIONAL RESPONSIBILITY
WASHINGTON, DC

DIRECTOR, OFFICE OF PROFESSIONAL
RESPONSIBILITY,

Complainant,

v.

Complaint No. 2008-14

James P. Napolitano,

Respondent.

DECISION BY DEFAULT

On June 12, 2008, a Complaint was issued on behalf of the Director, Office of Professional Responsibility, Internal Revenue Service, Department of the Treasury, pursuant to 31 C.F.R. 10.60, under the authority of 31 U.S.C. 330, alleging that the Respondent, James P. Napolitano, a CPA who practices before the Internal Revenue Service, engaged in disreputable conduct within the meaning of 31 C.F.R. 10.51. The complaint seeks to have the Respondent suspended from such practice for a period of forty-eight (48) months, pursuant to 31 C.F.R. 10.50 and 10.70.

On June 17, 2008, copies of the Complaint and Notice of Institution of Proceedings, together with a covering letter, were sent to the Respondent's counsel of record by certified mail, return receipt requested, at his last known address of record with the Internal Revenue Service. The Notice advised the Respondent of his obligation to file an answer to the Complaint within 30 calendar days of service of the Complaint. Respondent was also advised that failure to answer the Complaint could result in a decision of default being rendered against him. The Complaint and Notice and the covering letter were delivered to Respondent's counsel at the address indicated on June 18, 2008, as shown by a United States Postal Service return receipt form. To date no answer to the Complaint has been received.

On July 28, 2008, counsel for the Director filed a Motion for Default Judgment with the undersigned. The motion, together with a covering letter, an affidavit from counsel for the Director, and attached exhibits, were sent to the Respondent's counsel, at his last known address of record, by certified mail, return receipt requested, on July 28, 2008.

On August 6, 2008, Respondent's counsel submitted a letter to me, with a copy to counsel for the Director seeking a thirty day extension of time within which to file an answer in this case. In the letter, counsel stated concerns about the Respondent's Fifth Amendment rights because the Nassau County District Attorney was investigation charges based at least in part on the conduct alleged in the Complaint in this case. Counsel indicated that negotiations with the District Attorney in mid-August might alleviate those concerns. On August 11, 2008, counsel for the Director responded, stating that he opposed any extension of time because the answer was out of time, having been due thirty days after service of the complaint.

On August 25, 2008, I issued an order to show cause why the Director's motion for default should not be granted. Respondent, through his counsel, submitted a response on September 3, 2008, repeating some of the assertions made in the August 6 letter and stating that the Respondent was between the "proverbial rock and a hard place. He cannot testify against himself for fear of jeopardizing his criminal case, and he cannot stand mute in this proceeding without being vulnerable to a default judgment." No case citations were provided by Respondent in support of his position. Counsel also asserted that the criminal case against Respondent is presently scheduled for October 10, 2008, but he could not represent that the matter would be resolved at that time, although he does "expect a disposition shortly thereafter." Counsel therefore requested that the matter "be adjourned for a brief period to permit Respondent to answer these pending allegations."

Counsel for the Director filed a response to Respondent's response to the order to show cause. In the response, the Director pointed out that Respondent had failed to file a timely answer or a timely motion for extension of time to file an answer and only submitted a request for an extension after the motion for default judgment was filed. The Director also cited numerous authorities for the proposition that just because a respondent in a concurrent civil suit is also a defendant in a criminal matter does not present Fifth Amendment problems. See *United States v. White*, 589 F.2d 1283, 1286 (5th Cir. 1979); *Diebold v. Civil Service Commission of St. Louis County*, 611 F.2d 697, 700-701 (8th Cir. 1979); *Arthurs v. Stern*, 560 F.2d 477 (1st Cir. 1977), cert. denied, 434 U.S. 1034 (1978); *DeVita v. Sills*, 422 F.2d 1172 (3rd Cir. 1970); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980), cert. denied, 449 U.S. 993 (1980); *U. S. v. Kordel*, 397 U.S. 1, 11-12 (1970). Indeed, as the Director pointed out, one court stated, in circumstances quite similar to the situation here, that "[a]t the administrative hearing [the respondent had] a 'free choice to admit, to deny, or to refuse to answer.' This is full vindication of the Fifth Amendment privilege against self-incrimination." *Luman v. Tanzler*, 411 F.2d 164, 167 (5th Cir. 1969).

Ruling on Motion for Default Judgment

Respondent has not shown good cause for the failure to file an answer in this proceeding. The August 6 request for an extension of time to file an answer was itself filed well after the time for filing an answer or indeed the filing of a motion for extension of time was due. Not having filed for an extension within the time within which an answer was due, Respondent has not shown good cause for failing to file an answer in a timely fashion. Nor has Respondent shown good cause for failing to file a motion for extension of time to file an answer in a timely fashion. Therefore, I cannot consider the reasons submitted in untimely filings as excusing the failure to file an answer in this case.

In any event, it is clear from the authorities cited above that the Respondent's Fifth Amendment right is not violated by having to participate in a concurrent civil proceeding. Surely, he could have filed a timely answer. And he retains his right to remain silent and put the Director to his proof in this proceeding. As the Director points out, the Respondent cited no case authorities in support of a contrary position. Nor has Respondent persuasively shown how filing an answer in this case would have been precluded by the assertion of his Fifth Amendment rights.

In these circumstances, I reject any attempt to use Respondent's assertion of Fifth Amendment considerations as an excuse for failing to file an answer or a timely motion for extension of time for filing an answer, or, indeed, for resisting an order of judgment by default.

A review of the record herein shows that effective service of copies of the Complaint and

Notice of Institution of Proceedings was made upon the Respondent in accordance with 31 C.F.R. 10.63(a). The Respondent was obliged to file an answer to the Complaint and the Amended Complaint or be subject to having a decision by default entered against him, but he failed to do so. No answer has been filed. Accordingly, the motion for default judgment is granted.

Pursuant to the provisions of 31 C.F.R. 10.64(d), failure to file a timely answer constitutes a waiver of hearing. Thus, the allegations of the Complaint are deemed to be admitted, and they may be considered as proved without further evidence. Inasmuch as the allegations in the Complaint have been admitted and no hearing or further proceeding is necessary, based on the record herein, I make the following:

Findings of Fact

1. At all times material, the Respondent was a CPA engaged in practice before the Internal Revenue Service and was subject to the disciplinary authority of the Secretary of the Treasury and the Director, Office of Professional Responsibility, Internal Revenue Service.

2. While representing a taxpayer before the IRS, Respondent presented the taxpayer a document that he represented was written by someone from the IRS on the official letterhead of the IRS. The document was not written by an official of the IRS and Respondent knew it was not. The document was actually a fabrication created by Respondent, a fact which was admitted by Respondent when he was interviewed by an official from the office of the Treasury's Inspector General.

3. The conduct set forth in Number 2 above is evidence of Respondent's failure to exercise due diligence as to the accuracy of representations made to his client with regard to matters administered by the IRS under 31 C.F.R. 10.22(a)(3). Such conduct amounts to disreputable conduct within the meaning of 31 C.F.R. 10.51 and reflects adversely on Respondent's current fitness to practice before the Internal Revenue Service.

Conclusions of Law

1. The Respondent's eligibility to practice before the Internal Revenue Service is subject to suspension or disbarment by reason of disreputable conduct.

2. The Respondent's failure to exercise due diligence as to the accuracy of representations made to his client with regard to matters administered by the IRS constitutes disreputable conduct within the meaning of 31 C.F.R. 10.51. The Respondent's disreputable conduct and violation of the regulations governing practice before the Internal Revenue Service warrant his suspension from such practice. There is no record evidence of extenuating or mitigating circumstances for such disreputable conduct. Accordingly, a forty-eight (48) month suspension, the penalty sought by the Director, is reasonable.

Upon the foregoing findings of fact and conclusions of law, and on the entire record, it is

ORDERED that James Napolitano is suspended from practice before the Internal Revenue Service for a period of forty-eight (48) months. Reinstatement thereafter is at the sole discretion of the Office of Professional Responsibility.

Dated at Washington, D.C., September 23, 2008

Robert A. Giannasi
Administrative Law Judge