

**UNITED STATES TAX COURT  
WASHINGTON, DC**

Ruben [REDACTED]	)	
Petitioner,	)	Docket No.: 22573-21
v.	)	
COMMISSIONER OF INTERNAL REVENUE	)	Filed Electronically
Respondent,	)	

**PETITIONER'S MOTION FOR DEFAULT AND ENTRY OF DECISION IN  
PETITIONER'S FAVOR, AND MOTION TO ORDER REFUND OF AMOUNT COLLECTED**

Petitioner respectfully Moves the Court to find Respondent in default, due to Respondent's failure to timely answer or otherwise move the Court with respect to Petitioner's First Amended Petition ("FAP"), without sufficient cause. Petitioner further respectfully Moves the Court, on the basis of finding Respondent to be in default, and the admissions made thereby, to enter a decision in Petitioner's favor and determine there to be no deficiency in the above-captioned matter, pursuant to United States Tax Court Rules of Practice & Procedure ("TCRP"), Rules 36(a), and 123.

In addition, Petitioner respectfully Moves the Court to order refund of amount collected, pursuant to TCRP, Rule 55, due to Respondent's misapplication of the refund due to Petitioner for the

2017 tax year, against an alleged "outstanding balance" for the 2005 tax year, which at the time did not, and does not exist.

Respondent's concurrence was sought in a phone conversation on January 10, 2022, with counsel of record for Respondent communicating his objection to this motion.

**STATEMENT OF MATERIAL FACTS**

1. The purported Notice of Deficiency, dated March 24, 2021, a true and correct (redacted) copy of which is attached hereto as "Exhibit A", was issued by Respondent on or about March 24, 2021 (the "NOD").
2. On June 21, 2021, Petitioner timely filed his petition before the Court, in response to the purported NOD (the "original petition").
3. On October 27, 2021, Petitioner filed his First Amended Petition (the "FAP") as a matter of course, pursuant to TCRP, Rule 41(a).
4. On October 27, 2021, Respondent mailed his Answer to the original petition to Petitioner, and filed electronically with the Court on the same date.
5. Court docket records confirm that service of Petitioner's FAP was made upon Respondent on November 4, 2021 (the "date of service").
6. As of the date of the filing of this motion, January 10, 2022, court docket records confirm that Respondent has neither moved the court with respect to the FAP, nor filed an Answer to the FAP.

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MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTIONS

**A. Respondent is in default and has relinquished his right to proceed in this case.**

TCRP, Rule 36(a), explicitly provides for only a forty-five (45) day period from the date of service for Respondent to have moved the Court with respect to Petitioner's FAP, or otherwise a sixty (60) day period from the date of service for Respondent to timely file an Answer. Rule 36(a) reads, in pertinent part:

**"(a) Time to Answer or Move:** The Commissioner shall have 60 days from the date of service of the petition within which to file an answer, or 45 days from that date within which to move with respect to the petition. With respect to an amended petition or amendments to the petition, the Commissioner shall have like periods from the date of service of those papers within which to answer or move in response thereto, except as the Court may direct otherwise."

(**Emphasis** in original).

Thus, with court records confirming the date of service on November 4, 2021, the forty-five (45) day period for Respondent to move the Court with respect to the FAP expired after December 20, 2021; and the sixty (60) day period for Respondent to file an Answer expired after January 3, 2022.

As a result of Respondent's failure to timely file an Answer or otherwise move the Court with regard to Petitioner's FAP, Respondent is in default and Petitioner is entitled to a decision in his favor, pursuant to TCRP, Rule 123, which reads in pertinent part:

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**"RULE 123. DEFAULT AND DISMISSAL**

**(a) Default:** If any party has failed to plead or otherwise proceed as provided by these Rules or as required by the Court, then such party may be held in default by the Court either on motion of another party or on the initiative of the Court. Thereafter, the Court may enter a decision against the defaulting party, upon such terms and conditions as the Court may deem proper, or may impose such sanctions (see, e.g., Rule 104) as the Court may deem appropriate. The Court may, in its discretion, conduct hearings to ascertain whether a default has been committed, to determine the decision to be entered or the sanctions to be imposed, or to ascertain the truth of any matter."

**(b) Dismissal:** For failure of a petitioner properly to prosecute or to comply with these Rules or any order of the Court or for other cause which the Court deems sufficient, the Court may dismiss a case at any time and enter a decision against the petitioner. The Court may, for similar reasons, decide against any party any issue as to which such party has the burden of proof, and such decision shall be treated as a dismissal for purposes of paragraphs (c) and (d) of this Rule."

**(c) Setting Aside Default or Dismissal:** For reasons deemed sufficient by the Court and upon motion expeditiously made, the Court may set aside a default or dismissal or the decision rendered thereon.

**(d) Effect of Decision on Default or Dismissal:** A decision rendered upon a default or in consequence of a dismissal, other than a dismissal for lack of jurisdiction, shall operate as an adjudication on the merits."

(**Emphasis** in original).

Respondent's failure to file an answer to Petitioner's FAP, despite ample time and opportunity, or otherwise move the Court for additional time to do so, clearly constitutes a default in this case.

Moreover, Respondent makes a living as this nation's presumed expert in the field of tax law and its administration, as well as tax court rules of practice and procedure, with a multi-billion dollar budget and legions of legal counsel at his disposal, and therefore should be held to a higher standard than Petitioner, who is merely a private citizen. Thus, there can be no plausible or sufficient

reason to excuse a finding of default, and decision in favor of Petitioner.

**RESPONDENT'S DEFAULT REPRESENTS HIS TACIT ADMISSION OF ALL MATERIAL FACTUAL ALLEGATIONS, ASSIGNMENTS OF ERROR, AND AFFIRMATIVE DEFENSES SET FORTH IN PETITIONER'S FAP**

Respondent's abandonment of his obligation to proceed in this case, despite formal notice, and despite carrying the burden of proof for every material allegation contained in the purported NOD, under IRC § 6201(d), constitutes not only a clear default under TCRP, Rules 36(a) and 123, but also Respondent's tacit, if not formal, admission of all material factual allegations, assignments of error, and affirmative defenses set forth in Petitioner's FAP, including but not limited to the following, as to the 2017 tax year:

**1. Material Factual Allegations**

- a. No underpayment of Petitioner's Federal income tax liabilities exists for the 2017 tax year.
- b. Petitioner is not liable for any amount whatsoever of the alleged deficiency in income taxes and interest as set forth by Respondent in the NOD for the 2017 tax year.
- c. No underpayment of Petitioner's Federal income tax liabilities exists as determined by Respondent in the NOD for the 2017 tax year.

**2. Assignments of Error**

- a. Respondent erred, because the purported NOD was improperly issued by a party without the delegated authority to do so, pursuant to IRS Delegation Order 4-8, and established IRS rules and procedure, at Internal Revenue Manual ("IRM") § 1.2.2.5.8.

- b. Respondent erred in determining that there is a deficiency in Federal income tax for Petitioner in any amount whatsoever.
- c. Respondent erred in determining that there is an underpayment of tax in any amount whatsoever.
- d. Respondent erred in determining that Petitioner received "IRA Distributions", in any amount whatsoever.
- e. Respondent erred in determining Petitioner's "wages, salaries and tips" in any amount whatsoever.
- f. Respondent erred in determining the amount of "W-2/1099 Federal Income Tax Withholding".
- g. Respondent erred in his determination of an adjustment to Petitioner's "withholding credits", in any amount whatsoever.
- h. Respondent erred in calculating the alleged tax liability for Petitioner.
- i. Respondent erred, by falsely claiming, on page 1 of 2, in Form 4549, that the "Person with whom examination changes were discussed", was the Petitioner.
- j. Respondent erred, by failing to conduct any good-faith inquiries prior to his issuance of the NOD, in violation of his express statutory duty under IRC § 6201(a).

**3. Affirmative Defenses**

- a. Respondent's purported NOD was improperly issued by a party without the delegated authority to do so, pursuant to Delegation Order 4-8, and established IRS rules and procedure, at IRM § 1.2.2.5.8.
- b. Respondent's purported NOD contains a false statement of material fact, by falsely claiming, on page 1 of 2, in Form 4549, that the "Person with whom examination changes were discussed", was the Petitioner.

- c. Respondent failed to conduct any good-faith inquiries prior to issuance of the NOD, in violation of his express statutory duty under IRC § 6201(a).
- d. Respondent's purported NOD fails to state a claim upon which relief can be granted.

**RESPONDENT OWES PETITIONER A REFUND FOR THE 2017 TAX YEAR**

1. As to the 2017 tax year:

a. On March 9, 2018, Petitioner filed his Form 1040 tax return, with supporting documents attached thereto, for the 2017 tax year (the "2017 return"), reflecting a refund due in the amount of \$1,373.47 (the "2017 refund").

b. On April 30, 2018, Respondent issued IRS Notice CP49, a true and correct copy of which (redacted, includes page 1 of 3 only) is attached hereto as "Exhibit B", processing the 2017 return as filed, but unilaterally applying the 2017 refund to an outstanding balance alleged to be owed for the 2005 tax year.

c. However, Petitioner denies ever owing any alleged outstanding balance for the 2005 tax year, at any time after August 12, 2015 - the date on which Petitioner filed his original Form 1040 tax return for the 2005 tax year, which reflected no tax liability due (the "2005 return").

d. The fact that Petitioner neither owed, nor owes, any outstanding balance for tax year 2005, since August 12, 2015, is confirmed by the decision issued in T.C. Ruben T. Varela vs. Commissioner, Docket No. 16994-18 L; ECF 58, in which the section 6702 civil penalty Respondent attempted to assess against Petitioner, by alleging the 2005 return to be "frivolous" - was NOT SUSTAINED.

e. Furthermore, neither Respondent, nor his counsel, nor any agent, officer, or employee of Respondent can, or will testify as to any first-hand knowledge regarding the existence of any

outstanding balance for the 2005 tax year, owed by or due from Petitioner at any time after August 12, 2015.

f. Nor has Respondent's counsel presented, nor will they present to this Court any actual EVIDENCE of an outstanding balance for the 2005 tax year, owed by or due from Petitioner at any time after August 12, 2015, such as a substitute return of Respondent's own making, which pertains to the filed 2005 return, as mandated under IRC § 6020(b)(1), and which contains or is verified by a written declaration that it is made under the penalties of perjury, as required under IRC § 6065.<sup>1</sup>

g. Therefore, Respondent's misapplication, in April 2018, of Petitioner's 2017 refund to an alleged but nonexistent "outstanding balance" for the 2005 tax year, should be immediately returned to Petitioner, pursuant to TCRP, Rule 55.

#### **CONCLUSION AND PRAYER**

Respondent is clearly in default and has abandoned his obligation to proceed in this matter, by failing to answer Petitioner's FAP, despite receiving formal notice, ample time and opportunity to do so - without any sufficient cause - and for this reason is no longer entitled to proceed. Accordingly, Petitioner is entitled to findings and a decision in his favor in this case, as well as a return of his 2017 refund, which was misapplied by Respondent against an alleged outstanding balance due for the 2005 tax year, which at the time did not, and does not exist.

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<sup>1</sup> With respect to Respondent's IRC § 6020(b)(1) mandate, the courts have held, under United States v. Lacv, 658 F.2d 396 (5th Cir. 1981) (citing United States v. Harrison, 486 F.2d 1397 (2d Cir. 1972), in pertinent part, as follows:

"[T]he purpose of section 6020(b)(1) is to provide the Internal Revenue Service with a mechanism for assessing the civil liability of a taxpayer who has failed to file a return..." (Emphasis added); [or who has filed what the IRS deems to be a "false, fraudulent or frivolous" return. See 26 CFR § 301.6020-1(b)].