

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	CV 2:12-cv-10530-SVW(MRW)
)	
Plaintiff,)	ORDER GRANTING PLAINTIFF'S
)	MOTION FOR ENTRY OF DEFAULT
v.)	JUDGMENT AND GRANTING
)	PLAINTIFF'S MOTION FOR
YONNY TORRES, d.b.a. YONNY'S)	INJUNCTIVE RELIEF [7]
INCOME TAX,)	
)	
Defendant.)	
_____)	
)	
)	
)	
)	

I. INTRODUCTION

On October 31, 2012, Plaintiff United States of America filed a Complaint ("Compl.") against Defendant Yonny Torres, individually, and doing business as Yonny's Income Tax (collectively "Defendant"), for engaging in conduct prohibited under the Internal Revenue Code ("IRC"). On February 13, 2013, the Government filed for entry of default against Defendant, and on February 14, the Clerk of the Court entered default. On March 15, 2013, the Government filed this Motion for Entry of Default Judgment ("Motion") against Defendant. The Motion principally seeks to permanently enjoin Defendant from preparing or filing, or

1 assisting in the preparation or filing of, federal income tax returns
2 for other people pursuant to 26 U.S.C. § 7407.

3 The Court has jurisdiction pursuant to 26 U.S.C. § 7402, and it
4 GRANTS default judgment.

5
6 **II. FACTS & PROCEDURAL HISTORY**

7
8 This action has been requested by the Chief Counsel of the
9 Internal Revenue Service ("IRS"), and commenced at the direction of the
10 Attorney General of the United States. (Compl. ¶ 3). Defendant resides
11 and does business in Los Angeles, California. (Id. ¶ 4). Defendant
12 currently offers tax return preparation services to individuals through
13 his business, Yonny's Income Tax, where he prepares tax returns for
14 others in exchange for compensation. (Id. ¶ 7). Between 2009 and 2012,
15 Defendant filed at least 3913 income tax returns. (Id. ¶ 8).

16 In 2011, the IRS began investigating the Defendant for the 2009
17 income tax returns he prepared during the 2010 filing season. (Id. ¶
18 10). During their investigation, the IRS discovered that Defendant had
19 failed to comply with the "due diligence" requirement of 28 U.S.C. §
20 6695(g). (Id.). This section of the tax code creates a duty for a tax
21 preparer to make reasonable inquiries into information provided by the
22 taxpayer in determining eligibility for the Earned Income Credit
23 ("EIC"), as well as a duty to document his customer files regarding
24 those inquiries. (Id. ¶ 15). The IRS believes that the Defendant
25 fraudulently claimed larger EICs which resulted in income tax refunds
26 in amounts larger than what the clients were legally entitled. (Id. ¶
27 13). Subsequently, Defendant admitted that all of the client files that
28

1 he provided to the IRS were not in such compliance, and he agreed to a
2 \$52,000 penalty, which was assessed on May 9, 2011. (Id. ¶ 10).

3 In 2012, the IRS discovered similar noncompliance with the due
4 diligence requirement of § 6695(g) for the 2010 income tax returns that
5 Defendant prepared during the 2011 filing season. (Id. ¶ 15, 18a-18o;
6 Brown Decl. ¶ 10). The Government claims that these continual and
7 repeated violations evidence a willful attempt to understate clients'
8 tax liability and a reckless or intentional disregard for the IRS rules
9 or regulations in violation of § 6694. (Compl. ¶ 27). The Government
10 also claims that Defendant's fraudulent and deceptive conduct has the
11 effect of substantially interfering with the proper administration of
12 the internal revenue laws, and unless Defendant is enjoined, he will
13 continue to engage in this conduct. (Id. ¶¶ 31-32).

14 Based on these allegations, and pursuant to 26 U.S.C. §§ 7402 and
15 7407, the government requested in its complaint the following relief:

- 16 1. A permanent injunction, enjoining Defendant, and all other
17 persons in active concert or participation with him, directly
18 or indirectly, by use of any means or instrumentality, from:
- 19 a. Acting as an income tax return preparer within the
20 meaning of § 7701(a)(36);
 - 21 b. Taking any action in furtherance of aiding, assisting,
22 advising, preparing, or filing for compensation tax
23 returns of third-party taxpayers;
 - 24 c. Further engaging in conduct subject to penalty under §§
25 6694 and 6695;
 - 26 d. Substantially interfering with and/or impeding the
27 proper administration of internal revenue laws.

1 2. That this Court further order and decree, as part of its
2 permanent injunctive relief, that Defendant notify, in writing,
3 all persons whose tax returns he has prepared from January 1,
4 2009, to the date of the Court's order, of the findings and
5 relief by the Court, including in such notice to each person a
6 copy of the Complaint and of the Court's Final Order of
7 Permanent Injunction; and that Defendant provide the
8 government's attorneys a list of the names, Social Security
9 numbers, addresses, email addresses, and telephone numbers of
10 all persons so notified within thirty (30) days of the date the
11 Order is entered.

13 **III. ANALYSIS**

14 **A. Default Judgment**

15 The government moves this Court for the entry of default judgment
16 and a permanent injunction against Defendant. "With respect to the
17 determination of liability and the default judgment itself, the general
18 rule is that well-pled allegations in the complaint regarding liability
19 are deemed true." Fair Hous. of Marin v. Combs, 285 F.3d 899, 906 (9th
20 Cir. 2002); TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th
21 Cir. 1987). Thus, based on the above allegations, the court analyzes
22 whether both the procedural requirements of the Local Rules and the
23 substantive requirements of the Eitel factors have been satisfied.

24 **1. Procedural Requirements - Local Rule 55-1**

25 Before this Court may rule on a Motion for Default Judgment, it
26 first must determine whether the Motion complies with Local Rule 55-1.
27 See Pepsico, Inc. v. California Security Cans, 238 F. Supp. 2d 1172,
28 1175 (C.D. Cal. 2002). Local Rule 55-1 establishes that "[w]hen

1 application is made to the Court for a default judgment, the
2 application shall be accompanied by a declaration in compliance with
3 55(b)(1) and/or (2)" with the following included: (1) when and against
4 which party the default was entered; (2) the identification of the
5 pleading to which default was entered; (3) whether the defaulting party
6 is an infant or incompetent person, and if so, whether that person is
7 adequately represented; (4) that the Soldiers' and Sailors' Civil Relief
8 Act of 1940 does not apply; and (5) that notice of the application has
9 been served on the defaulting party, if required. Id.; see also
10 Landstar Ranger, Inc. v. Parth Enters., Inc., 725 F. Supp. 2d 916, 919
11 n.19 (2010) (holding that service on defaulting party is required only
12 if the party has appeared in the action).

13 The Government has satisfied the procedural requirements for
14 default judgment under Rule 55 and Local Rule 55-1. It has provided the
15 Declaration of Valerie L. Makarewicz, Assistant United States Attorney
16 for the Central District of California and counsel of record for the
17 Government representing that: (1) on February 14, 2013, the Clerk
18 entered default against Defendant; (2) when Defendant failed to file a
19 timely response to the Complaint for Permanent Injunction, the
20 government filed a Request to Enter Default; (3) Defendant is not an
21 infant or an incompetent person; and (4) the Soldiers' and Sailors'
22 Civil Relief Act of 1940 is not applicable here. (Makarewicz Decl. ¶¶
23 5-8). Because Defendant has not appeared in the action, the government
24 was not required to serve notice of this application. As the procedural
25 requirements are met, the Court turns to examine the merits of the
26 Request.

27 2. Substantive Requirements - Eitel Factors

1 Once these procedural requirements are met, “[g]ranted or denying
2 a motion for default judgment is a matter within the court’s
3 discretion.” Landstar, 725 F. Supp. 2d at 919. Entry of default does
4 not automatically entitle the non-defaulting party to a court-ordered
5 judgment. See Pepsico, 238 F. Supp. 2d at 1174. In fact, default
6 judgments are ordinarily disfavored. Eitel v. McCool, 782 F.2d 1470,
7 1472 (9th Cir. 1986). Accordingly, the Ninth Circuit has instructed
8 courts to consider the following factors in deciding whether to grant
9 default judgment: (1) the possibility of prejudice to the plaintiff;
10 (2) the merits of the plaintiff’s substantive claim; (3) the
11 sufficiency of the complaint; (4) the sum of money at stake in the
12 action; (5) the possibility of a dispute concerning material facts; (6)
13 whether the default was due to excusable neglect; and (7) the strong
14 policy underlying the Federal Rules of Civil Procedure favoring
15 decisions on the merits. Eitel, 782 F.2d at 1471-72.

16 i. Possibility of Prejudice to the Plaintiff

17 The Government would suffer prejudice if default judgment is not
18 entered. A denial of default judgment that leaves a plaintiff without
19 other recourse has been found to be prejudicial. Pepsico, Inc., 238 F.
20 Supp. 2d at 1177. The Government has already sustained losses,
21 potentially as much as \$6.5 million. (Compl. ¶ 21). Defendant had
22 previously been penalized \$52,000 for similar violations. (Compl. ¶
23 10). Because no indication exists that his conduct has or will cease,
24 and because the losses to the government continue to grow, granting a
25 default judgment and injunction are necessary to prevent further
26 prejudice.

27 ii. Merits of Claim and Sufficiency of Complaint

28

1 The second and third Eitel factors are often analyzed together.
2 The Ninth Circuit has "suggested that these two factors require that a
3 plaintiff 'state a claim on which [it] may recover.'" Pepsico, 238 F.
4 Supp. 2d at 1175 (quoting Kloepping v. Fireman, No. C 94-2684 THE, 1996
5 U.S. Dist. LEXIS 1789, at *2 (N.D. Cal. Feb. 13, 1996)).

6 To maintain a civil action to enjoin a tax return preparer from
7 further engaging in conduct proscribed by 26 U.S.C. § 7407, the
8 government must establish (1) that the defendant engaged "in conduct
9 subject to penalty under 26 U.S.C. § 6694 or 26 U.S.C. § 6695" or "in
10 any other fraudulent or deceptive conduct which substantially
11 interferes with the proper administration of the Internal Revenue
12 laws"; and (2) that "injunctive relief is appropriate to prevent the
13 recurrence of such conduct." 26 U.S.C. § 7407(b); United States v.
14 McIntyre, 715 F. Supp. 2d 1003, 1009 (C.D. Cal. 2010) (citing United
15 States v. Kapp, 564 F.3d 1103, 1109 (9th Cir.2009); United States v.
16 Nordbrock, 828 F.2d 1401, 1403 (9th Cir.1987) (stating that any
17 violation of Sections 6694 or 6695 must be willful in order to be
18 "subject to penalty")).

19 Section 6695(g) requires tax preparers to comply with due
20 diligence requirements with respect to determining client eligibility
21 for EIC. Section 6694(b) prohibits the willful attempt by a tax
22 preparer to understate a client's tax liability on a return or claim,
23 and it prohibits a reckless or intentional disregard of IRS rules and
24 regulations.

25 Here, the Government has stated and supported a claim under § 7407
26 for which relief is sought. The Government has demonstrated Defendant's
27 lack of compliance with the due diligence requirement of § 6695(g) by
28

1 providing 15 examples of tax returns prepared by Defendant which
2 contain fabricated dependency exemptions and/or Schedule C business
3 income that resulted in improper claims of the EIC. (Compl. 18a-18o).
4 Furthermore, the due diligence requirement includes a duty which
5 necessitates following certain investigative procedures regarding his
6 clients' eligibility as well as documenting those inquiries; all of
7 which Defendant has failed to do. The Government has also demonstrated
8 that because this conduct has continued into the 2011 filing season,
9 after Defendant admitted to his prior unlawful tactics, the conduct is
10 more likely than not intentional, and at minimum, clearly reckless.¹
11 (Compl. ¶ 10; Brown Decl. ¶¶ 9-10). Moreover, because there are 3,913
12 income tax returns at issue that may have resulted in losses up to \$6.5

13
14 ¹The complaint does not state a beginning date of investigation or the
15 date that defendant admitted to the noncompliance, only the date of
16 fine assessment, May 9, 2011. (Compl. ¶ 10). This theoretically
17 leaves a window open for the Defendant to complete another tax season
18 without notice of his noncompliance. The Government's Application for
19 Default Judgment and Declarations shed some light on this matter,
20 stating that the Defendant admitted to the noncompliance on January
21 12, 2011, and sometime "thereafter" agreed to a penalty. (Brown Decl.
22 ¶ 9). Yet, the penalty was not assessed until four months later (on
23 May 9), arguably leaving time for the Defendant to complete more
24 noncomplying tax returns before fully realizing the magnitude of his
25 prohibited conduct. However, it can be reasonably inferred that the
26 plaintiff was on notice of his illicit conduct on January 12, before
27 the bulk of his tax preparation was to occur for the 2011 filing
28 season. Pleitez v. Carney, 594 F. Supp. 2d 47, 49 (D.D.C. 2009)
(holding that when a defendant does not participate in a case
undergoing default judgment, a court may draw reasonable inferences
from plaintiff's recollections and whatever documentation has been
presented); Flynn v. Mastro Masonry Contractors, 237 F. Supp. 2d 66,
69 (D.D.C. 2002) ("[T]he movant is entitled to all reasonable
inferences from the evidence offered."); Au Bon Pain Corp. v. Artect,
Inc., 653 F.2d 61, 65 (2d Cir. 1981) ("[Plaintiff] was also entitled
to all reasonable inferences from the evidence offered.") Thus,
Defendant's disregard of such an IRS investigation and such notice of
his noncompliance regarding hundreds of improper filings from the
past season easily rises to the level of recklessness, and is more
likely than not evidence of willful misconduct.

1 million and require devotion of scarce resources in audit conduction,
2 the Government has shown a substantial interference with proper
3 administration of the internal revenue laws. (Compl. ¶¶ 19-21; Brown
4 Decl. ¶¶ 19-20).

5 The Government has also established that injunctive relief is
6 necessary to prevent a recurrence of such conduct. Defendant willfully
7 resumed preparing fraudulent EIC-based tax returns, even after he was
8 penalized for submitting inaccurate documents. (Compl. ¶ 10; Brown Decl.
9 ¶¶ 9). Defendant has not simply made understandable mistakes or tried
10 an innovative, but arguably reasonable, new method on a few returns
11 filed in close temporal proximity. Rather, the details above describe a
12 substantial pattern of deliberate wrongdoing. Thus, taking the
13 foregoing as true, the Court concludes that the Government has
14 demonstrated the sufficiency of the merits of their claim.

15 iii. Amount of Money at Stake

16 There is no money at stake in this action, only permanent
17 injunctive relief. Accordingly, this factor favors granting a default
18 judgment.

19 iv. Possibility of Dispute Concerning Material Facts

20 Since the Government supported its factual allegations with ample
21 evidence, and "defendant has made no attempt to challenge the accuracy
22 of the allegations in the complaint," no factual dispute precludes
23 entry of default judgment. Landstar, 725 F. Supp. 2d at 921-22.

24 v. Excusable Neglect

25 The possibility of excusable neglect is minimal. Even where a
26 defendant is only constructively served through the Secretary of State,
27 the failure to appear or defend is not a result of excusable neglect.
28

1 See Solis v. Vigilance, Inc., C 08-05083 JW, 2009 WL 2031767 (N.D. Cal.
2 July 9, 2009). Here, Defendant was served with the Summons and
3 Complaint on December 12, 2012. (ECF No. 1; Makarewicz Decl. ¶ 2).
4 However, Defendant has failed to respond and has made no effort to
5 appear before this Court. Furthermore, the evidence demonstrates a
6 pattern of willful disregard for the IRC, which belies any theory of
7 excusable neglect. Thus, this factor weighs in favor of granting
8 default judgment.

9 vi. Policy Favoring Decision on the Merits

10 On balance, even though there is a general preference to decide
11 matters on the merits, the first six Eitel factors here strongly favor
12 granting default judgment in this civil action to enjoin Defendant from
13 further engaging in conduct proscribed by 26 U.S.C. § 7407.

14 Accordingly, the Court GRANTS the government's Application for
15 Default Judgment.

16 **B. Request for Permanent Injunction**

17 This Court has jurisdiction to issue writs and orders of
18 injunction, and to render such judgments and decrees, "as may be
19 necessary or appropriate for the enforcement of the internal revenue
20 laws." 26 U.S.C. § 7402. To obtain a permanent injunction prohibiting a
21 defendant from acting as a federal tax return preparer pursuant to 26
22 U.S.C. § 7407, the Government must establish that he "continually or
23 repeatedly engaged" in the proscribed conduct such that a more limited
24 injunction prohibiting the misconduct "would not be sufficient to
25 prevent such person's interference with the proper administration of
26 this title" 26 U.S.C. § 7404(2); See McIntyre, 715 F. Supp. 2d
27 at 1009. In analyzing this issue, courts have considered a variety of
28

1 factors, including but not limited to: "(1) a defendant's willingness
2 or refusal to acknowledge wrongdoing; (2) compliance with the law
3 following a warning or notification by the IRS that the conduct is
4 unlawful; (3) the percentage of tax returns filed which are fraudulent;
5 (4) the severity of the harm, *i.e.* the amount of money fraudulently
6 requested and the amount actually and erroneously released; (5) the
7 number of discrete fraudulent practices; (6) the longevity of the
8 fraudulent scheme; and (7) the defendant's degree of scienter." Id. at
9 1010.

10 Here, the Government provides abundant and persuasive evidence
11 that a limited injunction will be insufficient to permanently preclude
12 Defendant's dishonest conduct. As of January 12, 2011, the Defendant
13 had admitted that all of the files provided to the IRS were not in
14 compliance with the due diligence requirements of § 6695(g). (Compl. ¶
15 10; Brown Decl. ¶ 9). Although this failure culminated in a \$52,000
16 penalty, the Defendant maintained the status quo of noncompliance while
17 preparing client returns during the 2011 filing season. (Brown Decl. ¶
18 10). This overall scheme spanned over multiple years, comprised
19 thousands of instances of noncompliance, and accumulated losses to the
20 government estimated as high as \$6.5 million. (Brown Decl. ¶ 19). The
21 government must now devote scarce IRS resources to rectify the problem,
22 (Compl. ¶ 22; Brown Decl. ¶ 20). Many of the clients will be required
23 to file amended returns, and in most cases, they may incur
24 unanticipated financial burdens beyond the amounts of their original
25 liabilities. (Compl. ¶¶ 22-24; Brown Decl. ¶¶ 20-22). From these facts
26 it can be reasonably inferred that the Defendant is willfully repeating
27 the proscribed conduct, whereas "a limited injunction prohibiting
28

1 [Defendant] only from participating in the prohibited conduct is not
2 sufficient because of his . . . continued pattern of violations."
3 United States v. Camp, 629 F. Supp. 2d 1224, 1231 (W.D. Wash. 2009)
4 (holding in part that a limited injunction is insufficient to curtail a
5 repeated and blatant disregard for the internal revenue laws).
6 Therefore, in light of the above factors and at the risk of a limited
7 injunction being insufficient to prevent further harm by the
8 Defendant's ongoing unlawful tax preparation practices, this Court
9 finds that a permanent injunction is warranted. Accordingly, it is
10 hereby ORDERED that Defendant is restrained from:

- 11 1. Acting as a federal income tax return preparer within the
12 meaning of 26 U.S.C. § 7701(a)(36) or requesting, assisting
13 in, or directing the preparation or filing of federal tax
14 returns, amended returns, and other related income tax
15 documents and forms for any person (other than himself and
16 his legal spouse, if any), or appearing as a representative
17 on behalf of any person or organization (other than himself)
18 whose tax liabilities are under examination by the IRS;
- 19 2. Preparing or filing, or assisting in the preparation or
20 filing of, federal income tax returns (including, but not
21 limited to, forms and documents related to federal income tax
22 return) for any person other than himself and his legal
23 spouse, if any;
- 24 3. Preparing or filing, or assisting in the preparation or
25 filing of, any document in connection with any material
26 matter governed by the internal revenue laws of the United
27 States (including, but not limited to, Title 26 or the United
28

1 States Code) for any person other than himself and his legal
2 spouse, if any; and,

- 3 4. Engaging in activity subject to penalty under 26 U.S.C §§
4 6694 and 6695, i.e., aiding, assisting in, procuring, or
5 advising with respect to the preparation of any portion of a
6 return, affidavit, claim, or other document, when defendant
7 knows or has reason to know that portions will be used in
8 connection with a material matter arising under the federal
9 tax law, and Defendant knows that the relevant portion will
10 result in the material understatement of the liability of the
11 tax of another person.

12 Defendant is hereby ordered to notify, in writing, all persons
13 whose tax returns he has prepared from January 1, 2009, to the date of
14 the Court's Order entered below, of the findings and relief by the
15 Court, including in such notice to each person a copy of the Complaint
16 and the Default Judgment and Order for Permanent Injunction.

17 Defendant is hereby ordered to provide the government's attorneys
18 a list of the names, Social Security numbers, addresses, email
19 addresses, and telephone numbers of all persons so notified within
20 thirty (30) days of the date the Default Judgment and Order of
21 Permanent injunction is entered to the following address:

22 AUSA Valerie Makarewicz
23 United States Attorney's Office, Tax Division
24 300 N. Los Angeles Street, Rm. 7211
25 Los Angeles, CA 90012
26
27
28

1 **IV. CONCLUSION**

2 For the reasons set forth above, Plaintiffs' Motion for Entry of
3 Default Judgment against Defendant is GRANTED. The Court GRANTS
4 Plaintiffs' motion for injunctive relief.

5 IT IS SO ORDERED.



6
7 DATED: April 17, 2013

8 STEPHEN V. WILSON
9 UNITED STATES DISTRICT JUDGE
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28