

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNITED STATES OF AMERICA
Plaintiff

vs.

JOHN BAPTIST
KOTMAIR, JR., et al.,
Defendants

Case No.: WMN 05 CV 1297

**NOTICE OF SERVICE OF REPLY TO DEFENDANT KOTMAIR'S RESPONSE
TO MOTION TO COMPEL DEFENDANTS' DISCOVERY RESPONSES**

Pursuant to Local Rule 104.8.a., Thomas M. Newman hereby certifies that on January 30, 2006, a REPLY TO DEFENDANT KOTMAIR'S RESPONSE TO THE UNITED STATES' MOTION TO COMPEL was served on Defendants by United States mail, postage prepaid. The response is attached to this notice for electronic filing with the United States District Court for the District of Maryland.

/s/Thomas M. Newman
THOMAS M. NEWMAN
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Washington, D.C. 20044
Tel.: (202) 616-9926
Fax: (202) 514-6770
Thomas.m.newman@usdoj.gov

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing REPLY TO DEFENDANT KOTMAIR'S RESPONSE TO THE UNITED STATES' MOTION TO COMPEL has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 30th day of January, 2006.

John Baptist Kotmair, Jr.
P.O. Box 91
Westminster, MD 21158

George Harp, Esq.
610 Marshall St., Ste. 619
Shreveport, LA 71101

/s/Thomas M. Newman
THOMAS M. NEWMAN
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Washington, D.C. 20044
Tel.: (202) 616-9926
Fax: (202) 514-6770
Thomas.m.newman@usdoj.gov

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Civil No. WMN 05 CV 1297
)
JOHN BAPTIST KOTMAIR, JR., et al.,)
)
Defendants.)

UNITED STATES' REPLY TO DEFENDANT KOTMAIR'S RESPONSE TO UNITED STATES' MOTION TO COMPEL DEFENDANTS' DISCOVERY RESPONSES

I. BACKGROUND

On January 10, 2006, the United States moved to compel defendants John Baptist Kotmair, Jr. and Save-A-Patriot Fellowship (SAPF) to answer several of the United States' interrogatories and requests for production of documents.¹ Defendant Kotmair timely served a memorandum in opposition on January 17, 2006. The United States now files this reply.

In his response, Defendant Kotmair raises several objections to the United States' discovery requests, some for the first time. In this reply, the United States addresses the following:² (1) an assertion that Defendant Kotmair, as an individual, does not have custody, possession, or the right to provide documents or answer questions that he would otherwise have the ability to do as the director of Save-A-Patriot; (2) the answers to interrogatories of production

¹ The United States' Motion to Compel, Memorandum in Support of Motion to Compel, the United States' L.R. 104.7 Certificate of Conference, and Notice of Service of Motion to Compel were sent to the Court on December 30, 2005, and filed by the Court on January 10, 2006.

² Defendant additionally asserts that the information sought in the Motion to Compel is not relevant to this case. However, this objection was fully addressed in United States' Brief in Support of Motion to Compel Defendants' Discovery Responses and requires no further discussion.

of documents infringe on Defendant Kotmair's rights under the Fifth Amendment to the United States Constitution; and (3) that answers to certain interrogatories and production of documents are unduly burdensome. Defendant Kotmair's objections should be overruled for two reasons. First, these objections are deemed waived and, second, even if the Court were to consider these untimely objections, they are meritless.

II. KOTMAIR'S OBJECTIONS TO THE UNITED STATES' DISCOVERY REQUESTS ARE DEEMED WAIVED

Federal Rule 33(b)(4) explicitly provides that "[a]ll grounds for objections to interrogatories must be stated with specificity and that any ground not so stated in a timely objection is waived unless excused by the Court for good cause." *Id.*; *see also, Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992); *Dorrough v. Mullikin*, 563 F.2d 187, 191 (5th Cir. 1977); *Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc.*, 200 F.R.D. 255, 258-59 (D.N.C. 2001); *Hall v. Sullivan*, 231 F.R.D. 468 (D. Md. 2005). While there is no similar provision in Federal Rule 34(b), the "procedure under Rule 34 [is] intended to be governed by the same procedures applied under Rule 33" requiring the raising of objections within thirty days. *Hall v. Sullivan*, 231 F.R.D. 468 (D. Md. 2005). The burden of avoiding waiver rests with the party that failed to state its objections. *Id.*

Defendant Kotmair's objections in his response are deemed waived because they are untimely and no good cause has been shown. On October 25, 2005, the United States served interrogatories and requests for production of documents upon Defendant Kotmair; his responses were mailed on November 28, 2005, and received by the United States on November 30, 2005.

He amended those responses on December 27, 2005, and for the first time raised an “unduly burdensome and financially prohibitive” objection. United States’ L.R. 104.7 Certificate of Conference, Ex. A, C, and G. Then, in his January 17, 2006 response to the United States’ Motion to Compel Defendant Kotmair raised for the first time a Fifth Amendment objection to interrogatory 3, and a non-custodial possession objection with respect to the remaining requests at issue. As Defendant Kotmair did not raise these objections within thirty days of the United States’ discovery requests, he has waived them, absent a showing of good cause.

Here, the objections should be deemed waived, as no good cause has been demonstrated. Kotmair’s “unduly burdensome and financially prohibitive” objection was raised sixty-three days after discovery was served; and the Fifth Amendment, and non-custodial possession objections, eighty-four days after discovery was served. Even after the United States brought the issue of waiver to Kotmair’s attention in its Motion to Compel, he raised new objections, failed to address the previous untimely objections, and did not meet his burden of showing good cause for this failure in his response.

III. KOTMAIR’S OBJECTIONS TO THE UNITED STATES’ DISCOVERY REQUESTS

1. Defendant Kotmair’s Objection that he is not the Custodian of the Requested Information.

In his January 17, 2006 response, Kotmair objected to discovery requests by the government by asserting -for the first time- that he is not the custodian of the requested information. This objection relates to the United States’ interrogatory numbers 3, 9, 10, and 12 and requests for production of documents numbers 7, 8, and 13, information that Kotmair admits

exists in his response. Notwithstanding that this objection is waived (*see supra*), it is without merit and should be overruled because the information provided by Defendant Kotmair demonstrates that he has custody and control of the requested information.

To the extent Kotmair claims that the information sought is controlled by Save-A-Patriot, Kotmair states in his Answer, response to the United States' discovery requests, and response to the motion to compel that he is the fiduciary of Save-a-Patriot. Save-A-Patriot, in its response to interrogatory number 8, which requested the identity of anyone that has held a management or supervisory position with SAPF, provided only one name, John B. Kotmair, Jr. Since it is well settled that an entity's officer has the requisite control over documents, and can be compelled to produce the information, Kotmair's objection should be overruled. *M.L.C., Inc. v. North American Philips Corp.*, 109 F.R.D. 134, 136-37 (S.D.N.Y. 1986).

Moreover, Kotmair has mailed an unknown number of letters to the IRS on behalf of taxpayers. Declaration of Thomas M. Newman in Support of Reply to Defendant Kotmair's Response to the United States' Motion to Compel Discovery Responses ¶¶ 3-9. The letters purport to give power of attorney to John B. Kotmair, Jr., under the provisions of Treasury Circular 230 § 10.7(c)(1)(iv). *Id.* Since Kotmair sent all these letters on behalf of taxpayers, he should be compelled to respond to discovery seeking information about these letters.

2. Kotmair is not Protected by the Fifth Amendment to the United States Constitution from Disclosure of his Personal Books.

Kotmair objects in his response to the disclosure of his "personal books, papers and effects" based on the Fifth Amendment to the United States Constitution. Since Kotmair's Fifth

Amendment objection refers to his personal records, it is presumed that the objection relates to the United States' interrogatory number 3, requesting amounts and sources of his income since January 1, 2002. This objection is without merit and should be overruled.

The information requested of Kotmair, including the source and amount of income, is required to be kept under I.R.C. § 6001; and Treasury Regulation § 1.6001-1. Since these are required records, they are not private as Kotmair asserts, but subject to inspection. *Davis v. United States*, 328 U.S. 582, 586 (1946). Kotmair can only assert the privilege for the source if he has a reasonable belief that the income is derived from an illegal activity, *Sullivan v. United States*, 274 U.S. 259 (1927), or if the government is compelling him to produce documents. *Fisher v. United States*, 425 U.S. 391 (1976).

The Fifth Amendment privilege against self-incrimination applies, however, only in situations where one is faced with "substantial hazards of self-incrimination," *California v. Byers*, 402 U.S. 424, 429 (1971), or where the claimant can demonstrate "real dangers" of incrimination, as opposed to dangers which are "remote and speculative." *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972). The objection is invalid to the extent Kotmair refuses to supply the amount of income received, the source if the income was obtained legally, and has not demonstrated a danger of self-incrimination.

3. *Defendant Failed to Demonstrate that the Production of the Requested Documentation is Unduly Burdensome.*

Kotmair objects to responding to interrogatory number 12 because the request is unduly burdensome. Specifically, Kotmair asserts that the IRS already possesses the name, Social

Security numbers, and identifying information of taxpayers he represents in a central location.

This assertion is incorrect, and the objection should be overruled.

The letters sent by Kotmair on behalf of taxpayers are mailed to various IRS service centers and associated with each taxpayers' individual file. The information is not centrally located, as it is not associated with either Kotmair or SAPF. Declaration of Thomas M. Newman in Support of Reply to Defendant Kotmair's Response to the United States' Motion to Compel Discovery Responses ¶¶1-9. As such, the requested items are centrally located only at SAPF and Kotmair should be required to produce the information.

IV. CONCLUSION

For the foregoing reasons, the Court should enter an order compelling defendants to respond in full to the above-listed discovery requests.

Respectfully submitted,

ROD J. ROSENSTEIN
United States Attorney

/s/ Thomas M. Newman
THOMAS M. NEWMAN
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Washington, D.C. 20044
Tel.: (202) 616-9926
Fax: (202) 514-6770
thomas.m.newman@usdoj.gov

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing UNITED STATES' REPLY TO DEFENDANT KOTMAIR'S RESPONSE TO THE UNITED STATES' MOTION TO COMPEL has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 30th day of January, 2006.

John Baptist Kotmair, Jr.
P.O. Box 91
Westminster, MD 21158

George Harp, Esq.
610 Marshall St., Ste. 619
Shreveport, LA 71101

/s/Thomas M. Newman
THOMAS M. NEWMAN
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Washington, D.C. 20044
Tel.: (202) 616-9926
Fax: (202) 514-6770
anne.n.graham@usdoj.gov

9. There is no administrative file associate with the Save-A-Patriot Fellowship.

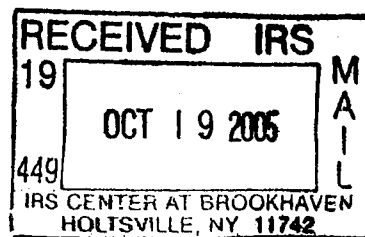
I declare under penalty of perjury that the foregoing is true and correct.

Executed this _____ day of January 30, 2005.



THOMAS M. NEWMAN

Concerning:



Person making response via attached Power-of-Attorney pursuant to 26 CFR § 301.6103(c)-1, 26 CFR § 601.502(a), 26 CFR § 601.502(b)(5)(ii) and Treasury Circular No. 230, at § 10.7(c)(1)(iv):

John B. Kotmair, Jr., Representative Number 2605-47815R
Post Office Box 91, Westminster, MD 21158

October 17, 2005

Certified Mail No. 7005 1160 0004 9956 9363

Re: "NOTICE OF DEFICIENCY" dated September 19, 2005, and
IR Code § 6404(a)(3), "ABATEMENTS."

Lynne Walsh, Director
Internal Revenue Service Center
P.O. Box 400, 1040 Waverly Ave.
Holtsville, NY 11742

RECEIVED

OCT 21 2005

ASER - SUPPORT I

Dear Ms. Walsh:

[REDACTED] is in receipt of a document from your office which purports to be a "NOTICE OF DEFICIENCY," (copy enclosed) alleging various amounts of money due for the year 2001, but fails the statutory provisions of §§ 6211 and 6212. This document is also deficient because it does not contain a "...declaration that it is made under the penalties of perjury" (Internal Revenue Code § 6065), and is devoid of any mention of appeal rights pursuant to Internal Revenue Code § 6404(a)(3). Therefore, it must be abated pursuant to § 6404(a)(3). The following is my response to this unquestionably wrongful assessment procedure:

Please be advised that [REDACTED] has related to me that he has not submitted any type of tax return forms for the year in question to the Internal Revenue Service for a "DEFICIENCY" to occur in. It is obviously absurd for you to claim that you have the authority to file returns for [REDACTED] create a "DEFICIENCY" within those returns, and then give him "NOTICE" of that "DEFICIENCY."

[REDACTED] denies any requirement to file a tax return under Subtitle A, Chapters 1 and/or 3; i.e., he does not have any "Foreign Earned Income," and is not a nonresident alien, officer of a foreign corporation, or involved in any way with a foreign tax exempt organization.

Your citing of Internal Revenue Code §§ 6651(a)(1), 6651(a)(2), and 6654(a) within the attachments to the "NOTICE OF DEFICIENCY" are wrongfully applied pursuant to the Code of Federal Regulations Index. According to this Index these sections apply to Title 27 United States

Code, and section 6654(A) relates to Title 26 United States Code Chapter 1, and as exemplified within Title 26 of the Code of Federal Regulations, Part 600, Section 602.101, the procedures relate to "Foreign Earned Income." [REDACTED] declared to me that he did not work outside of the States of the Union for the years cited within the "NOTICE OF DEFICIENCY."

Further, according to 26 CFR § 1.861-1(a):

"Part I (section 861 and following), Subchapter N, Chapter 1 of the Code, and the regulations thereunder determine the sources of income for purposes of the income tax."

26 CFR § 1.861-8(a)(1) states, in part:

"The rules contained in this section apply in determining taxable income of the taxpayer from specific sources and activities under other sections of the Code, referred to in this section as operative sections. See paragraph (f)(1) of this section for a list and description of operative sections."

The items of income listed on the worksheets enclosed with the alleged "Notice of Deficiency" are not derived from the taxable "sources" listed in 26 CFR § 1.861-8(f)(1), and are therefore not "taxable income" as defined in the Internal Revenue Code.

Since [REDACTED] did not file income tax returns made pursuant to ". . . subtitle A or B or chapter 41, 42, 43, or 44. . ." of the Internal Revenue Code for the year in question, would you please tell me what statutory procedure(s) you are proceeding under the authority of? Please respond pursuant to IR Manual § 1.2.1.2.34, "Policies of the Internal Revenue Service":

"P-1-156:

"Keeping the taxpaying public informed by communicating provisions of the law in understandable terms...";

"P-1-179:

"Since taxpayers must compute their taxes under a body of laws and regulations, some of the provisions of which are complex, the Service has the responsibility of providing taxpayers with all possible information to assist them in the performance of their obligations." and;

"P-1-180:

"The Service recognizes the people's right to know about their tax laws and the manner in which they are being administrated."

As stated above, the purpose of this letter is to put you on notice of the wrongful assessment procedures and the fact that the notice itself is deficient because:

- (a) the notice does not set forth all of [REDACTED] appeal rights, i.e. section 6404(a)(3);
- (b) the notice is not signed pursuant to section 6065;
- (c) the proposed deficiency does not meet the definition of "deficiency," nor come within the statutory authority of sections 6211 and 6212;
- (d) you have failed to comply with the provisions of section 6501(c)(3) to substantiate your alleged assessment against [REDACTED] and
- (e) the items of income listed within the notice were not derived from the taxable sources listed in 26 CFR § 1.861-8(f)(1), and are therefore not "taxable income."

In addition to the foregoing, [REDACTED] submitted a written protest in response to the "proposed" assessments dated June 27, 2005, for the same year, on July 27, 2005, and has not received a reply or been afforded his administrative appeal rights. Therefore, the issuance of the alleged "Notice of Deficiency" for the year in question is clear evidence of your denial of due process.

Ms. Walsh, it is quite obvious that this action taken by you, or on your behalf, is a fraudulent misuse of the Internal Revenue Code deficiency/assessment procedures. On behalf of [REDACTED] I am here and now giving you notice that we will tirelessly prosecute any effort to illegally seize any of [REDACTED] property. I am also sending a copy of this letter to Mark W. Everson, Commissioner of Internal Revenue, so that he is properly notified of the wrongful use of the cited statutes and their deficiency/assessment procedures and can also be held accountable. If you or Mr. Everson continue to prosecute this Notice of Deficiency action, and insist that you have the authority to do so, then you should have no objection to executing the enclosed affidavits. If you decline to do so, then it will be presumed that you do not have any such authority and are proceeding wrongfully.

By reason of the above stated facts, I demand that you abate this "assessment" procedure pursuant to § 6404(a)(3), Title 26, U.S. Code.


I hereby declare that:

1. I am not currently under suspension or disbarment from practice before the Internal Revenue Service or other practice of my profession by any other authority;
2. I am aware of the regulations contained in Title 31 CFR part 10 concerning the practice of attorneys, certified public accountants, enrolled agents, enrolled actuaries and others;
3. I am authorized to represent the individual identified in the power of attorney;
4. I am an individual described in Title 26 Code of Federal Regulation Part 600, at 26 CFR § 601.502(a)(1) and (2), §601.502(b)(5)(ii) and in Circular 230 at §10.7(c)(1)(iv); and
5. the original attached Power-of-Attorney is valid under the laws of the State of Maryland.

Under penalty of perjury, I declare that the foregoing is true to the best of my knowledge and belief.


John B. Kotmair, Jr.

Enclosures: Original Power-of-Attorney; copy of "Notice of Deficiency" dated September 19, 2005; and affidavits for your and Mr. Everson's execution.



Jan Sinclair, ASFR Operation Manager
Internal Revenue Service Center
P.O. Box 400, 1040 Waverly Ave.
Holtsville, NY 11742

Mark W. Everson, Commissioner
Internal Revenue Service
1111 Constitution Avenue, Rm. 3000
Washington, D.C. 20224

AFFIDAVIT

I, Lynne Walsh, Director of the Brookhaven Service Center office of the Internal Revenue Service, do hereby declare under penalty of perjury that the tax liability of [REDACTED] was determined in accordance with Title 26, United States Code, Title 26, Code of Federal Regulations, the Administrative Procedures Act, the Federal Register Act, the Paperwork Reduction Act of 1980, and the policies, procedures, practices, rules, and regulations as incorporated in the various Internal Revenue Manuals.

Lynne Walsh, Director

Subscribed and sworn to before me, a Notary Public, of the State of _____, County of _____, this ____ day of _____, 20____, that the above named person did appear before me and was identified to be the person executing this document.

Notary Public

My Commission Expires On: _____

AFFIDAVIT

I, Mark W. Everson, Commissioner of the Internal Revenue Service, do hereby declare under penalty of perjury that the tax liability of [REDACTED] was determined in accordance with Title 26, United States Code, Title 26, Code of Federal Regulations, the Administrative Procedures Act, the Federal Register Act, the Paperwork Reduction Act of 1980, and the policies, procedures, practices, rules, and regulations as incorporated in the various Internal Revenue Manuals.

Mark W. Everson, Commissioner

Subscribed and sworn to before me, a Notary Public, of the State of _____, County of _____, this ____ day of _____, 20____, that the above named person did appear before me and was identified to be the person executing this document.


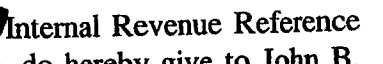

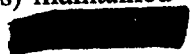

Notary Public

My Commission Expires On: _____

**PRIVACY ACT RELEASE FORM
AND POWER OF ATTORNEY**

Because of the Privacy Act of 1974, written authorization is required by the individual before any information can be given to another individual or organization.

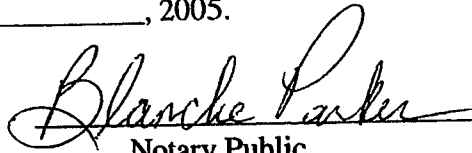
Pursuant to the authority in 26 CFR § 301.6103(c)-1, 26 CFR § 601.502(a)(1) and (2), 26 CFR § 601.502(b)(5)(ii) and Treasury Department Circular No. 230, at § 10.7(c)(1)(iv), this form will give John B. Kotmair, Jr., (Representative Number: 2605-47815R), of Post Office Box 91, Westminster, Maryland 21158, permission to investigate this matter for me.

 Internal Revenue Reference 
 a member of the Save-A-Patriot Fellowship, do hereby give to John B. Kotmair, Jr., the Fiduciary of Save-A-Patriot Fellowship, permission to represent, inquire of and procure from the Internal Revenue Service any and all of the records, pertaining to income taxes, to include income tax returns (1040, 1040A, related forms and assessment records) maintained within any of the Internal Revenue Service Offices, regarding the following years: 


On this 11th day of October, 2005, I hereby certify that I am the individual making this Power of Attorney, to John B. Kotmair, Jr., and that I have a "material interest" in the information within the documents sought.



Subscribed and affirmed to before me, a Notary Public, of the State of Connecticut, County of Fairfield, on this 11th day of October, 2005.


Notary Public

My Commission Expires On: 4-30-2007

RECEIVED

OCT 21 2005