IN THE UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

IN RE:	
SCOTT L. SHINN,	Case No. 10 - 83750
	Judge Thomas L. Perkins
Debtor.	Chapter 7
SCOTT L. SHINN,	Adversary No. 10 - 08139
Plaintiff,	
vs.	
INTERNAL REVENUE SERVICE,	
Defendant.	

Exhibit
B

DEFENDANT'S STATEMENT REGARDING RECENT DECISION: *McCOY v. MISSISSIPPI TAX COMM.*

The United States of America, named and sued as the defendant Internal Revenue Service, submits this statement in light of a recent opinion of a court of appeals. In *McCoy v. Mississippi State Tax Commission (In re McCoy),* No. 11–60146, 2012 WL 19376 (5th Cir. Jan. 4, 2012), the State of Mississippi moved to dismiss the debtor's adversary complaint seeking a declaration that her pre-petition income tax debts for the tax years 1998 and 1999 were dischargeable although she had filed returns for those years late. The Fifth Circuit held McCoy's late-filed returns were not "returns" for discharge purposes because they did not comply with state law filing requirements and thus the income tax for the year was nondischargeable in total under 11 U.S.C. § 523(a)(1)(B)(i).

As noted in the United States' brief, the broader question as to whether any part of a tax debt is ever dischargeable for a tax year for which the debtor filed a late Form 1040 is not before this Court. *See* Doc # 23-1, p. 17. Instead, this case presents the more limited question as to whether a tax debt is dischargeable where the Form 1040 was filed after the IRS had already

made an assessment of the debt for that tax year. *Id.* Under those circumstances, the debt is non-dischargeable under both the United States' position and *McCoy*. The United States continues to maintain, however, that a Form 1040 is not disqualified as a "return" under § 523(a) merely because it was filed late. As indicated in IRS Notice CC-2010-016, the United States' position is that where the tax debt is assessed under the deficiency procedures before the Form 1040 is filed, it is a debt for which no return was filed and thus is nondischargeable under § 523(a)(1)(B)(i), but that a tax assessed as a result of a late-filed return, rather than a deficiency notice, is dischargeable under § 523(a)(1)(B)(i).

To the extent this Court may be inclined to adopt *McCoy*, the United States notes its disagreement with several points made in the decision. Most importantly, we disagree that the flush language *unambiguously* compels the result in *McCoy* on the premise that when a return is due is inescapably one of the "applicable filing requirements" in the flush language. Because § 523(a)(1)(B)(ii) was simultaneously amended and is far more specifically directed at the impact on dischargeability of filing a return late, and given the "commonplace rule of statutory construction that the specific governs the general" (*Morales v. TWA, Inc.*, 504 U.S. 374, 384 (1992)), it is quite plausible that "applicable filing requirements" was intended to refer only to those kinds of filing requirements that had theretofore been understood to bear on whether a document submission was to be treated as a "return" – both for dischargeability purposes and for tax-law purposes. The issue might be viewed as: which filing requirements are logically "applicable" to the treatment of a document as a return. Meeting the filing deadline was not historically considered to have any bearing on whether a return was in fact a return – for tax law purposes or dischargeability purposes. Nothing in the legislative history remotely suggests that Congress suddenly wished to deprive taxpayers of dischargeability whenever a return is filed so

much as one day late. Nor would it be rational for Congress to make all taxes assessed as a result of a late-filed return nondischargeable, while allowing discharge of a tax that is not reported on a return filed by the taxpayer, if the IRS discovers the tax obligation as a result of an investigation, simply because the taxpayer then offers to sign a document prepared by the IRS investigator.

It is also notable that the Final Report Of The Tax Advisory Committee to the National Bankruptcy Review Commission (August 1997)[1] ("Committee Report") in discussing the proposal to add § 1308 to the Bankruptcy Code, which was later added by BAPCPA, explained:

> *Three additional notes to proposal:* 1. "Filing of returns" presumes returns are properly filed -- i.e., with the right agency, at the right address, with the right tax identification numbers, with the requisite signatures, and subject to penalties of perjury/false filing. . . .

Committee Report, Section 1, end of ¶ 441. A footnote to section 441 reads:

> The representative of the IRS has reservations on the issue of what constitutes a filed return. For dischargeability purposes under Bankruptcy Code § 523, the IRS position is that the Internal Revenue Code definition controls. See Track No. 513(b).

What this reveals is that experienced lawyers involved with proposing amendments on these kinds of issues, and ultimately legislators, could have viewed "applicable filing requirements" as being concerned with filing with the right agency, at the right address with the right tax identification numbers, with requisite signatures, and without attempting to cross out the language in the jurat that execution is under penalty of perjury, rather than timeliness. Admittedly, § 1308 has its own definition of "return" (subsection (c)) and the provision serves a different function than § 523(a). The point here is not that the definitions are the same – to the

[1] The Committee Report is Appendix F1 to the Final Report of the National Bankruptcy Review Commission (August 1997) ("Final Commission Report"). The Final Commission Report evolved into the BAPCPA amendments. *See In re McNabb,* 326 B.R. 785, 789 fn. 8 (Bankr. D.Ariz. 2005); *In re Excel Storage Products, L.P.*, 458 B.R. 175, 183 (Bankr. M.D. Pa. 2011). A copy of the Final Commission Report may be found at http://govinfo.library.unt.edu/nbrc/reportcont.html

contrary, § 1308(c) includes in its definition of "return" one prepared and executed by the taxing authority under 26 U.S.C. § 6020(b) or a similar state provision, whereas § 523(a)'s flush language excludes such a filing. The point is that "applicable filing requirements" in the flush language implies the need to consider if a particular filing requirement is logically "applicable" to determining whether a document is a "return" in the first place, given the context and purpose of the definition, and the comments of the Bankruptcy Review Commission suggest that timeliness of filing is not invariably an "applicable" filing requirement.

We submit that this Court should hesitate to condemn all late-filers – even those who file just a day or two late – to nondischargeability when there is not the slightest indication that Congress intended such a vast alteration the rules pertaining to dischargeability without so much as a moment of discussion of such a proposal, or a reason for it, in the legislative history. Instead, this Court should decide this case on the narrower basis that a tax assessment made based on a notice of deficiency issued because no return was filed at all remains a debt for a tax in respect to which no return was filed under § 523(a)(1)(B)(ii), regardless of whether a Form 1040 is thereafter filed. This approach is also consistent with the distinction between § 6020(a) and § 6020(b) returns in the flush language when one considers that § 6020(b) cannot be used to assess unreported taxes of the kind that required deficiency notices to assess, like income taxes. The deficiency provisions bar assessment of such taxes using the truncated procedure in § 6020(b) that can be used for employment tax or excise tax. *See* 26 U.S.C. § 6213 (prohibiting assessment of income tax without a notice of deficiency and a chance to petition the Tax Court

followed either by a default or a Tax Court decision).[2] Thus, for income tax, an assessment based on deficiency notice where no return was filed is roughly analogous to a § 6020(b) return for non-deficiency type taxes.[3]

Respectfully submitted,

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[2] This is not in conflict with the reference to 26 U.S.C. § 6020(b) in 11 U.S.C. § 1308(c) for two reasons. First, § 1308(a) is not limited to income tax returns. Secondly, although the deficiency provisions prohibit assessing income tax based on a return prepared by the IRS under § 6020(b), the IRS does sometimes nevertheless use that provision to prepare income tax returns in conjunction with the issuance of a notice of deficiency for various reasons, including triggering the subsequent accrual of certain penalties for failure to pay tax shown on a return. *E.g.*, *Beatty v. C.I.R.*, 676 F.2d 15 (5th Cir. 1982). *See also Kilker v. C.I.R.*, 2011 WL 5105750 (Tax Court 2011) (penalty for failing to pay amount shown on return disallowed because IRS did not accompany deficiency notice with a § 6020(b) return).

[3] In the Final Report of the National Bankruptcy Review Commission, created under the Bankruptcy Reform Act of 1994, Professor Jack Williams aptly notes that "Section 523(a)(1)(B) was meant to encourage honest and self-generated reporting by taxpayers, not to immunize nonreporting debtors who, once caught, seek to discharge their discovered tax obligations along with other debts in bankruptcy." National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years*, (1997), p. 981, available at http://govinfo.library.unt.edu/nbrc/reportcont.html. We submit that this in fact reflects the intent behind the flush language ultimately added to § 523(a). This is why § 6020(b) returns are excluded.