IN THE UNITED STATES DISTRICT COURT
ALABAMA MIDDLE DISTRICT (OPELIKA)

IN Re: DARYL ZAIN PERRY	**)**	**CIVIL DOCKET #**
Appellant,	**)**	**3:12-cv-00913-WKW**
	)	
v.	**)**	
	)	
THE UNITED STATES OF AMERICA,	**)**	
DEPARTMENT OF THE TREASURY	**)**	
INTERNAL REVENUE SERVICE,	**)**	
Appellee.	**)**	

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ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

DARYL ZAIN PERRY, PLAINTIFF
ADVERSARY PROCEEDING NUMBER 12-08006

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REPLY BRIEF OF APPELLANT

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REPLY BRIEF AND ARGUMENT

The Appellee concedes in its brief that 11 U.S.C. §523(a)(1)(B)(ii) does not apply in the analysis of this Appeal. The Debtor would agree. The Debtor would also argue that 11 U.S.C. §523(a)(1)(B)(i) equally does not apply and that his debt to the Internal Revenue Service is due to be discharged. The Appellee puts all of its eggs in the 11 U.S.C. §523(a)(1)(B)(i) basket, and for reasons as shown in the Appellant's initial brief, as well as below, the Appellee's theory is lacking.

A**. Admission by the Defendant/Appellee**

It is undisputed that the Debtor/Appellant filed his tax returns over three years prior to the filing of this bankruptcy case. As that 11 U.S.C. §523(a)(1)(B)(i) only excepts from discharge "from any debt-(1) for a tax or customs duty- …(B) with respect to which a return, or equivalent report or notice, if required – (i) was not filed or given", 11 U.S.C. §523(a)(1)(B)(i), clearly the Debtor/Appellant has met his burden with respect to this code section. This Code section only excepts tax debts from discharge if the Debtor's returns are not filed. The Parties have jointly stipulated in the facts that the Debtor/Appellant **filed** his tax **returns**[1]. There is no simpler way to put it.

Now the Appellee wants to argue that "returns are not returns". This might be a great question of fact to be argued in trial, except that the Defendant has already stipulated otherwise. However, the facts as they exist in the current state of this case are that the debtor filed his returns. Therefore, because the Defendant/Appellee concedes that 11 U.S.C.§523(a)(i)(B)(i) is the only applicable standard, and that the Defendant/Appellee has stipulated that the Debtor filed

[1] Noting that in the Joint Stipulation of Facts, the Defendant/Appellee Stipulates that "The Debtor filed the above **returns**" (emphasis added).

his returns, the Debtor/Appellant is due Summary Judgment in his favor based on the Defendant's own admission.

B. Judicial Estoppel

The Defendant/Appellant is judicially estopped from denying the Debtor's returns as returns based on its own admission in another case. In the case of Rene Sharp v. United States of America, Bankruptcy Case No. 08-27159, Adv. Proc. No. 08-01003, Northern District of Illinois, Eastern Division, Creditor United States' "Withdrawal of its Argument That Timeliness is a Part of the Definition of "Return"" in 11 U.S.C. §523(a), (Doc. 17) the United States of America makes the following admission: "(1) the fact that limiting "returns" filed late to returns prepared by the Internal Revenue Service pursuant to 26 U.S.C. §6020(a) would almost, if not completely, eviscerate section 523(a)(1)(B)(ii), since section 6020(a) returns are rare; (2) the fact that section 6020(a) returns appear by definition to be late returns makes use of the word "includes" in section 523(a)'s flush language an odd construction; and (3) the fact that section 6020(b) returns are explicitly limited to instances where a taxpayer has failed to file a return altogether would make the exclusion of section 6020(b) returns wholly unnecessary if the first sentence in section 523(a)'s flush language were construed to eliminate late-filed returns generally". The Defendant/Appellee admits that timeliness is not a part of the definition of return, therefore late-filed returns are "returns"so 11 U.S.C. §523(a)(1)(B)(i) does not exclude the Debtor/Appellant from discharge.

C. Case law cited by the Defendant/Appellee

The Defendant/Appellee cites several cases for the proposition that a Form 1040 filed after assessment is not a return. **All** of the cases cited by the Defendant/Appellee in its favor

base that holding on one of two reasons, either the "hanging paragraph" at the end of 11 U.S.C. 523(a), or the "honest and reasonable attempt" prong of the Beard test.

1. The "hanging paragraph":

This argument is simply that the "hanging paragraph" at the end of 11 U.S.C. §523(a) states in part that a return is not a return if it does not meet "applicable filing requirements". This much is true. However, no court can provide any law that states a tax return is not a tax return if it is filed late, or after assessment. The courts simply make an assumption that there is one. The reason all of these opinions have omitted the Internal Revenue Code Section that states that a late-filed tax return is not a return is because **there is no Internal Revenue Code Section, "applicable nonbankruptcy law", or "applicable filing requirement" that states that a return is not a return if it is filed late.** Plain and simple.

a. "The Internal Revenue Code does not specifically set out how accurate, thorough, or complete the requisite form must be in order to qualify as a return under the many sections of the Code that reference a return. **The Code also does not specify when a late tax form will no longer qualify as a return under the tax law**. (emphasis added) *United States v. Hindenlang* 164 F.3d. 1029, 1033 (6th Cir. 1999).

b. The Internal Revenue Code might assess penalties for filing late, but it does not nullify a return that is late.

c. Under this theory, any debtor or individual who files their taxes on April 16 has not filed anything.

d. The Internal Revenue Service publishes that an individual should always file a tax return. A copy of this publication was attached to the Debtor's Brief with the bankruptcy court, and attached to the initial brief in this Court. A portion of the Internal Revenue's published statement is that: "If a substitute return has already been filed for you by the IRS, you should still file your own return to claim any additional items".

e. This argument could easily end if the Defendant/Appellee simply provided which "applicable nonbankruptcy law" states that tax returns are no longer tax returns if they are filed late, or that an "applicable filing requirement" negates any late filed return. There is no such law. As that the Defendant/Appellee has the burden of proof, and as that exceptions to discharge must be liberally construed in favor of the Debtor, the Defendant/Appellee should be required to show this Court which "applicable nonbankruptcy law" states that late tax returns are not returns.

f. *In re Colsen*, 446 F.3d 836 (8th Cir. 2006), the Eighth Circuit reasoned that timeliness of filing a form is a requirement entirely distinct from the definition of what is a "return". *See Id.* In a decision finding in favor of the debtor for a late-filed, after-assessment return, the Court, in applying the *Beard* test, reasoned that the fourth *Beard* criterion (honest and reasonable) contains no mention of timeliness or the filer's intent, declining to create a more subjective definition of "return" that is dependent on the facts and circumstances of a taxpayer's filing or the filer's subjective intent. *See Id.* The court held that the

honesty and genuineness of the filing should be determined on the face of the form itself, not from the filer's delinquency or the reasons for it. *See Id.*

g. Congress considered that Debtors might file returns late, which is why 11 U.S.C. §523(a)(1)(B)(ii) was created. For the Defendant/Appellee to create an applicable nonbankruptcy law out of thin air that states that if a return is not filed on its due date, then it is no longer a return negates any possibility of application of 11 U.S.C. §523(a)(1)(B)(ii). "Since the nondischargeability statute has separate provisions for unfiled tax returns and for late-filed tax returns, it is not at all apparent why a debtor who files a completed 1040 after the filing deadline should be treated the same as one who never files a return at all." *In re: Shinn*, 2012 Bankr. LEXIS 1218, p.2.

2. "Honest and Reasonable"

The other reason the cases cited by the Defendant/Appellee held that a 1040 filed after assessment could not be considered as a return were based on the *Beard* standard, and that the debtor in each case did not demonstrate an "honest and reasonable" explanation for filing his returns late. Otherwise, the 1040's could have been used as returns and discharged. The distinction between those cases and the present case are that, in the cited cases, the debtor either did not present **any** evidence to satisfy the "honest and reasonable" prong, or that, **after a hearing on the matter**, the court concluded in a finding of fact that the debtor did not satisfy the "honest and reasonable" prong. In the present case, there has been no finding of fact that the Debtor/Appellant did not satisfy the "honest and reasonable" prong. To the contrary, in the present case, the Debtor/Appellant submitted an affidavit before the bankruptcy court (attached in his

initial brief), stating in part that "the filing of my tax returns represents an honest attempt on my part to comply with the Internal Revenue Code". Under the Summary Judgment standard, in a light most favorable to the nonmoving party, a genuine issue of material fact would remain that would lead this Court to remand this case back to bankruptcy court for a finding of fact as to whether or not the Debtor had an honest and reasonable motive for his late filing.

Therefore, if this Honorable Court follows the cases cited by the Defendant/Appellee, it is left with: 1.) the decision to use the "hanging paragraph" standard with no applicable nonbankruptcy law to support it; or 2.) the "honest and reasonable" standard that is clearly in dispute, and in a light most favorable to the Debtor, would leave a genuine issue of material fact, and ripe for remand.

3. Not all courts hold that 1040's filed after assessment are not returns.

a. *United States v. Klein*, 312 B.R. 443 (S.D. Fla. 2004) stating that "the reasons for the delinquency in his delayed filing are relevant along with all the other circumstances…for determining the Honest and Reasonable Attempt prong". *Klein* at 455.

b. <u>*See*</u> *In re: Shinn*, 2012 LEXIS 1218. In *Shinn*, the Court stated that:

> "Since the nondischargeability statute has separate provisions for unfiled tax returns and for late filed tax returns, it is not at all apparent why a debtor who files a completed 1040 after the filing deadline should be treated the same as one who never files a return at all…this position was adopted by the Nebraska bankruptcy court in *Matter of Arenson*, 134 B.R. 934 (Bankr.D.Neb. 1991), *aff'd Arenson v. U.S. Through I.R.S.*, 145 B.R. 310 (D.Neb. 1992). among lower courts, it developed as a minority position. *In re Walsh*, 260 B.R. 142 (Bankr.D.Minn. 2001), *aff'd Walsh v. U.S.*, 2002 U.S. Dist. LEXIS 13626, 2002 WL 1058073 (D.Minn. 2002); *In re Mickens*, 214 B.R. 976 (N.D.Ohio 1997), aff'd 173 F.3d 855 (6th Cir. 1999); *In re Shrenker*, 258 B.R. 82 (Bankr.E.D.N.Y. 2001). **A <u>majority</u> of lower courts held that a completed and signed 1040 could qualify as a return even if filed after a unilateral assessment by**

> **the IRS**. *In re Nunez*, 232 B.R. 778 (9th Cir.BAP 1999); *In re Savage*, 218 B.R. 126 (10th Cir.BAP 1998); *U.S. v. Klein*, 312 B.R. 443 (S.D.Fla. 2004); *In re Payne*, 306 B.R. 230 (Bankr.N.D.Ill. 2004), aff'd 331 B.R. 358 (N.D.Ill. 2005); *In re Woods*, 285 B.R. 284 (Bankr.S.D.Ind. 2002), *rev'd U.S. v. Woods*, 2004 U.S. Dist. LEXIS 6438, 2004 WL 882057 (S.D.Ind. 2004); *In re Crawley*, 244 B.R. 121 (Bankr.N.D.Ill. 2000); *In re Pierchoski*, 220 B.R. 20 (Bankr.W.D.Pa. 1998), vacated 243 B.R. 639 (W.D.Pa.1999)" (emphasis added), *Id.* 5-6.

D. Plain Reading of the Statute.

Even if the Court is persuaded that the Debtor/Appellant's "returns" are not "returns", the Debtor "filed or gave" an "equivalent report or notice". This language was not in the Bankruptcy Code prior to the widespread changes in October of 2005. Every court that has found in favor of the Defendant by stating a "return" is not a "return" has overlooked that Congress added language favorable to the Debtor in 11 U.S.C. §523(a)(1)(B) at the same time it "defined" a return in the "hanging paragraph".[2] Many courts have denied a debtor discharge under 11 U.S.C. §523(a)(1)(B) since October, 2005. However, no court has explained or even addressed the fact that, although their interpretation of the "hanging paragraph" is that a late-filed return cannot be a return, this does not reconcile with the fact that if the "non-return" is not deemed a return, it is still a "filed or given" "equivalent report or notice". If not, then what is an "equivalent report or notice"? The holdings in these cases do not lead to a rational conclusion when 11 U.S.C. §523(a)(1)(B) is read in its entirety.[3]

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[2] It should be noted that the widespread changes of the Bankruptcy Code in October, 2005 were not all against debtors. Amongst others, the Bankruptcy Code eliminated Social Security from disposable income calculations, added deductions for charitable contributions and retirement loan repayments, and also (as here) expanded the tax discharge by allowing "equivalent reports" "filed or given" by the debtor. To allow a debtor a discharge even if he never actually "filed" a "return". See 11 U.S.C.§523(a)(1)(B).

[3] 11 U.S.C. §523(a)(1)(B) reads: "with respect to which a return, **or equivalent report or notice,** if required-

(i) was not filed **or given**; or

(ii) was filed **or given** after the date on which such return**, report, or notice** was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition;" 11 U.S.C. §523(a)(1)(B) (emphasis added to BAPCPA changes).

When interpreting a statute, the court must first look to the statutory language. *Dalton v. IRS*, 77 F.3d 1297 (10th Cir. 1996). "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a section of a statute but omits it in another." *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). If Congress added the language "equivalent report or notice" in addition to "return", and the language "or given" in addition to "filed", the court has to assume that was Congress' intent. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, (1993).

Therefore, even if this Court finds that "returns" are not "returns", then surely they are "equivalent report or notice" that has been "filed or given" to the Defendant/Appellee, and therefore leads to a conclusion of Summary Judgment in favor of the Debtor/Appellant, especially when considered liberally in his favor as required by *In re Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986).

Respectfully Submitted, this the 20th day of December, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the parties listed below by electronic means or by placing a copy of the same in the United States Mail first-class, and certified mail postage prepaid, on this the 20th day of December, 2012.

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