

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

CHARLES ELBERT THOMSON,

Case No. 6:11-bk-00224-ABB

Chapter 7

Debtor.

_____ /

CHARLES ELBERT THOMSON,

Plaintiff,

Adv. Pro. No. 6:11-ap-00115-ABB

vs.

INTERNAL REVENUE SERVICE,

Defendant.

_____ /

ORDER

This matter came before the Court on the Complaint (Doc. No. 1) filed by the *pro se* Plaintiff/Debtor Charles Elbert Thomson (“Plaintiff”) seeking to have federal income tax debts for various years deemed dischargeable pursuant to 11 U.S.C. Section 523(a)(1). A status hearing was held on January 30, 2012 at which Plaintiff and counsel for Defendant Internal Revenue Service (“IRS”) appeared. The Court, in open Court, directed the IRS to file a Motion for Summary Judgment and Plaintiff to file a response.

The IRS filed a Motion for Summary Judgment (Doc. No. 18) seeking an award of summary judgment pursuant to Federal Rule of Civil Procedure 56, Federal Rule of Bankruptcy Procedure 7056, and 11 U.S.C. Section 523(a)(1). Plaintiff filed a Response (Doc. No. 21). The IRS did not file a rebuttal to the Plaintiff’s Response. The IRS’s

Motion for Summary Judgment is due to be granted in part and denied in part for the reasons set forth herein.

Federal Income Taxes

Federal income tax debts for the tax years 1987 through 2007 are at issue. Plaintiff contends any federal income tax debt relating to these tax years is dischargeable pursuant to 11 U.S.C. Section 523(a)(1). Plaintiff was employed as a paralegal by the law firm Joe M. Mitchell, Jr., Esquire, in Melbourne, Florida during the years 1987 through 2007 and asserts he was treated as an independent contractor, but was actually an employee.

Plaintiff explained he did not file tax returns for each year of his employment because he was classified by his employer as an independent contractor and he believed he had no obligation to file returns. Plaintiff disputes the independent contractor classification. He contends his employer should have withheld federal income taxes from his wages, but did not, and the employer is responsible for payment of his back taxes. He seeks to discharge any and all tax liabilities for the years when he was employed by the law firm.

Plaintiff, pursuant to the statutory provisions of the Internal Revenue Code, was required to file federal income tax returns for tax years 1987 through 2007 and to pay taxes for any tax liabilities. 26 U.S.C. § 6012(a). Such returns and payments were generally due on the April 15th subsequent to the close of the particular tax year. 26 U.S.C. § 6072.

Willful avoidance of tax payment obligations is not an issue in this proceeding. Plaintiff misunderstood the tax laws and had a good faith belief he was not responsible

for filing returns or paying the tax liabilities for tax years 1987 through 2007. He did not willfully attempt to evade his income taxes. Cheek v. U.S., 498 U.S. 192, 204-205 (1991).

11 U.S.C. Section 523(a)(1)

Section 523(a)(1) of the Bankruptcy Code contains three subsections, (A), (B), and (C), which render a debt “for a tax or a customs duty” nondischargeable. Plaintiff references the three subsections in his Complaint. A discharge pursuant to Section 727 “does not discharge an individual debtor from any debt—”

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) 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; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

11 U.S.C. § 523(a)(1).

Congress added an unnumbered “hanging” paragraph after Section 523(a)(19)

defining the term “return”:

For purposes of this subsection, the term “return” means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements) . . . but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

11 U.S.C. § 523(a)(*) (2005).

Section 523(a)(7) addresses the dischargeability of fines, penalties, or forfeitures payable to and for the benefit of governmental units. Tax penalties generally are not dischargeable unless they fall within one of the two exceptions. The second exception, Section 523(a)(7)(B), provides a tax penalty imposed with respect to a transaction or event that occurred more than three years before the petition date is dischargeable.

Plaintiff's Complaint constitutes a Section 523(a)(1)(B) cause of action and is governed by that provision. The dischargeability exceptions of Section 523 are to be construed "liberally in favor of the debtor." Equitable Bank v. Miller (In re Miller), 39 F.3d 301, 304 (11th Cir. 1994). The government has the burden to establish by a preponderance of the evidence a particular debt is nondischargeable pursuant to Section 523(a). U.S. v. Fretz (In re Fretz), 244 F.3d 1323, 1327 (11th Cir. 2001).

A debtor is not entitled to discharge taxes for any year in which he did not file a return pursuant to the plain and unambiguous language of Section 523(a)(1). In re Schwartz, 2009 WL 361383, at *5 (Bankr. M.D. Fla. Jan. 9, 2009) (holding pursuant to 11 U.S.C. § 523(a)(1)(B)(i), "a debtor can never discharge tax liability if no tax return was filed."); In re Hicks, 377 B.R. 889, 894 (8th Cir. BAP 2007) (holding "taxes for which the Debtors did not file tax returns are nondischargeable under § 523(a)(1)(B)."). Any substitute returns prepared by the IRS pursuant to Section 6020(b) of the Internal Revenue Code does not constitute "returns" pursuant to 11 U.S.C. Section 523(a)(1)(B)(ii) and do not relieve a plaintiff of his obligation to file returns. In re McCoy, 666 F.3d 924, 931 (5th Cir. 2012); In re Donahue, 2008 WL 5065644, at *5 (Bankr. M.D.

Fla. Aug. 25, 2008). Plaintiff's status as an independent contractor or employee is not relevant to the requirement for filing a return.

Tax Years 2003, 2004, 2006 and 2007

The IRS filed its Motion for Summary Judgment on March 1, 2012. It states in its Motion for Summary Judgment that its records reflect Plaintiff did not file returns for tax years 2003, 2004, 2006, and 2007 and balances are due and owing for each of these tax years. The IRS states its records reflect no balance is due by Plaintiff for tax year 2005.

Plaintiff sets forth in his Response he filed tax returns for tax years 2003 and 2004 on March 20, 2012 and filed tax returns for tax years 2006 and 2007 on February 25, 2012. Plaintiff does not address tax year 2005, but attached to his Response copies of tax returns for tax years 2003, 2004, 2006, 2007, *and 2005* prepared by a bookkeeping firm and signed by Plaintiff.¹ Plaintiff signed the tax returns for 2003, 2004, and 2005 on March 30, 2012 and he signed the tax returns for 2006 and 2007 on February 25, 2012. It appears Plaintiff filed these tax returns shortly before and after the IRS filed its Motion for Summary Judgment.

Plaintiff filed his bankruptcy case on June 10, 2011 ("Petition Date"). The returns for tax years 2003, 2004, 2005, 2006 and 2007 were filed post-petition. The returns had to be filed more than two years prior to the Petition Date for any tax liabilities to be dischargeable pursuant to 11 U.S.C. Section 523(a)(1)(B). Any tax liabilities owed by Plaintiff for tax years 2003, 2004, 2005, 2006 and 2007 are not dischargeable pursuant to the plain and unambiguous language of 11 U.S.C. Section 523(a)(1)(B).

¹ Doc. No. 21.

The IRS has established there are no material facts in dispute and it is entitled to judgment as a matter of law pursuant to 11 U.S.C. Section 523(a)(1) regarding tax years 2003, 2004, 2005, 2006, and 2007. The IRS has established it is entitled to summary judgment for any liabilities for tax years 2003, 2004, 2005, 2006, and 2007 pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056. Judgment is due to be awarded in favor of the IRS and against Plaintiff regarding the income tax liabilities for tax years 2003, 2004, 2005, 2006, and 2007, exclusive of any fines or penalties assessed against Plaintiff.

Section 523(a)(7) of the Bankruptcy Code addresses the dischargeability of fines, penalties, or forfeitures payable to and for the benefit of governmental units. Tax penalties generally are not dischargeable unless they fall within one of the two exceptions. The second exception, Section 523(a)(7)(B), provides a tax penalty imposed with respect to a transaction or event that occurred more than three years before the petition date is dischargeable.

To the extent any penalties or fines were assessed or imposed by the IRS more than three years prior to the Petition Date, such penalties or fines are dischargeable pursuant to 11 U.S.C. Section 523(a)(7)(B). The IRS has not delineated or established whether any penalties or fines have been assessed against Plaintiff for tax years 2003, 2004, 2005, 2006, or 2007. The IRS has not established it is entitled to summary judgment for any penalties or fines assessed against Plaintiff for tax years 2003, 2004, 2005, 2006, and 2007.

Tax Years 1987 – 2002

Plaintiff did not address in his pleadings whether he filed tax returns for tax years 1987 through 2002. The IRS's records reflect no balances are due for tax years 1987 through 2002. Neither party has addressed whether Plaintiff had an obligation to file any income tax returns for the tax years 1987 through 2002 pursuant to 26 U.S.C. Section 6012(a) (requiring every individual, having for the taxable year gross income which equals or exceeds the exemption amount, to file a return).

Insufficient evidence has been presented to adjudicate whether any tax liabilities exist for tax years 1987 through 2002 and, if so, whether such liabilities are dischargeable pursuant to 11 U.S.C. Section 523(a)(1)(B). The IRS has not established it is entitled to summary judgment regarding tax years 1987 through 2002 pursuant to Federal Rule of Civil Procedure 56, Federal Rule of Bankruptcy Procedure 7056, and 11 U.S.C. Section 523(a)(1).

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the IRS's Motion for Summary Judgment (Doc. No. 18) is hereby **GRANTED** as to tax years 2003, 2004, 2005, 2006, and 2007 and **DENIED** as to tax years 1987 through 2002. Plaintiff's income tax liabilities for tax years 2003, 2004, 2005, 2006, and 2007, exclusive of any fines or penalties assessed or imposed by the IRS, are nondischargeable pursuant to 11 U.S.C. Section 523(a)(1); and it is further

ORDERED, ADJUDGED and DECREED that an evidentiary hearing shall be held on July 11, 2012 at 1:30 p.m. to address the status of this adversary proceeding and for evidence to be presented by the parties on the following matters: (i) whether Plaintiff was required to file any tax returns for tax years 1987 through 2002; (ii) whether tax returns were filed by Plaintiff for the tax years 1987 through 2002; (iii) whether any substitute returns were filed by the IRS for the tax years 1987 through 2002; and (iv) what penalties or fines have been assessed or imposed by the IRS against Plaintiff for any tax year.

A separate Judgment consistent with these Findings of Fact and Conclusions of Law shall be entered contemporaneously.

Dated this 15th day of June, 2012.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge