UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

CASE NO.: 3:12-bk-5248-JAF

PAUL L. GILBERT,

Chapter 7

Debtor.
_____/

PAUL L. GILBERT,

Plaintiff,

v. **Adversary No.: 3:12-ap-652-JAF**

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This proceeding came before the Court upon [Defendant's] Motion for Summary Judgment (Doc. 12), Plaintiff's Motion for Summary Judgment (Doc. 13), [Defendant's] Response in Opposition to Plaintiff's Motion for Summary Judgment and Reply in Support of Its Motion for Summary Judgment (Doc. 18), and Plaintiff's Response to United States' Motion for Summary Judgment (Doc. 19). Upon a review of the papers and the applicable law, the Court finds it appropriate to deny Plaintiff's Motion for Summary Judgment and grant Defendant's Motion for Summary Judgment.

The following facts are undisputed. Plaintiff is a concrete installer with a tenth grade education. Plaintiff is very inexperienced at maintaining the paperwork required by his business, and has normally hired others to assist him in completing the paperwork.

In June, 2002 Plaintiff and his neighbor, an experienced businessman who understood paperwork and how to complete it, formed KO Concrete, Inc. Plaintiff's partner prepared and completed all of the required paperwork. It was Plaintiff's understanding that his partner prepared and filed all the paperwork required by the business, including business tax returns, and that he prepared Plaintiff's personal tax returns for 2003, 2004, and 2005.

In 2006 Plaintiff and his partner had a business dispute and ceased doing business together. Notwithstanding the dispute, Plaintiff did not know that his partner had failed to file his tax returns for 2003, 2004, and 2005.

In 2009 Plaintiff was visited by Internal Revenue Service ("IRS") employees who informed him his 2003, 2004, and 2005 tax returns had not been filed. Prior to that time, Plaintiff did not receive notice from the IRS regarding his failure to file the returns and was not aware the returns had not been filed. Plaintiff believes his failure to receive such notice was because he had changed addresses since he filed his 2002 tax return.

As a result of Plaintiff's failure to file the 2003 tax return, the IRS calculated Plaintiff's tax liability for the 2003 tax year and issued Plaintiff a notice of deficiency in accordance with 26 U.S.C. § 6212. Plaintiff did not file a petition in Tax Court to challenge the notice of deficiency he received for 2003. On July 27, 2009, after providing Plaintiff with a notice of deficiency and an opportunity to contest the proposed deficiency in Tax Court, the IRS assessed federal income tax, penalties, and interest against Plaintiff for the 2003 tax year as follows:

Year	**Assessment Date**	**Tax Assessed**	**Penalties**
2003	7/27/2009	$29,238.00	$6,573.82 (late filing penalty) $7,304.25 (late payment penalty) $753.82 (failure to pre-pay tax penalty)

Plaintiff filed his 2003 federal income tax return on August 28, 2009 reporting a tax liability of $18,464.00. On November 9, 2009 the IRS abated $11,217.00 of the tax for 2003. That amount represented the difference between the tax the IRS calculated and assessed and the amount reflected on Plaintiff's untimely return.

On August 9, 2012 Plaintiff filed a voluntary petition under Chapter 7 of the Bankruptcy Code and received a discharge on November 21, 2012. On October 8, 2012 Plaintiff commenced this adversary proceeding by filing Complaint to Determine Dischargeability of Income Taxes seeking to determine the dischargeability of his unpaid income taxes for the 2003 (Count One), 2004 (Count Two), and 2005 (Count Three) tax years. In its answer to the Complaint Defendant asserted that Plaintiff's income tax liability for the 2003 tax year is excepted from discharge pursuant to 11 U.S.C. § 523(a)(1)(B)(i) and admitted that Plaintiff's income tax liabilities for the 2004 and 2005 tax years are dischargeable. As a result, the only remaining issue in this proceeding is whether Plaintiff's income tax liability for the 2003 tax year is dischargeable.

Thereafter, the parties filed a joint stipulation of facts. The parties reserved the right to supplement the stipulation with affidavits, testimony, and other evidentiary materials. Plaintiff and Defendant both filed Motions for Summary Judgment.

Discussion

Summary Judgment Standard

Federal Rule of Civil Procedure 56 is applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056. Granting summary judgment is appropriate if, based upon the materials in the record, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter

of law." FED. R. CIV. P. 56(a) and (c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The non-moving party, after a movant makes a properly supported summary judgment motion, must establish specific facts showing the existence of a genuine issue of fact for trial. FED. R. CIV. P. 56(c). The non-moving party may not rely on the allegations or denials in its pleadings to establish a genuine issue of fact, but must come forward with an affirmative showing of evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A court determining entitlement to summary judgment must view all evidence and make reasonable inferences in favor of the party opposing the motion. Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

Application to the Instant Case

Defendant argues that Plaintiff's federal income tax liability for 2003 is excepted from discharge under 11 U.S.C. § 523(a)(1)(B)(i). Section 523 of the Bankruptcy Code was amended by BAPCPA and provides that a discharge under § 727 of the Bankruptcy Codes does not discharge an individual debtor from any debt—for a tax

> **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;

11 U.S.C. 523(a)(1)(B)(i).[1]

Prior to the amendment, the Bankruptcy Code contained no definition of the term "return." BAPCPA added the following definition of "return" in an unnumbered paragraph at the end of § 523(a) ("hanging paragraph").

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, 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) hanging paragraph.

Defendant argues that Plaintiff's tax liability for the 2003 tax year is a debt for which no return was "filed" because the IRS assessed the tax debt against him before he belatedly filed his Form 1040 for that year. Citing to Smythe v. United States, 2012 WL 843435 at * 3 (Bankr. W.D. Wash. March 12, 2012) and Casano v. Internal Revenue Service, 473 B.R. 504, 508 (Bankr. E.D.N.Y. 2012), Defendant argues that as a matter of law, Plaintiff's federal income tax liability for 2003 is excepted from discharge pursuant to 11 U.S.C. § 523(a)(1)(B)(i).

In Smythe the debtors filed their tax returns for 1999-2001 after the IRS had made assessments for those tax years. Smythe, 2012 WL 843435 at *1. Thereafter, the debtors filed bankruptcy and filed a complaint seeking to have the taxes declared dischargeable.

[1] The italicized portion reflects the language added by the amendment.

Id. The United States argued that the taxes were excepted from discharge pursuant to § 523(a)(1)(B)(i). The court analyzed the meaning of debt as set forth in the Bankruptcy Code and determined that when the IRS made tax assessments against the debtors, the debtors' tax obligations became enforceable and the IRS could pursue its claims. Id. at *3. Accordingly, the Court held that the IRS assessments created debts as defined by the Bankruptcy Code. Id. Although the debtors thereafter filed tax returns for the years in question, the court found that the tax debts had already been established by the IRS assessments. Id. The Court held that the tax debts were therefore debts "for which no return was filed" and were nondischargeable under § 523(a)(1)(B)(i). Id.

The court then addressed the IRS's alternative argument that even if the debts did not arise from the IRS assessments, the post-assessment Forms 1040 filed by the debtors did not meet the requirements of a return as defined by the hanging paragraph of § 523(a). Smythe, 2012 WL 843435 at *4. The court noted that the issue was whether the debtors' Forms 1040, which were filed after the IRS assessments, satisfied the "applicable nonbankruptcy law, including applicable filing requirements" as set forth in the hanging paragraph. Id. The court noted that while the Fifth Circuit Court of Appeals had recently held in McCoy v. Miss. State Tax Comm'n, (In re McCoy), 666 F.3d 924, 932 (5th Cir. 2012) that a debtor's failure to file a (state) tax return by its due date meant that it was not a return under the hanging paragraph because it did not comply with "applicable filing requirements," the IRS had adopted a more moderate position. Id. The IRS's position was that a Form 1040 which was filed after the filing deadline could still satisfy the "applicable filing requirements" as long as it was filed prior to the IRS's assessment. Id. The court determined that it did not need to resolve the differences

between the McCoy holding and the IRS's position because the debtors' returns were filed late and filed after the IRS assessments, failed to satisfy the "applicable filing requirements," and were therefore not "returns" under the hanging paragraph. Id.

The facts in Casano were similar. The debtor filed his 2001 and 2002 tax returns after the IRS had made assessments for those tax years. Casano, 473 B.R. at 505. The court noted that prior to the enactment of BAPCPA, the Bankruptcy Code did not define "return" for purposes of § 523(a) and pointed to the four part test set forth in Beard v. Comm'r of Internal Revenue, 82 T.C. No. 766 (Tax Court May 24, 1984), aff'd, 793 F.2d 139 (6th Cir. 1986) and other circuit court cases which addressed whether a post-assessment form 1040 constituted a return for bankruptcy purposes.[2] Id. at 506. The court stated that as a result of the inclusion of the hanging paragraph, it no longer needed to determine whether a post assessment 1040 satisfied the Beard factors. Id. at 507. The court recognized that a number of cases had held that a late filed return would never qualify as a return for purposes of § 523(a)(absent consent by the debtor to a return prepared by the IRS pursuant to 26 U.S.C. § 6020(a)), but like Smythe, acknowledged the IRS's position that a Form 1040 which was filed after the filing deadline could still satisfy the "applicable filing requirements" as long as it was filed prior to the IRS's assessment. Id. at 508. Following the reasoning set forth in Smythe's alternative holding, the court found that it did not need to address the issue of whether any late filed Form 1040 would always result in a nondischargeable tax debt; the fact that the debtor filed the tax returns after the applicable filing deadlines and after the IRS had assessed the taxes rendered the tax liability non-dischargeable. Id.

[2] See Beard and other cases, discussed infra.

The Court does not agree with the first basis for Smythe's holding, that the debt at issue when a debtor files a tax return after the IRS has already made an assessment, is based upon the IRS's assessment rather than the debtor's post assessment Form 1040 and is therefore not a debt for which a return was filed pursuant to § 523(a)(1)(B)(i). As the court in Martin v. United States, 482 B.R. 635, 641 n.6 (Bankr. D. Col. 2012), rev'd on other grounds, In re Mallo, 2013 WL 4873057 at *1 (D. Colo. September 11, 2013) points out, the debt which is the subject of dischargeability in that instance is the amount which is set forth in the debtor's post-assessment Form 1040, not the amount contained in the IRS assessment.

While Defendant relies on Smythe and Casano, it only argues in its papers that the debt at issue is based upon the IRS's assessment rather than Plaintiff's post-assessment Form 1040 and fails to discuss or even mention the hanging paragraph. At oral argument, Defendant indicated that it does not seek to have the Court adopt the holding in McCoy, that a debtor's failure to file a tax return by its due date means that it is not a return under the hanging paragraph because it does not comply with "applicable filing requirements." However, to the extent that the United States would rely on the "applicable filing requirement" language in § 523's hanging paragraph to support its argument that a return filed after an assessment is not a return, the Court rejects that argument.

A number of courts (including McCoy) have interpreted the "applicable filing requirements" language in the hanging paragraph to encompass the time for filing a tax return. Those courts have held that a late filed Form 1040[3] would never qualify as a return for purposes of § 523(a) unless the debtor consented to and signed a return

prepared by the IRS pursuant to 26 U.S.C. § 6020(a). In re Shinn, 2012 WL 986752 (Bankr. C.D. Ill. March 22, 2012); In re Hernandez, 2012 WL 78668 (Bankr. W.D. Tex. January 11, 2012); In re Cannon, 451 B.R. 204 (Bankr. N.D. Ga. 2011); In re Links, 2009 WL 2966162 (Bankr. N.D. Ohio August 21, 2009); In re Creekmore, 401 B.R. 748 (Bankr. N.D. Miss. 2008).

The Court in Martin rejected such an interpretation. Martin, 482 B.R. at 639. The court noted that construing the language "applicable filing requirements" in the hanging paragraph as encompassing the time for filing a tax return would render § 523(a)(1)(B)(ii) superfluous and "entirely coincidental with that of § 523(a)(1)(B)(i), except in the case of tax returns prepared under section 6020(a) of the Tax Code more than 2 years prior to bankruptcy." Id. at 638-639. The court also noted that the hanging paragraph's legislative history does not indicate that it was intended to have such an effect on § 523(a)(1)(B)(ii). Id. at 639. The court found that: 1) "applicable filing requirements" refers to considerations other than timeliness, such as the form and contents of a return, the place and manner of filing, and the types of taxpayers who are required to file returns; and 2) pre-BAPCPA case law is therefore relevant to determine whether a disputed document complies with those requirements and otherwise "satisfies the requirements of non-bankruptcy law" so as to be considered a return for § 523(a) purposes. Id. The Court agrees with the reasoning of Martin and rejects an interpretation of "applicable filing requirements" as encompassing the time for filing a tax return. The Court also agrees that it must look to pre-BAPCPA case law to determine whether a disputed document is a return for § 523(a) purposes.

[3] As the Court previously noted, McCoy dealt with a late filed state tax return.

Prior to the passage of BAPCPA, the seminal case on the issue of whether a document which was filed by a debtor constituted a return was Beard v. Comm'r of Internal Revenue, 82 T.C. No. 766 (Tax Court May 24, 1984), aff'd, 793 F.2d 139 (6th Cir. 1986). The "Beard test" requires that in order to be considered a "return" a document must: 1) contain sufficient data to calculate tax liability; 2) purport to be a return; 3) evince an honest and reasonable attempt to satisfy the requirements of the tax law; and 4) be executed under penalties of perjury. While the Eleventh Circuit Court of Appeals has not weighed in on the issue of whether tax forms filed after IRS assessments "represent an honest and reasonable attempt to satisfy the requirements of the tax law" and therefore constitute returns for purposes of § 523(a)(1)(b), several other courts of appeal and a district court in the Middle District of Florida have.

The Sixth Circuit first addressed the issue in United States v. Hindenlang (In re Hindenlang), 164 F.3d 1029 (6th Cir. 1999). In Hindenlang, the debtor failed to timely file tax returns for 1985-1988. Id. at 1031. The IRS assessed taxes for those years. Id. Two years later, the debtor filed Forms 1040 for those years. Id. The debtor's calculations were substantially the same as the substitute for returns prepared by the IRS upon which the assessments were based. Id. Three years after the debtor filed the Forms 1040, he filed a Chapter 7 bankruptcy petition and sought to have the taxes declared non-dischargeable. Id. The disputed issue was whether the Forms 1040 represented an honest and reasonable attempt to satisfy the requirements of the tax law. Hindenlang, 164 F.3d at 1034. The court stated:

> We hold as a matter of law that a Form 1040 is not a return *if it no longer serves any tax purpose or has any effect* under the Internal Revenue Code. A purported return filed

> too late to have any effect at all under the Internal Revenue Code cannot constitute "an honest and reasonable attempt to satisfy the requirements of the tax law." Once the government shows that a Form 1040 submitted after an assessment can serve no purpose under the tax law, the government has met its burden. The district court concluded that the government must bring forth particularized evidence to show that the taxpayer did not file the Form 1040 in an honest and good faith attempt to comply with the tax law, even after an assessment has been made. We conclude, however, that when the debtor has failed to respond to both the thirty-day and the ninety-day deficiency letters sent by the IRS, and the government has assessed the deficiency, then the Forms 1040 serve no tax purpose, and the government thereby has met its burden of showing that the debtor's actions were not an honest and reasonable effort to satisfy the tax law.

Id. at 1034-35.

In United States v. Hatton (In re Hatton), 220 F.3d 1057 (9th Cir. 2000) the debtor failed to file his 1983 tax return. After the IRS prepared a substitute for return and assessed the taxes against the debtor, it threatened to levy his bank account and seize his personal property. Id. at 1059. The debtor eventually met with the IRS and entered into an installment agreement by which he agreed to pay the taxes over time. Id. Approximately two years later the debtor filed a bankruptcy petition. Id. The issue before the court was whether the installment agreement and the substitute return prepared by the IRS satisfied the Beard factors and constituted the filing of a return under § 523(a)(1)(B)(i). Hatton, 220 F.3d at 1059. The bankruptcy court concluded that the taxes were dischargeable. Id. The Bankruptcy Appellate Panel held that the IRS's filing of the form 1040 coupled with the taxpayer's settlement with the IRS satisfied the filing requirement. United States v. Hatton (In re Hatton), 216 B.R. 278, 283 (9th Cir. B.A.P. 1997). The Bankruptcy Appellate Panel stated "[a]lthough [the debtor] technically did

not satisfy the four-prong test of Beard, his actions certainly were consistent with the spirit of that decision. If we were to take the technical road, we would elevate form over substance without serving the Code's strong public policy to give an honest debtor a fresh start." Id. at 282.

The Ninth Circuit reversed the Bankruptcy Appellate Panel. Hatton, 220 F.3d at 1061. The court found that neither the installment agreement nor the substitute return qualified as a return under Beard as a return because neither document was signed under penalty of perjury. Id. Moreover, the court found that neither the installment agreement nor the substitute return represented an honest and reasonable attempt to satisfy the requirements of the tax law. Id. The court stated:

> It is undisputed that Hatton failed to file a federal tax return on his own initiative for the 1983 tax year as required by section 6012 of the I.R.C. *See* 26 U.S.C. § 6012(a)(1)(A). It is also undisputed that Hatton never attempted to cure this failure until after the IRS had assessed his tax deficiency and initiated a delinquency investigation. It was only after the IRS threatened to levy his wages and bank account and seize his personal property that Hatton elected to cooperate with the IRS. Moreover, even after Hatton finally responded to the notices sent by the IRS, it still took months of negotiations before the IRS and Hatton could agree on a settlement that ultimately resulted in the installment agreement.... Hatton's belated acceptance of responsibility, however, does not constitute an honest and reasonable attempt to comply with the requirements of the tax law. Instead, Hatton made every attempt to avoid paying his taxes until the IRS left him with no other choice. Because Hatton never filed a return and only cooperated with the IRS once collection became inevitable, the bankruptcy court erred in concluding that section 523 did not except Hatton's tax liability from discharge.

Id.

In Moroney v. United States (In re Moroney), 352 F.3d 902, 906 (4th Cir. 2003) the court rejected the debtor's argument that forms which were filed showing lesser liabilities than the IRS had calculated and, as a result of which the IRS abated portions of its prior assessments, were honest and reasonable attempts to comply with the tax laws. The court held that income tax forms "unjustifiably filed years late" after an IRS assessment do not constitute returns pursuant to § 523(a)(1)(B)(i) but declined to adopt the IRS's position that any post-assessment filing can never qualify as a return pursuant to the statute. Id. at 907.

In In re Payne, 431 F.3d 1055, 1057 (7th Cir. 2005) the court held that a return filed after the IRS has "borne th[e] burden" of attempting to reconstruct a taxpayer's income and income tax liability with no help from the taxpayer does not serve the purpose of the filing requirement. The court stated that "[t]he legal test is not whether the filing of a purported return has some utility for the tax authorities, but whether it is a reasonable endeavor to satisfy the taxpayer's obligations, as it might be if the taxpayer had tried to file a timely return but had failed to do so because of an error by the Postal Service." Id. at 1058. However, the court declined to find that a return filed after an assessment could never be an honest and reasonable attempt to comply with the tax law, noting that there might be circumstances beyond a taxpayer's control which prevented him from filing a timely return before the tax was assessed. Id. at 1059-1060.

In Colsen v. United States (In re Colsen), 446 F.3d 836, 840 (8th Cir. 2006) the court held that the honesty and genuineness of a taxpayer's attempt to satisfy the tax laws should be determined from the face of the form itself rather than from the taxpayer's delinquency or the reasons for the delinquency and that the taxpayer's subjective intent is

irrelevant. The court found no evidence that the debtor's post assessment Forms 1040 appeared inaccurate or fabricated, found that the forms contained information that allowed the IRS to calculate the debtor's tax obligation more accurately and that such information was "honest and genuine enough to result in thousands of dollars of abatements in taxes and interest," and found that filing the forms served an important purpose under the tax laws for the debtor. Id. at 840-841. The court affirmed the judgment discharging the taxes. Id. at 841.

In Ralph v. United States (In re Ralph), 258 B.R. 504, 505 (Bankr. M.D. Fla. 2000) the debtor did not timely file her 1987-1989 tax returns. Several years after the IRS assessed the debtor's taxes for those years, the debtor filed 1040 EZ forms for those years. Id. The figures on the returns filed by the debtor were essentially the same as those used by the IRS. Id. Four years later the debtor and her husband filed a Chapter 7 bankruptcy petition and thereafter filed an adversary proceeding seeking to have the taxes declared dischargeable. Id. Relying on Hindenlang, the United States argued that the taxes were non-dischargeable pursuant to 11 U.S.C. § 523(a)(1)(B)(i). Id. at 506. The bankruptcy court rejected the per se rule in Hindenburg regarding Form 1040s filed after assessment of a tax by the IRS and relied instead on Unites States v. Nunez (In re Nunez), 232 B.R. 778 (9th Cir. B.A.P. 1999).[4] Id. at 509. The court stated:

> Such an absolute rule is inconsistent with Congress' failure to use assessment as the triggering event in § 523(a)(1)(B) of the Bankruptcy Code. "Congress specifically excluded any reference to assessment in § 523(a)(1)(B)(i). The Court

[4] In Nunez the debtor failed to file tax returns after which the IRS assessed the taxes. Thereafter, the debtor filed the returns with the assistance of an accountant and an attorney in response to an amnesty program offered by the IRS. The court first determined that the language of § 523(a)(1)(B) does not require a debtor to file a return prior to an IRS assessment for the tax liability to be dischargeable. The court determined that whether the debtor made an honest and reasonable attempt to satisfy the requirements of the tax laws should focus on the debtor's intent at the time the returns are filed.

> has to assume that was Congress' intent. Further, the IRS's interpretation would lead to absurd results. Effectively, a debtor, for whom the IRS prepares substitute returns, could never discharge taxes. We find nothing in the Bankruptcy Code that would lead us to adopt the IRS's argument."

Ralph, 258 B.R. at 509 (internal quotation omitted). The court held that the determination of whether a document constitutes an honest attempt and reasonable attempt to satisfy the requirements of the tax laws should focus on whether the debtor acted in good faith in filing the documents and such good faith inquiry should focus on the debtor's intent at the time the returns were filed. Id. Finding no evidence of fraud, misrepresentation or an improper motive and noting that the returns were filed with the assistance of an accountant and in response to a program designed to encourage taxpayers to file delinquent returns, the court held that the forms filed by the debtor were honest and reasonable attempts to satisfy the tax law and were returns within the meaning of § 523(a)(1)(B)(i). Id. at 510.

On appeal to the district court, the debtor failed to file a brief and failed to respond to the court's order to show cause. Ralph v. United States (In re Ralph), 266 B.R. 217, 218 (M.D. Fla. 2001). The court recognized that the issue in the case was whether the Forms 1040EZ filed by the debtor "constitute[d] an honest and genuine[5] endeavor to satisfy the law." Id. at 219. Although the court recognized the four factors set forth in Beard, it stated that courts place great weight on a taxpayer's cooperation in the audit process, consent to immediate assessment, and assistance in the calculation of the tax liability in determining whether a document constitutes a tax return and found no evidence of cooperation in the case. Id. The court reversed the bankruptcy court,

[5] The court mistakenly used the term genuine rather than reasonable.

concluding that based upon the facts of the case, the United States met its burden of establishing that the Forms 1040EZ filed by the debtor served no purpose and the tax liabilities were therefore not dischargeable. Id.

Relying on or citing to Ralph, other bankruptcy courts in this district have similarly held. See In re Sgarlat, 271 B.R. 688, 696 (Bankr. M.D. Fla. 2001)(stating that "[w]hether or not this Court accepts the proposition urged by the Government, that a return filed by taxpayer after the Government prepared an SFR and made the deficiency assessment is per se a nullity, the fact remains that from the record of this case, it clearly cannot be accepted that after years of not filing returns, the filing of these documents by Debtor ... represents an honest and reasonable attempt of Debtor to satisfy the requirements of the tax law."); In re Weintraub, 290 B.R. 410, 414 (Bankr. M.D. Fla. 2002)(recognizing that a late filed Form 1040 which discloses additional income, of which the IRS was not aware when it prepared a substitute return, may serve a legitimate tax purpose, but no legal purpose is served "in the usual case, where taxpayers deliberately ignore their obligation to timely file tax returns, wait for the IRS to prepare [substitute returns], and then only later file tax returns mimicking the tax liability already assessed by the IRS in order to receive a discharge of that tax liability in a bankruptcy case.")

Relaying on Hindenlang and Ralph, Defendant argues that Plaintiff's post assessment Form 1040 serves no purpose and therefore does not represent an honest and reasonable attempt to satisfy the requirements of the tax law. As the Court noted, the Eleventh Circuit has not ruled on the issue. Additionally, the Court is not bound by the District Court opinion in Ralph. See Baker v. Health Servs. Credit Union, 264 B.R. 759,

763 (Bankr. M.D. Fla. 2001)(holding that bankruptcy court is not bound by stare decisis to follow the decision of a single district judge in a multi-judge district) rev'd, Case No. 3:01-cv-989-J-21 (M.D. Fla. 2001). The District Court reversed the Court's decision in Baker, finding that bankruptcy courts are "inferior" courts for purposes of stare decisis and that a bankruptcy court is bound by a published district court opinion, unless an opinion that contains a different holding is published. However, the Court stands by its holding in Baker. The Court is bound by the District Court's decision in Baker in that case only, not district court decisions which are not the result of a direct appeal.

Moreover, because the facts in Ralph are quite different than those in the instant proceeding, the extent to which Ralph would otherwise guide the Court in its determination is limited. It is clear that Ralph stands for the proposition that a tax return filed by a taxpayer: 1) after an IRS assessment and which lists amounts for wages, exemptions, and tax due that are almost identical to the amounts previously determined by the IRS and 2) only after threatened or actual collection by the IRS, serves no purpose and therefore does not represent an honest and reasonable attempt to satisfy the requirements of the tax law. However, the Court does not believe that Ralph stands for the proposition that any post assessment tax return filed by a taxpayer serves no purpose and therefore does not reflect an honest and reasonable attempt to satisfy the requirements of the tax law.

Defendant urges the Court to adopt a per se rule that any post assessment return filed by a taxpayer serves no purpose and therefore does not reflect an honest and reasonable attempt to satisfy the requirements of the tax law. Defendant asserts that the question of intent should only be analyzed in proceedings involving 11 U.S.C. §

523(a)(1)(C). The Court rejects a per se rule which would find that any post assessment tax return filed by a taxpayer serves no purpose and therefore does not reflect an honest and reasonable attempt to satisfy the requirements of the tax law. However, the Court also rejects the holding in Colsen that the honesty and genuineness of a taxpayer's attempt to satisfy the tax laws should be determined from the face of the form itself rather than from the taxpayer's delinquency or the reasons for the delinquency, and that the taxpayer's subjective intent is irrelevant. Moreover, the Court declines to hold that the post assessment filing of a tax return which results in a reduction in the taxpayer's tax liability, in and of itself, serves a purpose under the Internal Revenue Code and therefore constitutes an honest and reasonable attempt to comply with the requirements of the tax law.[6] As noted by the Court in Payne, 431 F.3d at 1057, when a taxpayer files a return for which the IRS has already calculated the tax due from him, "he ha[s] succeeded in defeating the main purpose of the requirement that taxpayers file income-tax returns: to spare the tax authorities the burden of trying to reconstruct a taxpayer's income and income-tax liability without any help from him. A return filed after the authorities have borne that burden does not serve the purpose of the filing requirement."

That having been said, there might be circumstances which would justify a debtor filing his tax return after an IRS assessment such that the return would serve a purpose and constitute an honest and reasonable attempt to satisfy the requirements of the tax law. Plaintiff argues that his failure to timely file his 2003 tax return was reasonable because he relied on his former business partner to file the return and believed he had done so. Plaintiff's reliance on his former business partner does not excuse his failure to file the

[6] Defendant concedes that a post assessment return which reports an additional liability would serve a purpose but only to the extent of the additional liability.

Form 1040 before the IRS assessed the tax. As the Supreme Court made clear in United States v. Boyle, a taxpayer's duty to file his tax return cannot be delegated. 469 U.S. 241, 250 (1985)(holding that executor's failure to timely file estate tax return was not excused by reliance on attorney and that such reliance was not reasonable cause warranting waiver of late filing penalty). Although Plaintiff had the right to engage his former business partner to prepare his Form 1040, it was his ultimate responsibility to review, sign, and file his Form 1040 by the due date. See Wesley v. United States, 369 F. Supp. 2d 1328, 1331-1332 (N.D. Fla. 2005) and his misplaced reliance on his former business partner to file his Form 1040 does not excuse his failure to file the return by the due date. The Court finds that Plaintiff's 2003 tax return did not serve a purpose under the Internal Revenue Code and was not an honest and reasonable attempt to comply with the requirements of the tax law. Accordingly, it does not constitute a "return" for purposes of § 523(a)(1)(B)(i) and the tax liability is excepted from discharge under § 523(a)(1)(B)(i).

Conclusion

Plaintiff's post-assessment Form 1040 for 2003 did not serve a purpose under the Internal Revenue Code and was not an honest and reasonable attempt to comply with the requirements of the tax law. Accordingly, it does not constitute a "return" for purposes of

§ 523(a)(1)(B)(i) and the tax liability is excepted from discharge under § 523(a)(1)(B)(i). The Court will enter a separate judgment consistent with this Order.

DATED this 27 day of September, 2013 in Jacksonville, Florida.

/s/

Jerry A. Funk
United States Bankruptcy Judge