UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

EMANUEL GARY, JR., CASE NO. 03-11501

Debtor. Chapter 7

EMANUEL GARY, JR.,

Plaintiff,

v. ADV. PROC. NO. 03-01083

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART RELIEF SOUGHT IN PLAINTIFF'S COMPLAINT PURSUANT TO 11 U.S.C. §523(a)(1)(B)(i)

Barry Friedman, Counsel for Emanuel Gary, Jr.
Charles Baer, Counsel for the United States of America

This matter came on for hearing on the Plaintiff's complaint to determine dischargeability of certain taxes. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2). After due consideration of the pleadings, testimony, evidence and arguments of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Debtor, Emanuel Gary, Jr. ("Gary"), filed his chapter 7 petition on March 14, 2003. In his bankruptcy petition, Gary listed federal income taxes owed to the United States for tax years 1984 through 1996. On or about April 11, 2003, Gary filed this adversary proceeding

seeking to discharge his tax liability for the years 1984 to 1996. Prior to trial of this matter, the parties agreed that Gary's federal income tax liability for the years 1986-87 and 1990-96 are dischargeable as personal obligations. Therefore, the only tax years at issue are 1984, 1985, 1988 and 1989. Counsel for Gary stated at trial that he is not concerned about 1988 and 1989 because no taxes are owed for those two years.

In 1998, Gary contacted the Internal Revenue Service ("the IRS") in California as part of an Amnesty Day program for delinquent taxpayers. Carmen Tidwell, an IRS employee, assisted Gary. Gary testified that he had no documentation, but Tidwell provided him with the information needed to fill out the necessary forms. Gary testified that he met with Tidwell several times. He said he also met with two other people with the IRS office, Mr. Wong and Ms. Jones. Gary stated that he met with Mr. Wong and Ms. Jones along with Tidwell in her office. By affidavit, Tidwell stated that she only met with Gary on the Amnesty Day, and did not receive any tax returns from him. Mr. Wong stated by affidavit that he never met with Gary, but did speak with him by telephone. Ms. Jones testified by affidavit that she never met with Gary.

Tidwell helped Gary to prepare IRS forms entitled "Report of Individual Income Tax Examination Changes" (hereinafter referred to as "1902-B form") for tax years 1984, 1985 and other years.[1] The identifying number for these forms was not evident on the copies of the reports received by the Court, having been cut off in the copying process. However, counsel for the United States was able to identify the forms as 1902-B.[2] The forms contain the following

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[1]There were no "Report of Individual Income Tax Examination Changes" forms for 1988 and 1989 introduced into evidence.

[2]The Court asked counsel for the United States for this information after the trial of the matter was completed. Copies of these forms also were attached to Gary's December 17, 2003

language:

> Consent to Assessment and Collection - I do not wish to exercise my appeal rights with the Internal Revenue Service or to contest in the United States Tax Court the findings in this report. Therefore, I give my consent to the immediate assessment and collection of any increases in tax and penalties, and accept any decrease in tax and penalties above, plus any interest as provided by law.
>
> Although this report is subject to review, you may consider it as your notice that your case is closed if you are not notified of an exception to these findings within 45 days after a signed copy of the report or a signed waiver, Form 870, is received by the District Officer.

These forms are dated March 31, 1998 and bear Gary's signature. The forms contain information about Gary's adjusted gross or taxable income, corrected tax, and the balance due to the IRS. Gary testified that Tidwell filled in the handwritten information on the forms. By completing these forms, he believed that he had done everything necessary for filing his tax returns for tax years 1984 and 1985. At his deposition prior to trial, Gary testified that he filed all the returns for the years 1984 through 1995 when he met with Tidwell. Gary said that he gave the returns to Tidwell. At trial, Gary testified that he filled out forms with Tidwell, that she provided the information for the forms and he signed the forms.

Gary presented another IRS form entitled "Request for Adjustment", which indicated that a tax return that Gary filed (the year is not specified) should be changed from single filing status to married filing single. The document is signed by Tidwell is dated April 3, 1998. Gary also presented an IRS form entitled "Collection Information Statement for Individuals", which is signed by Gary. In the blank for the date, the date "4/9/98" was written and scratched out, and "9/23" is written beside the scratched out date. On the Court's copy, the year for the "9/23" date

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deposition, which the IRS entered into evidence as Defendant's Exhibit 29. The attached copies (Exhibit 3 to the deposition) show the form number as 1902-B.

was cut off. Gary testified that he provided the information for this form.

The IRS's transcript of assessments and payments shows that Gary did not file an income tax return for 1984 and 1985, but the IRS made an examination assessment of tax after it produced a substitute for return for each year. The IRS's records also show that Gary did not file tax returns for 1988 and 1989. Gary filed tax returns for tax years 1990, 1992, 1993, 1994 and 1995 in July 1997.

On November 6, 1998, Gary submitted an offer of compromise to the IRS for several tax years, including 1984 and 1985. After receiving no response from the IRS, Gary resubmitted the offer of compromise on February 14, 2000. The IRS returned the offer of compromise because Gary had not filed his 1998 individual tax return. After some correspondence between Gary and the IRS, the IRS refused the offer of compromise because Gary had not filed his 1998 and 1999 tax returns. Revenue Officer Jim Davis ("Davis") of the IRS testified that the decision to refuse Gary's offer of compromise was not affected by Gary's failure to file tax returns for 1984, 1985, 1988 and 1989. The 1998 and 1999 returns were important because they were more recent.[3]

In March 2002, Gary submitted another compromise and offer. The IRS responded with a request for additional financial information. The IRS did not request that tax returns be filed. The IRS eventually rejected the March 2002 offer as insufficient.

CONCLUSIONS OF LAW

Gary's complaint asks that his tax debt from 1984, 1985, 1988 and 1989 be discharged in his chapter 7 bankruptcy. Gary originally contended that he filed tax returns for the years at issue when he met with Carmen Tidwell in 1998; however, the IRS has no record of tax returns being

[3]The 1998 and 1999 tax returns were filed in 2000.

filed for these years, and Gary has not produced copies of the returns for the years in question.

In the absence of the tax returns, Gary argues that the documents that he filed with the IRS should serve as tax returns. His dealings with the IRS regarding the offers of compromise led him to believe that he had filed all the necessary documents for the tax years in question. When rejecting Gary's offers of compromise, the IRS personnel cited his failure to file tax returns for more recent years, but did not mention the failure to file tax returns for 1984, 1985, 1988 and 1989. Gary inferred from their failure to identify the 1984, 1985, 1988 and 1989 tax returns that these returns were not at issue. The IRS maintains that the taxes from these years are nondischargeable pursuant to 11 U.S.C. §523(a)(1)(B)(i) because Gary failed to file tax returns for these years.

Under § 523(a)(1)(B)(i), tax debt is not dischargeable if a required return for that tax year has not been filed. The Bankruptcy Code does not define "return" or the proper filing of a return as used in §523(a)(1)(B)(i) . *Matter of Berard*, 181 B.R. 653, 655 (Bankr. M.D. Fla. 1995); *Johnson v. United States of America, (In re Johnson)*, 236 B.R. 456, 460 (Bankr. M.D. Fla. 1999). Courts seeking a definition have looked to the Internal Revenue Code's requirements for returns for personal income tax obligations. An individual with taxable income is required to file a return. 26 U.S.C. § 6012(a)(1)(A); *Johnson,* 236 B.R. at 460. The return must be filed according to the prescribed forms and regulations, and must include the information required by such forms and regulations. 26 U.S.C. §6011(a); *Johnson*, 236 B.R. at 460. Form 1040 is recommended for general use. 26 C.F.R. §1.6012-1(a)(6); *Johnson*, 236 B.R. at 460.

Section 6020 of Title 26 addresses the situation in which an individual does not file a return. Under §6020(a), an individual who does not file a required return may consent to

disclose all information necessary for the preparation of the return, and the IRS may prepare a return, which, if signed by the individual, may be received by the IRS as the individual's return. Under §6020(b)(1), the IRS may prepare a return for an individual who does not file a required return, without the individual's consent or participation. Returns created under §6020(a) and (b) are prima facie good and sufficient for all legal purposes. 26 U.S.C. §6020(b)(2). These returns are sometimes referred to as "substitutes for returns" or "substitute returns".

Courts have refused to recognize substitute returns created by the IRS under §6020(b) as "returns" for purposes of §523(a)(1)(B)(i). See *In re Bergstrom,* 949 F.2d 341 (10th Cir. 1991); *Swanson v. Comm'r of Internal Revenue*, 121 T.C. 111, 123-124 (U.S. Tax Court, 2003); *Ehrig v. United States, (In re Ehrig)*, 308 B.R. 542, 549-50 (Bankr. N.D. Okla. 2004). A return produced by the IRS under §6020 must be signed by the taxpayer before it can be accepted as the taxpayer's filed return. *Swanson*, 121 T.C. at 123 (citing 26 U.S.C. §6020(a) and *In re Bergstrom,* 949 F2d at 343); see also *Gless v. USA/IRS (In re Gless)*, 181 B.R. 414, 417 (Bankr. D. Neb. 1993) (the bankruptcy court considered 26 U.S.C. §6020(a) and (b) in defining "return" under §523(a)(1)(B)(i), and held, "[a]s a matter of law, this Court finds that a return filed pursuant to §6020(a) of the Internal Revenue Code, which is prepared with the cooperation of the debtor, and signed by the debtor, is deemed to be a return under §523(a)(1)(B)(i) of the Bankruptcy Code.").

In the present case, the IRS introduced its Record of Assessments and Payments for Gary's 1984 and 1985 taxes. These records show that the IRS created substitute returns for Gary's 1984 and 1985 tax debt. However, the actual substitute returns were not introduced into evidence, and there was no testimony as to whether Gary signed the substitute returns or

participated in preparing them. Therefore, the Court cannot determine whether the substitute returns for 1984 and 1985 would qualify as returns under §523(a)(1)(B)(i).

Although unsigned substitute returns are unacceptable as returns under §523(a)(1)(B)(i), courts have approved other documents prepared by the IRS with the taxpayer's cooperation and signed by the taxpayer as "returns" under 11 U.S.C. §523(a)(1)(B)(i). See *Gless v. USA/IRS (In re Gless)*, 181 B.R. 414 (Bankr. D. Neb. 1993) (genuine issue of material fact as to whether debtor cooperated in the preparation of a substitute return by the IRS barred summary judgment); *Matter of Berard*, 181 B.R. 653 (Bankr. M.D. Fla. 1995) (court held Internal Revenue Service Form 4549, "Income Tax Examination Changes," met the requirements for a return under §523(a)(1)(B)(i)); *Parker v. United States of American, (In re Parker),* 199 B.R. 792, 796 (Bank. M.D. Fla., 1996) (court found that "a 'return' for purposes of Section 523(a)(1)(B)(i) is not limited to the traditional Form 1040 return prepared by the taxpayer, . . ."); *Mathis v. United States of America, (In re Mathis)*, 249 B.R. 324 (S.D. Fla. 2000) (Form 4549 qualified as a return under §523(a)(1)(B)(i)). There are certain elements a document must possess to be considered a "return": it must contain all information necessary for calculation of any tax owed; it must be signed and verified, in most cases; and the information must honestly and reasonably be intended as a return. *Johnson,* 326 B.R. at 461; see also *Parker,* 199 B.R. at 796:

> . . . a "return" for purposes of Section 523(a)(1)(B)(i) may also include other forms initiated by the Internal Revenue Service, provided that the debtor cooperated with the Internal Revenue Service in the completion of the form and furnished the information to the Service which was necessary to compute the debtor's tax liability. Accordingly, for tax to be determined nondischargeable under Section 523(a)(1)(B)(i) on the basis of a "return" was "not filed," it must be determined not only that the debtor did not file a Form 1040 tax return, but also that no form was prepared by the Internal Revenue Service with the debtor's assistance and assent.

The court in *Mathis* held that a document "which satisfies all of the requirements of 26 U.S.C. §6020(a), i.e., it was completed in concert with the IRS after the taxpayer cooperated by providing full and truthful information, was signed by the taxpayer, and thereafter was filed and accepted by the IRS, constitutes a 'return' for the purposes of §523(a)(1)(B)(i)." *Mathis*, 249 B.R. at 328 (citations omitted). Many courts cite Revenue Ruling 72-203 (1974) regarding documents considered as "returns":

> Even though a document is not in the form prescribed for use as the appropriate return, it may constitute a return if it discloses the data from which the tax can be computed, is executed by the taxpayer, and is lodged with the Internal Revenue Service. ... Accordingly, the executed Form 870 with accompanying schedules is a return under section 6020(a) of the [Internal Revenue] Code. . . . The above conclusion applies equally to a Form 1902-E, Report of Individual Income Tax Audit Changes, or Form 4549, Income Tax Audit Changes, when signed by a husband and wife.

Johnson v. United States of America, (In re Johnson), 236 B.R. 456, 460 (Bankr. M.D. Fla.1999); see also *Gless*, 181 B.R. at 416; and *Mathis,* 249 B.R. at 327. But see also *Berard*, 181 B.R. at 655, fn. 5 (court finds that Revenue Ruling 74-203 is not dispositive on the issue of documents that constitute returns.) A key factor in accepting a document as a return is the taxpayer's cooperation with the IRS in assessing the tax and an admission of liability, which frees the IRS from certain procedural steps in finalizing tax liability. *Berard,* 181 B.R. at 656-57; *Parker*, 199 B.R. at 796; *Johnson*, 236 B.R. at 462-63.

Some courts require the document qualifying as a "return" under §523(a)(1)(B)(1) to be signed under penalty of perjury. According to these courts, to qualify as a tax return, a document must: (1) purport to be a tax return; (2) be executed under penalty of perjury; (3) contain sufficient data to allow collection of tax; and (4) represent an honest and reasonable attempt to

satisfy the requirements of the tax law. *In re Hatton*, 220 F.3d 1057, 1060-61 (9th Cir. 2000); *Beard v. Commissioner,* 82 T.C. 766, 777-78 (1984)*, aff'd* 793 F.2d 139 (6th Cir. 1986); *Swanson v. Commissioner*, 121 T.C. 111, 123 (2003); *U.S. v. Klein*, 312 B.R. 443, 447 (S.D. Fla. 2004) . However, other courts have found that, depending on the circumstances under which a document is completed and signed, a sworn statement is not necessary. The *Berard* court considered the significance of the lack of a signature under penalty of perjury. The purpose of the requirement is to assist the IRS "in ensuring compliance. Taxpayers must sign their returns under the penalties of perjury, a requirement that implicitly disqualifies a tentative return, that can be later disowned by the taxpayer, as a mere estimate or guess." *Berard*, 181 B.R. at 656 (citations omitted). However, the court found that under the facts before it, "requiring a sworn statement of perjury [was] of little moment. Debtors have executed a document, after having exposed all necessary financial data to assist an Internal Revenue auditor, which purports to supply all the necessary information to determine their tax liability. The threat and purpose in [sic] which the perjury sanction embodies have been eliminated by the sole nature of the agreement." *Id.* Also significant to the court was the debtors' waiver of rights to appeal or contest the taxes, and the IRS's right to immediate assessment and collection under Form 4549. "The absence of a sworn statement under penalties of perjury does not put the Internal Revenue Service in a more precarious position, nor does it enhance taxpayers' positions if valuable statutory rights are waived." *Berard*, 181 B.R. at 656. The District Court in *Mathis* dealt directly with the lack of a signature under penalty of perjury, finding, "[a]lthough none of the forms specified in the revenue ruling require the taxpayer to sign under penalty of perjury, they are all executed under circumstances where the IRS has computed the taxpayer's liability. By signing the form, the

taxpayer consents to the amounts so computed and permits the taxes to be immediately assessed without requiring the IRS to follow the notice of deficiency process. In this important respect, the effect of the taxpayer's signing these forms is the same as the effect of the debtor's filing a return." *Mathis*, 249 B.R. at 327 quoting *In re Wright*, 244 B.R. 451, 455 (Bankr. N.D. Cal. 2000).

Against this background of law, the Court must consider the present facts. The only documents that Gary has produced related to the 1984 and 1985 tax years are Forms 1902-B "Report of Individual Income Tax Examination Changes", which he signed in 1998 after Carmen Tidwell filled in the appropriate information. The sufficiency of Form 1902-B as a "return" under §523(a)(1)(B)(i) was the issue in *Lowrie v. United States of America (Internal Revenue Service) (In re Lowrie)*, 162 B.R. 864 (Bankr. D. Nev. 1994). The debtor failed to file tax returns for 1980 and 1981. She later met with an IRS agent, who prepared substitute 1040 returns, along with Form 1902-B and Form 3547. The 1040 return contained only the debtor's name, address and social security number. The Form 1902-B and 3547 contained some information about royalties and computations of the debtor's tax liability. The debtor signed Form 1902-B, but not did not sign the 1040 return. *Lowrie*, 162 B.R. at 685. An affidavit from the debtor's attorney who represented her in the tax matter stated that the debtor signed the forms based on the revenue agent's representations that the forms were a substitute for filing 1040 returns for the applicable tax years. *Id*. at 865, fn. 1. After considering the case law regarding substitute returns prepared by the IRS under 26 U.S.C. §6020(a) and (b), the *Lowrie* court held that in a situation where "the taxpayer/debtor has met with the IRS, signed a form containing sufficient information to calculate his or her tax liability, and admitted owing the taxes . . . the documents signed by the

debtor and provided to the IRS are properly treated as filed returns for purposes of Bankruptcy Code §523(a)(1)(B)(i)." *Lowrie*, 162 B.R. at 867.

The evidence before the Court shows that by signing the 1902-B forms for 1984 and 1985, Gary was cooperating with the IRS in the collection of tax for these years, and was admitting liability for these tax years. Although the information contained in the form was provided by the IRS, Gary accepted the figures by signing the forms. Gary provided information regarding his finances in the "Collection Information Statement for Individuals" which he signed on April 9, 1998. The fact that the IRS never requested further information about the 1984 and 1985 taxes or even referred to the taxes during the compromise negotiations indicates that the IRS had all information needed to assess and collect the 1984 and 1985 taxes. In addition, the 1902-B form contained the following language: "Although this report is subject to review, **you may consider it as your notice that your case is closed if you are not notified of an exception to these findings within 45 days after a signed copy of the report or a signed waiver, Form 870, is received by the District Officer**." (Emphasis added). There is no evidence that Gary received a notice of an exception from the IRS. This language supports Gary's contention that he believed he had done everything necessary to fulfill his tax reporting obligations for 1984 and 1985.

By signing the 1902-B forms Gary also waived his right to appeal or contest the figures in the 1902-B reports. He consented to immediate assessment and collection thereby saving the IRS time and effort in fulfilling certain statutory requirements usually required for assessment and collection. The language of the waiver is virtually identical to the waiver on Form 4549, which was found to be a "return" for purposes of §523(a)(1)(B)(i) in *Mathis*, as discussed above.

See *Mathis,* 249 B.R. at 326, fn. 2.

Finally, it is clear from Gary's testimony that by signing the 1902-B forms, Gary was making and honest and reasonable attempt to comply with the tax laws. Gary came to the IRS during its amnesty program, and cooperated by accepting the information listed on the 1902-B form by Ms. Tidwell. He made three attempts to compromise the tax debt for 1984 and 1985. Gary testified that he believed that he had done everything necessary to file his tax returns for 1984 and 1985. His testimony about filing actual returns as opposed to the 1902-B forms was inaccurate and not always clear, but his confusion was at least understandable given the many forms the IRS uses to document tax filings. Based on the foregoing, the Court finds that under the circumstances in the present case, the 1902-B forms for 1984 and 1985 qualify as "returns" under §523(a)(1)(B)(i), and therefore the exception to discharge does not apply to Gary. Gary's tax liability for 1984 and 1985 should be declared dischargeable. Since Gary presented no evidence regarding 1988 and 1989, these tax should be declared nondischargeable. It is hereby

ORDERED that Gary's federal income tax liabilities, including related interest and penalties, for the tax years 1984, 1985, 1986, 1987, 1990, 1991, 1992, 1993, 1994, 1995, 1996 and 1997 are **DISCHARGEABLE** as personal obligations; and it is further

ORDERED that Gary's federal income tax liabilities for the tax years1988 and 1989 are **NON-DISCHARGEABLE** pursuant to 11 U.S.C. §523(a)(1)(B)(i)**.**

Dated: March 1, 2005

William S. Shulman

WILLIAM S. SHULMAN
CHIEF U.S. BANKRUPTCY JUDGE