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JUDGE: M. A. Mahoney

PARTIES: Gus Bahos III, Teresa Bahos, State of Alabama Department of Revenue

CHAPTER: 7

ATTORNEYS: J. A. Johnson, D. R. Crow

DATE: 7/16/99

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

GUS BAHOS II and
TERESA BAHOS

Case No. 99-10188-MAM-7

Debtors.

GUS BAHOS, II and
TERESA BAHOS

Plaintiffs,

v.

Adv. No. 99-1018

STATE OF ALABAMA
DEPARTMENT OF REVENUE

Defendant,

**ORDER AND JUDGMENT OF NONDISCHARGEABILITY OF
CERTAIN DEBTS OF THE DEBTORS**

James A. Johnson, Mobile, Alabama, Attorney for the Debtors
Duncan R. Crow, Mobile, Alabama, Attorney for the State of Alabama

This case is before the Court for the trial of the complaint of the Debtors alleging that certain tax debts owed to the State of Alabama were dischargeable pursuant to 11 U.S.C. § 523. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court concludes that the state taxes of Gus Bahos for 1990 are not discharged and the state taxes for Teresa Bahos for the years 1988, 1992, 1993, and 1995 are not discharged.

FACTS

The debtors testimony was that they filed their returns for the years in question. They had no certified mail receipts or other documentation. Their evidence was solely their word that the returns had been filed just as they had filed returns for other years. They had no checks which showed payment of any of the amounts shown as due on the returns. They stated they had received no billings from the State of Alabama for unpaid amounts either.

The State of Alabama representative testified that the State's records did not show any of the returns had been received and no money had been paid for any of the tax years in question.

LAW

The only issue for decision is whether the tax returns were filed. Section 523(a)(1)(B)(i) precludes discharge of a tax "with respect to which a return, if required, was not filed." If the returns are not found to be filed the taxes are not dischargeable. The debtors bear the burden of proving by a preponderance of the evidence that the returns were filed. *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991). Filing means delivery. *U.S. v. Lombardo*, 241 U.S. 73, 36 S. Ct. 508, 60 L. Ed. 897 (1916).

Alabama has a statute, popularly called "The Mailbox Rule," which deems returns to be timely filed if postmarked on or before that date. Alabama Code § 40-1-45 (1998). This statute is identical (or nearly so) to the federal statute discussed in the case of *Campbell v. U.S.* which is attached. This rule is of no help to the debtors. It simply means that if Alabama admitted it received the returns, they would be timely filed and no interest or penalties would accrue if they were mailed by the due date.

What the debtors need to show is proof of delivery. Their word against the word of the State's representative is simply not enough. At best, it means the evidence is equally balanced.

The burden of proof required is a preponderance of the evidence. If the debtors had a canceled check or some other concrete indication that the returns were filed, it might be sufficient, but they did not.

The Court will not recite the case law set forth in the attached case. It is incorporated by reference.

THEREFORE IT IS ORDERED that the debt of Gus Bahos for taxes owed to the State of Alabama for the tax year 1990 is NOT DISCHARGEABLE and the debts of Teresa Bahos for taxes owed to the State of Alabama for tax years 1988, 1992, 1993 and 1995 are NOT DISCHARGEABLE.

Dated: July 16, 1999

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE