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JUDGE: M. A. Mahoney

PARTIES: Mary Brown, United States of America Department of Internal Revenue Service

CHAPTER: 7

ATTORNEYS: M. W. Wetzel, W. R. Sawyer

DATE: 6/__/97

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

Mary Brown
Debtor.

Case No. 96-14696

Mary Brown,
Plaintiff,

vs.

Adv. No. 97-1006

United States of America
Department of Internal
Revenue Service
Defendant.

ORDER

Melissa W. Wetzal, Mobile, Alabama, Attorney for Plaintiff
William R. Sawyer, Mobile, Alabama, Attorney for Defendant

This matter is before the Court on the complaint of Mary Brown to determine the dischargeability of her federal income tax debt. 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 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the 1989, 1991, and 1992 federal income tax debt of Mary Brown is nondischargeable in her Chapter 7 bankruptcy case.

FACTS

Mary Brown filed Chapter 7 on December 19, 1996. The United States of America, Department of Internal Revenue Service (IRS) is listed as an unsecured creditor in her schedules. The IRS claims an indebtedness owing by Brown which includes individual income taxes, penalties, and interest. The parties agree that tax liabilities for 1991 and 1992 are nondischargeable. They

also agree that no tax liability is owed for 1990. The parties disagree as to whether Brown's tax liability for 1989 is dischargeable.

In 1990, Brown consulted with George Smith, a certified public accountant, regarding her 1989 income tax. Smith prepared an application requesting a four-month extension of time in which to file Brown's 1989 tax return. Plaintiff's Exhibit No. 1. The application for extension was mailed on or about April 16, 1990. The IRS acknowledges that it received the application for extension. Brown explained that she filed the extension because she knew her 1989 tax liability was approximately \$7,500, and she believed that she would have the money within four months. Shortly thereafter, Brown realized that she would not have the money prior to expiration of the extension. Brown had Smith prepare her 1989 Form 1040 income tax return. Brown and Smith signed the tax return on April 18, 1990. Plaintiff's Exhibit No. 1. Brown testified that she mailed the tax return a few days after mailing the extension. No payment was sent with the tax return. Brown mailed the tax return by regular mail. The IRS alleges that it never received the tax return. USA Exhibit No. 1.¹ Brown did not send the tax return by registered or certified mail. She does not have a receipt for postage.

Brown does not recall receiving any correspondence from the IRS regarding her failure to include payment with the tax return. In July or August of 1996, Brown first became aware that the IRS had not received the tax return. In 1996, Brown received a document indicating that she owed \$20,000. Brown contacted Smith for advice. Pursuant to Smith's advice, Brown submitted the

¹ At the hearing, the IRS offered an uncertified document which showed non-receipt of Brown's tax return. Brown objected to the exhibit's lack of certification. The Court sustained Brown's objection, but gave the IRS leave to supplement the court record with a properly certified document. Subsequent to the hearing, a certified copy of the document was provided to the Court.

following letter to the IRS:

08-26-96

To Whom it May Concern:

The attached 1989 Form 1040, Individual Income Tax Return and supporting schedules was prepared and signed on April 18, 1990 by George W. Smith, Jr., CPA; 6700 Cottage Hill Road, Box 88; Mobile, Al. 36695. On the same day, 04-18-90, I filed the return by U.S. mail eventhough I was unable to pay the \$7,557 balance due.

Sincerely,

Mary W. Brown

423-66-3755

As stated in the letter, Brown also submitted a copy of her 1989 tax return. She resigned the tax return above her original signature. USA Exhibit No. 2.

Brown does not recall receiving notice of an IRS assessment made on February 8, 1993. She does not recall receiving anything like that prior to July or August of 1996. Brown did not file tax returns for 1991 and 1992. She was unemployed and did not have money to pay either taxes or an accountant. Brown filed a tax return for 1993. She thinks she recalls a notice from the IRS indicating that her 1993 refund of \$348 had been applied to her 1989 tax liability. Brown filed a tax return for 1994. She does not disagree that the IRS took her 1994 refund of \$610 and applied it to her 1989 tax liability. Brown filed a tax return for 1995. Brown does not recall a notice, but she remembers speaking with a representative at the IRS who indicated that her 1995 refund of \$1,505 had been applied to her 1989 tax liability.

LAW

Brown argues that she filed the original 1989 tax return in 1990. The IRS claims that it has no record of Brown's 1989 tax return having been received in 1990. The IRS argues that Brown did not file her 1989 tax return until 1996, and therefore, the tax owing for that year is nondischargeable pursuant to 11 U.S.C. § 523(a)(1)(B)(ii). That section provides that the debtor is not discharged

from any debt for a tax with respect to which a return, if required, was not timely filed and was filed within two years of the bankruptcy petition filing. 11 U.S.C. § 523(a)(1)(B)(ii).

The primary issue faced in this case is what proof Brown must submit to show her 1989 federal income tax return was filed in 1990. Brown must prove filing of the return by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991). The case law is clear that filing means delivery and receipt. The U.S. Supreme Court, in *United States v. Lombardo*, 241 U.S. 73, 36 S. Ct. 508, 60 L. Ed. 897 (1916) stated:

Filing, it must be observed, is not complete until the document is delivered and received. "Shall file" means to deliver to the office . . . A paper is filed when it is delivered to the proper official and by him received and filed.

U.S. v. Lombardo, 241 U.S. 73, 76-77, 36 S. Ct. 508, 509, 60 L. Ed. 897, 898 (1916); *Heard v. CIR*, 269 F.2d 911 (3d Cir. 1959); *Phinney v. Bank of Southwest Nat'l Ass'n*, 335 F.2d 266, 268 (5th Cir. 1964); *U.S. v. Robinson*, 811 F. Supp. 1174 (S.D. Miss. 1993).

The records of the IRS do not show receipt of Brown's 1989 tax return prior to 1996. A debtor may offer evidence to rebut the IRS records and that rebutting evidence must be weighed. *Bishop v. IRS (In re Bishop)*, 166 B.R. 732 (Bankr. N.D. Okla. 1994). Brown presented evidence to show that a tax return was prepared, and that she and her accountant signed the tax return. Brown also testified that she mailed the tax return in April of 1990. The Court does not find Brown's testimony persuasive. The need to prove her case by a preponderance of the evidence, places a heavy burden on Brown, which her evidence does not meet. See *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992); *Estate of Wood v. C.I.R.*, 909 F.2d 1155 (8th Cir. 1990); *In re Woodworth*, 202 B.R. 641 (Bankr. S.D. Fla. 1996).

Two exceptions to the common law mailbox rule were created by Congress in 26 U.S.C.

§ 7502. The exceptions are:

(1) If a tax return is postmarked with a date which would make the return timely filed, the return will be deemed timely filed even though actually received by the IRS after the due date. 26 U.S.C. § 7502(a).

(2) If a return is not received by the IRS, a taxpayer may still claim timely receipt if the return was mailed timely by registered or certified mail and the taxpayer has proof. 26 U.S.C. § 7502(c).

The first exception is not applicable to Brown. Under the second exception, the method for proving delivery of non-received documents is through the use of registered or certified mail. The Eleventh Circuit has stated that "the language of section 7502 is 'clear, explicit, and strictly limited.'" *Pugsley v. C.I.R.*, 749 F.2d 691, 693 (11th Cir. 1985). Brown did not mail the tax return by registered or certified mail. Pursuant to section 7502(c), Brown fails to meet her burden of proof

Therefore, it is ORDERED and ADJUDGED that:

1. The complaint of Mary Brown for a declaration of the dischargeability of her 1989, 1991, and 1992 federal income tax liabilities is denied and the debt is declared to be nondischargeable pursuant to 11 U.S.C. § 523(a)(1)(B).

2. The complaint of Mary Brown for a declaration of the dischargeability of her 1990 federal income tax liability is sustained and the debt is declared discharged pursuant to 11 U.S.C. § 523(a)(1).

Dated: June ____, 1997

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE