

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

DAVID WILLIAM STOKES,
LANA GAIL STOKES,

CASE NO. 99-11153-WSS

Debtors.

Chapter 7

DAVID WILLIAM STOKES,
LANA GAIL STOKES,

Plaintiffs,

v.

ADV. NO. 99-1242

UNITED STATES OF AMERICA, et al.,

Defendants.

**ORDER ON DEBTOR'S COMPLAINT TO DETERMINE
DISCHARGEABILITY OF DEBT**

This matter is before the Court on the Debtors' complaint to determine dischargeability of debt. Michael B. Smith appeared for the Debtors, and Charles Baer appeared for the United States. 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). Prior to the hearing on this matter, the parties stipulated that 1) the Debtors' tax liability for 1995, 1996 and 1997 is non-dischargeable; 2) the Debtors' tax liability for 1985, 1987, 1988, 1989, 1990, 1991, 1992, 1993, and 1994 is dischargeable; 3) the 1986 tax liability of Lana Gail Stokes (hereinafter "Mrs. Stokes") is dischargeable; 4) all penalties and related interest on the Debtors' 1995, 1996 and 1997 federal income tax which were imposed for transactions or events that occurred before March 29, 1996 are dischargeable, and all penalties

and interest that relate to transactions or events that occurred on or after March 29, 1996 are non-dischargeable; and 5) all federal tax liens of the United States that may exist pass through this case and survive discharge. After consideration of the pleadings, testimony, evidence and arguments of counsel, the Court makes the following findings of fact and conclusions of law:

The Debtors, David William Stokes (hereinafter “Stokes”) and Mrs. Stokes, filed a chapter 7 petition with this Court on March 29, 1999. Stokes testified that he mailed his 1986 federal tax return to the IRS¹ on November 2, 1987, the date listed on his copy of the return.² He sent the return by first class mail, and did not have a certified or registered mail receipt. Stokes received a letter from the IRS in 1988 stating that his 1986 return had not been received and asking him to respond within thirty days. Stokes stated that he sent another copy of the return to the IRS, and also spoke to an IRS agent on the telephone. The IRS’s records reflect that the return was not filed for tax year 1986. The IRA completed a substitute tax form for Stokes and estimated his tax liability in 1990.

A procedural issue before the Court is whether the Department of Treasury can be named as a proper defendant in this action. The Department of Treasury is not an agency that can be sued *eo nomine*. Castleberry v. Alcohol, Tobacco and Firearms Division of Treasury Dept., 530 F.2d 672, 673 n. 3 (5th Cir. 1976). Therefore, the Court finds that the Department of Treasury

¹The United States of America is the proper party defendant in an action brought against an agency of the federal government like the IRS. Blackmar v. Guerre, 342 U.S. 512, 514, 72 S.Ct. 410, 96 L.Ed. 534 (1952). However, because the IRS is involved in this action, the Court will refer to the defendant as the IRS.

²Stokes testified that he and Mrs. Stokes may have filed separate returns in 1986, but he does not remember. However, the parties stipulated that Mrs. Stokes’ tax liability for 1986 is dischargeable, therefore Mrs. Stokes’ tax liability is not at issue before this Court.

should be dismissed as a defendant in this proceeding.

Section 523(a)(1) provides:

- (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--
 - (1) for a tax or customs duty--
 - (A) of the kind and for the periods specified in section 507(a)(2) 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, if required--
 - (i) was not filed; or
 - (ii) was filed after the date on which such return 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;

The only issue before the Court is whether Stokes proved that he filed his 1986 tax return by first class mail. The IRS has the burden of proving by a preponderance of the evidence that Stokes did not file his 1986 return. In re Young, 230 B.R. 895, 897 (Bankr. S.D. Ga. 1999), citing Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Bankruptcy courts considering the requirements of a “filing” under §523(a)(1) have found that the debtor must prove receipt of the tax return by the IRS, and not merely mailing. See In re Young, 230 B.R. 895, 897 (Bankr. S.D. Ga. 1999); In re Campbell, 186 B.R. 731, 733 (Bankr. N.D. Fla. 1995); In re Brookman, 114 B.R. 769, 770 (Bankr. M.D. Fla. 1990). There are two exceptions to actual receipt based on 26 U.S.C. §7502. First, if a tax return is postmarked with a date which would make it timely, it will be timely even though the IRS receives it after the due date. Secondly, a tax return is timely if mailed timely by registered or certified mail, and the taxpayer has a receipt. Campbell, 186 B.R. at 733-34.

Stokes’ only proof of filing his 1986 return was his testimony that he filed the return. He had no postmarked copy of the return or the envelope in which it was mailed, and no certified or

registered mail receipt. Under the authority cited above, the Court finds that Stokes failed to prove that his 1986 return was filed. The IRS produced a certified copy of the transcript of Stokes' account, which showed that the IRS filed a substitute return filed on Stokes' behalf in 1990. It stands to reason that the IRS would not have filed a substitute return if it had received Stokes' return. Based on the foregoing, the Court finds that the IRS proved that Stokes did not file his 1986 tax return by a preponderance of the evidence. The relief sought in Stokes' complaint regarding his 1986 tax liability is due to be denied and the taxes due for 1986 are non-dischargeable. It is hereby

ORDERED that the Department of Treasury is **DISMISSED** as a defendant in this proceeding; and it is further

ORDERED that the Debtors' tax liability, and the interest and penalties thereon, for 1985, 1987, 1988, 1989, 1990, 1991, 1992, 1993, and 1994 is **DISCHARGEABLE**; and it is further

ORDERED that the 1986 tax liability, and the interest and penalties thereon, of Lana Gail Stokes is **DISCHARGEABLE**, and the 1986 tax liability, and the interest thereon, of David William Stokes is **NON-DISCHARGEABLE**; and it is further

ORDERED that all penalties and related interest on David William Stokes' 1986 federal income tax which were imposed for transactions and events that occurred before March 29, 1996 are **DISCHARGEABLE**, and all penalties and related interest which were imposed for events that occurred on and after March 29, 1996 are **NON-DISCHARGEABLE**; and it is further

ORDERED that the Debtors' tax liability for 1995, 1996 and 1997 is **NON-DISCHARGEABLE** and it is further

ORDERED that all penalties and related interest on the Debtors' 1995, 1996 and 1997 federal income tax which were imposed for transactions or events that occurred before March 29, 1996 are dischargeable; and all penalties and interest that relate to transactions or events that occurred on or after March 29, 1996 are non-dischargeable; and it is further

ORDERED that all federal tax liens of the United States that may exist pass through this case and survive discharge.

DATED: May ____, 2000

WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE