UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 98-24569

MICHAEL EDWARD McCOLLISTER,

Debtors. **DECISION & ORDER**

MICHAEL EDWARD McCOLLISTER,

Plaintiff,

V. **AP #99-2122**

THE UNITED STATES OF AMERICA,

Defendants.

BACKGROUND

On December 8, 1998, Michael Edward McCollister (the "Debtor") filed a petition initiating a Chapter 7 case. On the schedules and statements required to be filed by Section 521 and Rule 1007, the Debtor indicated that: (1) the California Franchise Tax Board had a claim for $29,727.00 for back income taxes for the calendar years 1980 through 1987; (2) the Internal Revenue Service (the "IRS") had claims for: (a) $10,280.18 for back income taxes for the calendar year 1980; (b) $17,369.14 for back income taxes for the calendar year 1981; (c) $12,783.78 for back income taxes for the calendar year 1982; (d) $45,462.37 for back income taxes for the calendar year 1983; and (e) an aggregate claim of $112,562.04 for back income taxes for the calendar years 1984 through 1987; and (3) he had an annual gross income of $54,360.00 and monthly disposable income of $165.91,

after payroll deductions and living expenses for his family of five, which expenses included $720.00 per month for food and $125.00 per month for pet food and vet bills.

On March 9, 1999, the Debtor commenced an adversary proceeding (the "Tax Proceeding") against The United States of America (the "United States") which requested that the Court determine that his debt for federal income taxes for the calendar years 1980 through 1987 was dischargeable. The Debtor's Complaint in the Tax Proceeding alleged that: (1) each of the tax debts was for federal income taxes which became due more than three years before the filing of his petition on December 8, 1998; (2) he had filed the required federal income tax returns for the calendar years 1984 through 1987; (3) the IRS had filed "Substitute Returns" for the calendar years 1980, 1981, 1982 and 1983; (4) in 1988, he had gone to the IRS office in Van Nuys, California with the information necessary to file his federal income tax returns for the calendar years 1980 through 1987, and was advised by an agent that there was no need for him to file returns for the calendar years 1981, 1982 and 1983, because the IRS had already filed Substitute Returns for those years; and (5) in 1992, he met with an IRS agent in Cincinnati, Ohio who told him there was no reason to prepare and file amended returns for the calendar years 1980 through 1987.

On April 14, 1999, the United States interposed an Answer in the Tax Proceeding which asserted that: (1) to the extent that the Debtor failed to file returns for any of the calendar years 1980 through 1987, the debts due for those years was not dischargeable pursuant to Section 523(a)(1)(B)(i)[1]; and (2) the records of the IRS indicated that it had prepared and filed Substitute

---

[1] Section 523(a)(1) provides that:

Returns for the Debtor only for the calendar years 1981, 1982 and 1983, and not for the calendar year 1980.

On July 7, 1999, the United States filed a Motion for Partial Summary Judgment (the "Motion") which requested that the Court determine that the amounts due from the Debtor for federal income taxes for the calendar years 1981, 1982 and 1983 were nondischargeable pursuant to Section 523(a)(1)(B)(i), because the Debtor never filed the required federal income tax returns for those calendar years.

A Memorandum of Law filed in support of the Motion asserted that: (1) there was no dispute that the Debtor did not file federal income tax returns for the calendar years 1981, 1982 and 1983

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —
>
> (1) for a tax or a 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[.]

11 U.S.C. § 523(a)(1) (1999).

or that the IRS, after it had instituted and completed the required deficiency procedures, assessed the Debtor for the amounts which it determined to be due for those calendar years pursuant to Substitute Returns prepared by the IRS; (2) the records of the IRS indicated that the Debtor had filed a return for the calendar year 1980; (3) by the Debtor's own admission, he never filed any documents with the IRS, prior to the filing of his bankruptcy petition on December 8, 1998, which purported to be federal income tax returns for the calendar years 1981, 1982 and 1983, so that this was not a case where the Court was being asked to determine whether some documents actually prepared and filed by a debtor constituted a "return" within the meaning and intent of Section 523(a)(1)(B)(i); (4) even if in 1988 or in 1992 the Debtor had offered to prepare and file federal income tax returns for the calendar years 1981, 1982 and 1983, any returns filed by him at those times would have had no legal relevance for purposes of Section 523(a)(1), as determined by the decision of the United States Court of Appeals for the Sixth Circuit in *The United States v. Hindenlang*, 164 F.3d 1029, 1034 (6th Cir. 1999) ("*Hindenlang*"); (5) the Debtor never prepared and filed the required federal income tax returns, and he never participated in the deficiency procedures commenced by the IRS which resulted in the preparation of the Substitute Returns for the calendar years 1981, 1982 and 1983; and (6) the Debtor's failure to file returns or participate in the deficiency procedures and in the preparation of Substitute Returns caused the United States to expend significant resources, and this should not be rewarded by the Bankruptcy Court determining that the federal income tax debts for those years are dischargeable.

On July 16, 1999, the Debtor interposed an Answer to the Motion. The Answer reasserted that in 1988 and 1992 the Debtor had gone to offices of the IRS to file the required 1981, 1982 and

1983 returns, "but he was told that it was not necessary." The Answer argued that: (1) since the Bankruptcy Code was silent as to what constituted a return, the Bankruptcy Court could find that a Substitute Return was a return for purposes of Section 523(a)(1)(B); (2) since Sections 727 and 523(a)(1)(B)(i)(2) of the Bankruptcy Code, when read together, permit federal tax debts for years when there have been late filed tax returns to be discharged, provided the returns are filed more than two years before the filing of a debtor's petition, notwithstanding the decision in *Hindenlang*, the Bankruptcy Court should find that a debtor can file returns even after a Substitute Return has been prepared by the IRS; and (3) the IRS should not be able to deceive a taxpayer into not taking advantage of the provisions of Sections 727 and 523(a)(1)(B)(i)(2) by suggesting that a tax return cannot be filed after a Substitute Return has been filed, and then argue that the tax debt for any such calendar year should be determined to be nondischargeable because the debtor failed to file a return. The Answer further argued that since after the Substitute Returns for the calendar years 1981, 1982 and 1983 were filed, the Debtor cooperated with the IRS by: (1) executing, without objection, a number of payroll deduction agreements (Form 2159), at least one installment agreement (Form 433-d), and a Collection Information Statement for Individuals (Form 433-A); and (2) making payments pursuant to those agreements, the Bankruptcy Court should find that the Debtor's actions in executing and preparing these documents in connection with the Substitute Returns and assessments constituted the filing of the necessary returns for the purpose of Section 523(a)(1)(B)(i), as decided by the United States Bankruptcy Appellate Panel for the Ninth Circuit in a similar case, *United States v. Hatton*, 216 B.R. 728 (BAP 9th Cir. 1997) ("*Hatton*").

Since the Court: (1) did not find the decision in *Hindenlang* persuasive, which holds that, as a matter of law a debtor can never do anything which would entitle him to a discharge under the Bankruptcy Code of federal tax debts for a calendar year where the IRS has completed deficiency procedures and prepared a Substitute Return, so that the debtor must either pay the tax debt, together with penalties and interest, or wait for the expiration of the ten-year collection period provided for by 26 U.S.C. § 6502(a)(1); (2) was not required to decide whether a tax return filed after a Substitute Return was prepared and filed by the IRS was a return within the meaning and intent of Section 523(a)(1)(B)(i), because the Debtor never filed a tax return for the calendar years 1981, 1982 or 1983;[2] and (3) felt that it was important to fully develop the facts of the Debtor's dealings with the IRS after 1987, especially the meetings he had with IRS agents in 1988 in Van Nuys, California and in 1992 in Cincinnati, Ohio, the Court conducted an Evidentiary Hearing on the Motion.

The testimony of the Debtor at the Evidentiary Hearing indicated that: (1) the Debtor had gone into the IRS's office in Van Nuys, California in 1988 only because the IRS had begun garnishing his wages, and an IRS agent from Buffalo, New York had advised him that the only way he could get that garnishment removed or reduced was to go into the IRS office in Van Nuys and complete the necessary paperwork to be allowed to enter into some form of payment agreement; (2) the Debtor was hopeful that any payment agreement he would enter into in Van Nuys would require him to pay less than was being garnished from his wages; (3) in 1988 in Van Nuys, the Debtor

---

[2] The Bankruptcy Court in *In Re McGrath*, (217 B.R. 389, 393 (Bankr. N.D.N.Y. 1997) ("*McGrath*") found that such a subsequently filed return was a return for purposes of Section 523(a)(1)(B)(i).

picked up the forms necessary to complete all of his unfiled tax returns, but he did not prepare and file the tax returns for the calendar years 1981, 1982 and 1983 because he was told by the IRS that since Substitute Returns had been filed there was no need for him to file returns for those years; (4) in 1988, in Van Nuys, the Debtor provided the IRS agent with his budget and other financial information, and as a result, a payment plan was entered into; (5) the Debtor made payments pursuant to the payment plan; (6) in 1992, after he had relocated to Ohio, he met with a revenue agent, Joseph Monaco ("Agent Monaco"), in the Cincinnati office of the IRS; (7) at the time of his meeting in 1992 with Agent Monaco, the Debtor discussed with him the possibility of filing amended returns for the calendar years 1981 through 1987, which might, because of possible deductions available to him or through the use of income averaging, reduce his tax liability for those calendar years and allow him to prepare an acceptable offer and compromise; (8) at the Debtor's request, Agent Monaco briefly reviewed some of the paperwork the Debtor had prepared in order to determine whether it might be more advantageous for the Debtor to file amended returns; (9) after he reviewed some of the Debtor's paperwork, Agent Monaco advised the Debtor that in his opinion the Debtor may be better off allowing the existing returns to stand; (10) the Debtor had never disputed the amount the IRS claimed was due based upon the Substitute Returns, and felt that he had cooperated with the IRS in entering into a number of installment and payroll deduction agreements; (11) the IRS agents which he dealt with never advised him that there could be negative consequences from his not filing federal income tax returns for the calendar years 1981, 1982 and 1983 after the IRS had prepared and filed Substitute Returns; and (12) he would have filed actual federal income tax returns for the calendar years 1981, 1982 and 1983 after 1988 if he had been advised, or had

otherwise known, that it might mean that he could ultimately obtain a discharge in bankruptcy from the federal tax debts for those calendar years.

DISCUSSION

I Substitute Returns

The Debtor has urged the Court to find that the Substitute Returns prepared and filed by the IRS for the calendar years 1981, 1982 and 1983 should be deemed to be returns within the meaning and intent of Section 523(a)(1)(B)(i). This Courts agrees with virtually every other court which has decided this issue, and holds that Substitute Returns prepared by the IRS pursuant to 26 U.S.C. § 6020(b) do not constitute filed returns in the absence of the signature of the taxpayer, as required by 26 U.S.C. § 6020(a), and, therefore, they do not constitute returns within the meaning and intent of Section 523(a)(1)(B)(i). **See** *United States v. Bergstrom*, 949 F.2d 341, 343 (10th Cir. 1991).

II The Filing of Actual Returns After Substitute Returns Have Been Filed

This Court does not agree with the decision in *Hindenlang* that, as a matter of law, once the IRS has prepared and filed a Substitute Return pursuant to 26 U.S.C. § 6020(b), there is no set of facts and circumstances under which that taxpayer could obtain a discharge of the federal tax debt for that calendar year pursuant to Section 523(a)(1)(B)(i). Since the Debtor in this case never prepared and filed an actual federal tax return for the calendar years 1981, 1982 or 1983 after the IRS had prepared and filed Substitute Returns for those calendar years, it is not necessary for the Court to determine whether it agrees with the decision of the Bankruptcy Court in *McGrath*, which held

that an actual return filed after a Substitute Return was prepared and filed qualified as a return for purposes of Section 523(a)(1)(B)(i).

III Actions of a Debtor, Including the Execution of Certain Documents, After the Filing of Substitute Returns as Constituting a Return for Purposes of Section 523(a)(1)(B)(i)

The Debtor has urged this Court to adopt the spirit of the decision of the Bankruptcy Appellate Panel in *Hatton*, based on the facts and circumstances of this case, because the Debtor: (1) did not contest the calculation of his federal income tax debts as set forth on the Substitute Returns prepared and filed by the IRS, nor the resulting assessment; and (2) executed installment payment and payroll deduction agreements, and made payments on the tax debt to the IRS pursuant to those agreements, he satisfied the requirements of Section 523(a)(1)(B)(i) by providing the equivalence of a return for the calendar years 1981, 1982 and 1983.

In the *Hatton* decision, the Bankruptcy Appellate Panel adopted the four-prong test for a return that was set forth in *Beard v. Commissioner of Internal Revenue*, 79 F.2d 139 (6th Cir. 1986) ("*Beard*"). The four-prong test set forth in *Beard* (the "Beard Test") is: (1) there must be sufficient data to calculate a tax liability; (2) the documents must purport to be a return; (3) an honest and reasonable attempt must be made to satisfy the requirements of the tax laws; and (4) the taxpayer must execute the return under penalty of perjury.

Since, from the evidence produced in this Tax Proceeding, including the Debtor's testimony at the Evidentiary Hearing, I find that the Debtor did not make an honest and reasonable attempt to satisfy the requirements of the tax laws, as required by the third prong of the Beard Test. Therefore,

I do not have to determine whether I would otherwise adopt the spirit of the decision of the Bankruptcy Appellate Panel in *Hatton*.

In his dealings with the IRS, it is clear that the Debtor never really made an honest and reasonable attempt to satisfy the requirements of the tax laws, he simply reacted to the collection efforts of the United States and the IRS and attempted to do the minimum amount possible to satisfy the IRS.

The Debtor: (1) did not make any attempt to file his calendar year 1980 through 1985 federal or state income tax returns even after he had filed a bankruptcy proceeding in 1986[3]; (2) even after he had filed bankruptcy, he did not file his 1986 or 1987 state or federal income tax returns voluntarily, but began to deal with his income tax debts for the calendar years 1981 through 1987 only after the IRS had garnished his wages in 1988; (3) the Debtor's principal motivation in cooperating with the IRS in Van Nuys, California in 1988 was not to satisfy the requirements of the federal income tax laws voluntarily, but it was to do whatever was necessary to pay the IRS a weekly or monthly amount that was less than what was then being garnished from his wages; (4) in 1988, at the Van Nuys office of the IRS when the Debtor accepted the statement from an IRS agent that there was no need to file his 1981, 1982 or 1983 calendar year income tax returns because Substitute Returns had been filed, once again, the Debtor's motivation clearly was not to make an honest and reasonable attempt to satisfy the requirements of the tax laws, or he may have filed actual returns

[3] The Court does not know what, if any, conversations the Debtor may have had with his bankruptcy attorney, or advice that he may have received from that attorney concerning his unfiled tax returns, or whether he even listed the taxing authorities as creditors at the time of his 1986 bankruptcy.

anyway, but it was to do whatever was necessary to get the garnishment of his wages removed and to pay a lesser amount than the amount being garnished; (5) in 1992, in Cincinnati, Ohio, the Debtor once again demonstrated that he had no real interest in making an honest and reasonable attempt to satisfy the requirements of the tax laws, when he sought advice as to whether he would be better or worse off filing amended returns, and failed to file any amended returns when it appeared that filing them might result in a greater tax debt for some or all of the calendar years in question; and (6) the Debtor appears to have provided the IRS with information and entered into various agreements only to react to their collection activities so that he could pay the minimum amount possible against his tax debts.

IV Failure of the IRS to Advise the Debtor Regarding the Provisions of Section 523(a)(1)(B)(i)

The Debtor argued at trial that there is an affirmative duty on the part of the IRS to advise taxpayers in their dealings with them of any and all negative consequences of their actions or inactions. I do not believe that the IRS agents in Van Nuys, California in 1988 or Agent Monaco in Cincinnati, Ohio in 1992 had any affirmative obligation to advise the Debtor of any rights he may have to discharge his federal income tax debts in bankruptcy. In addition, from the Debtor's testimony, there is no basis for the Court to conclude that the IRS agents: (1) ever had any reason to believe that the Debtor was going to file bankruptcy in the future, or (2) purposely misled him regarding his legal rights. It appears that the IRS agents, just as the Debtor was, were focused on and concerned with the tax collection process.

V Overview

Although I believe there may be some set of facts and circumstances which would entitle a debtor to a discharge of certain federal tax liabilities under Section 523(a)(1), even after substitute returns have been prepared and filed, this Debtor has not presented that compelling set of facts and circumstances.

CONCLUSION

The Motion is granted. The income tax debts due to the United States from the Debtor for the calendar years 1981, 1982 and 1983 are determined to be nondischargeable pursuant to Section 523(a)(1)(B)(i).

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: November 1, 1999