UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**JUDGE RICHARD L. SPEER**
Richard O. Burton	)	
	)	Case No. 00-3117
Debtor(s)	)	
	)	(Related Case: 00-30872)
Richard O. Burton	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
U.S.A., et al.	)	
	)	
Defendant(s)	)	

DECISION AND ORDER

In the above captioned adversary case, the Plaintiff/Debtor, Richard O. Burton (hereinafter referred to as the "Debtor"), seeks a determination that his 1989 tax liability to the Defendant, U.S.A., et al. (hereinafter referred to as the "Defendant"), is a dischargeable debt in bankruptcy. In opposition thereto, the Defendant argues that the Debtor's 1989 tax liability constitutes a nondischargeable obligation within the meaning of 11 U.S.C. § 523(a)(1)(B)(i). On the applicability of this section, the Parties filed Cross-Motions for Summary Judgment; in support of their respective positions thereunder, the Parties each attached a Memorandum in Support in which the following uncontested facts were presented to the Court:

> On March 8, 2000, the Debtor petitioned this Court for relief under Chapter 7 of the United States Bankruptcy Code;

on May 24, 2000, the Debtor filed a Complaint to determine whether his federal income tax liabilities for the years 1988, 1989, 1990, and 1991 were dischargeable debts in bankruptcy;

the only year now in dispute is 1989;

the Debtor's 1989 tax return was due on April 15, 1990. The Debtor did not file a tax return by this due date;

the Internal Revenue Service conducted an examination to determine the Debtor's tax liability for the year 1989. The Internal Revenue Service conducted this examination without any assistance from the Debtor;

a notice of deficiency was mailed to the Debtor reflecting a tax deficiency of $4,343.72. The Debtor did not petition the United States Tax Court to challenge the determination set forth in this notice of deficiency;

a delegate of the Secretary of the Treasury assessed the Debtor on or about March 11, 1993 for the deficiency set forth in the above stated notice of deficiency mailed to the Debtor;

on or about June 22, 1993, the Debtor filed a Form 1040 for his tax year 1989 reflecting a tax liability of $2,621.00. This return was not signed by the Debtor;

on or about October 31, 1993, the IRS abated the debtor's 1989 tax liability by $1,122.72;

in December of 2000, the Debtor signed his 1989 tax return.

LEGAL ANALYSIS

Proceedings brought to determine the dischargeability of a particular debt are core proceedings pursuant to 28 U.S.C. § 157(b)(2). Thus, this case is a core proceeding.

The instant case has been brought before the Court upon the Parties' Cross Motions for Summary Judgment. Federal Rule of Civil Procedure 56(c), which is made applicable to this proceeding by Bankruptcy Rule 7056, sets forth the standard for a summary judgment motion and provides for in part: A party will prevail on a motion for summary judgment when "[t]he pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed 2nd 265 (1986). With respect to this standard, the movant must demonstrate all the elements of his cause of action. *R.E. Cruise Inc. v. Bruggeman*, 508 F.2d 415, 416 (6th Cir. 1975). To determine whether this standard has been met, the Court is directed to view all the facts in a light most favorable to the party opposing the motion. *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 586-588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). In addition, in cases such as this where the Parties have filed Cross Motions for Summary Judgment, the Court must consider each motion separately, since each party, as a movant for summary judgment, bears the burden of establishing the nonexistence of genuine issues of material fact, and that party's entitlement to judgment as a matter of law. *French v. Bank One, Lima N.A. (In re Rehab Project, Inc.)*, 238 B.R. 363, 369 (Bankr. N.D.Ohio 1999).

For reasons of public policy, Congress chose to exclude from the scope of a bankruptcy discharge any debt in which the debtor did not file a tax return if required by law to do so. *See generally In re Motaharnia*, 215 B.R. 63, 72 (Bankr. C.D.Cal. 1997). Section 523(a)(1)(B)(i) of the Bankruptcy Code implements this policy decision by providing that:

> (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–
>
> (B) with respect to which a return, if required–

(i) was not filed[.]

With regards to this statutorily mandated exception to discharge, the sole issue presented in this case is whether the 1989 tax return filed by the Debtor in June of 1993 constitutes a return for purposes of 11 U.S.C. § 523(a)(1)(B). Such an issue was recently visited by the Sixth Circuit Court of Appeals in *United States v. Hindenlang (In re Hindenlang)*, which held that in order for a document to qualify as a tax return for purposes of § 523(a)(1)(B), four conditions must be met:

> (1) it must purport to be a return;
>
> (2) it must be executed under penalty of perjury;
>
> (3) it must contain sufficient data to allow calculation of tax; and
>
> (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.

164 F.3d 1029, 1033 (6th Cir. 1999).

With respect to the above elements, the operative facts presented in this case show two things: First, the Debtor did not sign his tax return until December of the year 2000; and second, when the Debtor, in June of 1993, filed his 1989 tax return, the IRS had already assessed the Debtor's tax liability for that year. Thus, for purposes of this case, only two of the above elements set forth in *In re Hindenlang* are at issue: whether the Debtor's 1989 tax return was executed under penalty of perjury; and whether the Debtor's tax return represented an honest and reasonable attempt to satisfy the requirements of the tax law. The Court begins its analysis by addressing whether the Debtor executed his 1989 tax return under penalty of perjury.

Any person who is required to file a tax return must make an assertion, under penalty of perjury, that the information contained in the return is correct and that the return has been properly completed in accordance with the law. *McNally v. United States*, 793 F.2d 1292 (6th Cir. 1986).

Sections 6061 and 6065 of the Internal Revenue Code effectuate these requirements by directing a taxpayer, in submitting a tax return, to execute an unqualified jurat, or declaration to that effect. *Pierce v. United States (In re Pierce)*, 184 B.R. 338, 342 (Bankr. N.D.Iowa 1995). In this case, the Debtor asserts that he complied with this requirement, albeit in a late manner, when he signed his 1989 tax return in December of 2000.

It is abundantly clear that a tax return is not effective until it has been signed – a rule which is considered absolute. *See, e.g., Vaira v. C. I. R.*, 444 F.2d 770, 777 (3rd Cir. 1971) (a return filed, but which is unsigned is no return at all); *United States v. Moore*, 627 F.2d 830, 834 (7th Cir. 1980) (forms submitted to the I.R.S. were not returns because the declaration that the forms were completed and signed under penalty of perjury was obliterated); *Mosher v. Internal Revenue Service*, 775 F.2d 1292, 1294 (5th Cir.1985) (per curiam) (a tax return without the jurat does not contain information on which the substantial correctness of the return may be judged); *Dixon v. C.I.R.*, 28 T.C. 338, 347-48 (1957) (income tax return form filed by taxpayers but not signed by them was no return at all). The Internal Revenue Code, however, does not actually specify when a return must be signed; as a result, a tax return that is not initially signed may be later cured by the taxpayer affixing his signature thereto. When a debtor files for bankruptcy, however, the ability to cure the defect in the tax return is circumscribed. This is because inherent in the nature of a dischargeability proceedings under § 523(a)(1)(B)(i) is that all the events to be considered must have occurred prepetition; a situation which is not present in this case since the Debtor did not sign his 1989 tax return until after he petitioned this Court for bankruptcy relief. Notwithstanding, the Debtor asserts that the Defendant is still precluded from raising as an issue the late signing of his 1989 tax return because it "never complained about the missing signature until the filing of their Motion for Summary Judgment." (Plaintiff's Memorandum in Support of Cross Motion for Summary Judgment, at pg. 3). In this regard, the Plaintiff put forth two legal issues: estoppel and waiver.

For purposes of federal law, the Supreme Court of the United States has held that, "[a]n essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations." *Lyng v. Payne*, 476 U.S. 926, 935, 106 S.Ct. 2333, 2339, 90 L.Ed.2d 921 (1986). A review of the facts presented in this case, however, does not reveal in any way that the Defendant misrepresented its position regarding the lack of the Debtor's signature on his 1989 income tax return. Similarly, with respect to the Plaintiff's defense of waiver, no additional evidence exists in this case which would tend to demonstrate that the Defendant intentionally relinquished a known right; this requirement being the *sine quo non* of any waiver defense. *In re Westbrook*, 246 B.R. 412, 419 (Bankr. N.D.Ala. 1999); *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 609 (B.A.P. 8th Cir. 1997). Accordingly, for these reasons, the Court must reject the Debtor's estoppel and waiver arguments.

In summation, the Court cannot find that the circumstances surrounding this case show that the Plaintiff executed his 1989 income tax return under penalty of perjury. As such, the 1989 tax return filed by the Debtor in June of 1993, does not constitute a tax return within the meaning of the decision rendered by the Sixth Circuit Court of Appeals in *In re Hindenlang*. Therefore, with respect to the Debtor's 1989 tax obligation, the exception to discharge contained in 11 U.S.C. § 523(a)(1)(B)(i) is applicable. Given this holding, the Court at this time declines to address the arguments raised by the Parties concerning the Defendant's compliance with the fourth prong of the test set forth in *In re Hindenlang*.

In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

Accordingly, it is

ORDERED that the Motion for Summary Judgment submitted by the Plaintiff, Richard O. Burton, be, and is hereby, DENIED; and that the Motion for Summary Judgment submitted by the Defendant, the United States of America, be, and is hereby, GRANTED.

It is ***FURTHER ORDERED*** that the debt owed by the Plaintiff, Richard O. Burton, to the Defendant, the United States of America, be, and is hereby, determined to be a NONDISCHARGEABLE debt in bankruptcy pursuant to 11 U.S.C. § 523(a)(1)(B)(i).

Dated:

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Richard L. Speer

Bankruptcy Judge