U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
PAUL J. VERHEYDEN and	§	**Bankruptcy Case No. 03-33046 HDH-7**
DONNA K. VERHEYDEN	§	
	§	
Debtors	§	

PAUL J. VERHEYDEN	§	
	§	
Plaintiff	§	
	§	
v.	§	**Adversary No. 03-3520**
	§	
UNITED STATES OF AMERICA	§	
(INTERNAL REVENUE SERVICE)	§	
	§	
Defendant	§	

MEMORANDUM OPINION ON PLAINTIFF'S COMPLAINT TO DETERMINE DISCHARGEABILITY OF TAX LIABILITY

In this adversary proceeding, Paul J. Verheyden, one of the debtors in this bankruptcy case (the "Debtor") seeks a determination that his federal income tax liability is dischargeable in this bankruptcy case. The United States of America, on behalf of the Internal Revenue Service (the "IRS"), did not dispute that most of the taxes sought to be discharged are, in fact, dischargeable. However, the IRS contends that the Debtor's 1991 federal income tax liabilities are excepted from discharge pursuant to § 523(a)(1)(B)(i) of the Bankruptcy Code, which provides, in pertinent part, "A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt

– (1) for a tax . . . – (B) with respect to which a return, if required – (i) was not filed." The IRS argues that this provision applies to except the Debtor's 1991 income tax liability because, although the Debtors filed a 1991 tax return, the purported return did not constitute a "return" for purposes of § 523(a)(1)(B) because the return was filed after the IRS had already filed a substitute tax return and had assessed the Debtor for the 1991 tax liability and, as such, the purported return served no purpose.

Under a long line of cases, a document qualifies as a tax return if four elements are met: (1) the document must purport to be a return, (2) it must be executed under penalty of perjury, (3) it must contain sufficient data to allow computation of the tax, and (4) it must represent an honest and reasonable attempt to comply with tax law. *See, Germantown Trust Co. v. Commissioner*, 309 U.S. 304, 60 S.Ct. 566, 84 L.Ed. 770 (1940); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 55 S.Ct. 127, 79 L.Ed. 264 (1934). The test derived from this old Supreme Court precedent is often referred to as the "Beard test." *See, Beard v. Comm'r of Internal Revenue*, 82 T.C. 766, 777, 1984 WL 15573 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986). In the present case the first three elements were easily met. Thus, the issue before the court is whether the late filed, after assessment, tax return constitutes a "return" for purposes of the discharge provision of the Bankruptcy Code.

Citing the Sixth Circuit case of *United States of America v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029 (6th Cir. 1999), the IRS argues that if a purported tax return serves no purpose under federal tax law, then an irrebuttable presumption is created that the debtor cannot meet the fourth prong of the Beard test, i.e., that the tax return was filed in an honest and reasonable attempt to comply with tax law. Indeed, *Hindenlang* stands for the proposition that "as a matter of law[,] . . . a Form 1040 is not a return if it no longer serves any tax purpose or has any effect under the Internal

Revenue Code. A purported return filed too late to have any effect at all under the Internal Revenue Code cannot constitute 'an honest and reasonable attempt to satisfy the requirements of the tax law.'" *Hindenlang*, 164 F.3d at 1034. The Sixth Circuit's holding inexplicably reads out of the fourth element of the Beard test that *the debtor* have made an honest and reasonable attempt to comply with the tax laws. That a purported return may not be considered *by the IRS*, after applying the thousands of extremely complex rules, regulations, and statutory provisions of the Internal Revenue Code, to constitute a valid "return" does not mean that *a debtor* would necessarily have known that this would be the result. Thus, *the debtor* could certainly have been making an honest and reasonable attempt to comply with the tax laws even though the IRS ultimately determined that the attempt was not successful.

Furthermore, although the Sixth Circuit gives lip service to the proposition that "exceptions to discharge are to be strictly construed in favor of the debtor," *Hindenlang*, 164 F.3d at 1034 (quoting *United States v. Fegeley*, 118 F.3d 979, 983 (3d Cir. 1997)), it effectively adds to the types of tax liability excepted from discharge any tax liability for a tax with respect to which a return was filed after assessment. Congress certainly could have included this type of language in the discharge provisions of § 523(a)(1)(B), but it did not. When the plain meaning of a provision does not produce absurd results, the Court must interpret that provision according to the language Congress chose to use. *See, U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-42, 109 S.Ct. 1026, 1030-31, 103 L.Ed.2d 290 (1989)(quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)). Because Congress did not choose to create a per se rule against the discharge of a liability for a tax with respect to which a return was filed after assessment by the IRS, this Court will not apply such a rule.

For these reasons, this Court rejects the per se rule of *Hindenlang* and joins the other courts that have done the same. *See, e.g, In re Payne*, 283 B.R. 719 (Bankr. N.D. Ill. 2002). Thus, the Court will address the issue of whether, in this case, the Debtor filed his 1991 tax return in "an honest and reasonable attempt to comply with the tax laws."

It is undisputed that the IRS filed a Substitute for Return for the 1991 taxes in July 1993. The IRS assessed tax liability in May 1994, based on the Substitute for Return. The Debtors delivered their completed 1991 tax return directly to the IRS Collection Division-Dallas (the division of the IRS with which the Debtors had been communicating about the 1991 taxes) on or about January 12, 1995. According to this tax return, the Debtors' tax liability for the 1991 tax year was significantly less than the liability assessed by the IRS. Among other things, the Debtors claimed deductions for mortgage interest and charitable contributions for which the IRS had not accounted in its Substitute for Return and subsequent tax assessment and also claimed exemptions for three children and Mrs. Verheyden, again items for which the IRS had not accounted in its Substitute for Return. Although the IRS ultimately rejected the Verheyden's return, the Debtors clearly submitted the return in an attempt to reduce the assessed liability by claiming deductions and exemptions that they were entitled to. The witness for the IRS testified that the Debtors' exemptions for the children claimed in their late-filed tax return were not accepted by the IRS because the Debtors failed to list the children's social security numbers, not because the return was filed after the assessment. In fact, the IRS used the return for its tax purposes by amending its records to reflect Mrs. Verheyden as a taxpayer.

Debtors are not tax experts. Mr. Verheyden, who testified, was a credible witness. His testimony and exhibits evidence an attempt by the Debtors to file a truthful return and to get their

tax liabilities reduced. The testimony before this Court indicates that the Debtors attempted to honestly and reasonably comply with tax law. Their return was even provided directly to the collection section of the IRS, further evidence of their good faith.

For these reasons, the Plaintiff has met the burden of proof required under the Bankruptcy Code for the discharge of the 1991 income tax liability.

Debtors' counsel shall submit a judgment to the Court within 10 days of this ruling.

Signed this 26 day of November, 2003.

HARLIN D. HALE
UNITED STATES BANKRUPTCY JUDGE