SO ORDERED,

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: March 23, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: DUNK A. ELLIS, 3rd	**CASE NO. 14-50224-KMS**
DEBTOR	**CHAPTER 7**
DUNK A. ELLIS, III	**DEBTOR/PLAINTIFF**
V.	**ADV. NO. 14-06004-KMS**
MISSISSIPPI DEPARTMENT OF REVENUE	**CREDITOR/DEFENDANT**

ORDER GRANTING IN PART AND DENYING IN PART
MOTION FOR SUMMARY JUDGMENT

Before the Court is the Defendant's Motion for Summary Judgment (Adv. Dkt. No. 33)[1] and Defendant's Brief in Support of Motion for Summary Judgment (Adv. Dkt. No. 34), filed by the Mississippi Department of Revenue ("MDOR"); the Plaintiff's Response to Motion for Summary Judgment (Adv. Dkt. No. 37) and Brief in Opposition to Defendant's Motion for Summary Judgment (Adv. Dkt. No. 38) filed by Dunk A. Ellis, III; and Defendant's Reply to Response (Adv. Dkt. No. 39) filed by MDOR. Having considered the pleadings, exhibits

[1] Unless stated otherwise, citations to the record are as follows: (1) citations to docket entries in the adversary proceeding, Adv. Proc. No. 14-06004-KMS, are cited as "Adv. Dkt. No. ___"; and (2) citations to docket entries in the main bankruptcy case, Case No. 14-50224-KMS, are cited as "Dkt. No. ___".

attached thereto, and the record, the Court finds that the Motion for Summary Judgment should be granted and states the following:

I. Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this Adversary Proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

II. Findings of Facts

Ellis is a physician at and the owner of the Pas-Point Family Clinic, where he has worked for the past twenty years. Adv. Dkt. No. 34 at 3; Adv. Dkt. No. 38 at 1. During this time, Ellis has used multiple addresses to file his business and personal taxes: (1) the P.O. Box, (2) the Riverwood Avenue address, (3) the Main Street address, and (4) the Wembly Avenue address.[2] Ellis filed for Chapter 7 relief on February 14, 2014. Dkt. No. 1. And MDOR filed its first claim in the amount of $122,915.47 on March 25, 2014. Claim 1-1. This claim has been twice amended, and the claim now alleges a debt in the amount of $232,024.45 secured by various tax liens enrolled in Jackson County on Ellis's property. Claim 1-3. MDOR filed a second administrative claim on May 27, 2014 in the amount of $1,895.99. Claim 6-1. On April 9, 2014, Ellis initiated this adversary proceeding, alleging three counts: (1) that MDOR's tax assessments were based on impermissible accounting methods and void, (2) that MDOR's tax assessments are dischargeable, and (3) that his "complaint is the initial pleading by which an adversarial proceeding is initiated." Adv. Dkt. No. 1 at 6-7. MDOR answered the complaint on May 14, 2014. Adv. Dkt. No. 4. And the Court entered a scheduling order on May 21, 2014. Adv. Dkt. No. 5. On November 26, 2014, the Court stayed the proceeding pending the resolution of an

[2] The parties used similar designations to discuss these addresses in their briefings, and the Court sees no need to republish the original addresses in this opinion but rather adopts their shorthand. *See* Adv. Dkt. No. 34 at 3; Adv. Dkt. No. 38 at 1-2.

interlocutory appeal filed by MDOR in another bankruptcy case in the Bankruptcy Court of the Northern District of Mississippi. Adv. Dkt. No. 25. On October 15, 2015, the Court held a status conference and determined that this case should no longer be stayed. Adv. Dkt. No. 28. The Court entered a new scheduling order on October 27, 2015. Adv. Dkt. No. 29. On December 15, 2015, MDOR moved for summary judgment on all of Ellis's claims against it. Adv. Dkt. No. 33. MDOR is seeking to collect on individual income tax assessments from the years 1998, 2000 – 2004, and 2006 – 2013 and withholding tax assessments from 2012 and 2013.

A. Individual Income Tax Assessments

MDOR asserts that it mailed the following assessments:

Individual Income Tax Assessments			
Tax period	Date Assessment Mailed	Address Mailed To	Amount
1998	12/20/2000	Riverwood Avenue	$4,799.66
2000	04/27/2001	Riverwood Avenue	$840.30
2001-2004	08/07/2006	Main Street	$94,655.00
2006	12/03/2010	Wembly Avenue	$520.00
2007-2012	07/29/2014	P.O. Box	$109,958.00

Adv. Dkt. No. 34 at 3-7. MDOR sent combined assessments for tax years 2001 through 2004 and 2007 through 2012 as a result of tax audits for those periods. Adv. Dkt. No. 34 at 4, 5-7.

Ellis admits that he did not file individual tax returns for tax years 1998, 2000-2004, and 2006. Adv. Dkt. No. 38 at 2. Because Ellis did not file returns, MDOR determined its assessments for these years based on information obtained from the Internal Revenue Service ("IRS"). Adv. Dkt. No. 34 at 3-5. For the tax years 2007-2012, Ellis asserts that he "used several tax preparation and filing services during these years." Adv. Dkt. No. 38 at 2-3. MDOR asserts that it did not receive returns for these years. Adv. Dkt. No. 34 at 6. In response to MDOR's audit of these years, Ellis provided "an income statement for 2007, the general ledger for 2008, federal income tax returns for 2009, 2010, 2011, and 2012, . . . an income statement for 2010[,

and] a complete set of bank statements for an account used for payroll for the years in question." Adv. Dkt. No. 38 at 2 (internal citations to exhibits omitted). In a report generated as a result of the audit, MDOR maintains that it received nine months of deposit slips, some bank statements, federal income tax returns, profit and loss statements for 2007 and 2010, and a general ledger from Ellis. Adv. Dkt. No. 33-9 at 1. Because Ellis did not "provide a complete set of records[,]" MDOR used "third party information . . . to compute gross business income along with the deposit slips provided." Adv. Dkt. No. 33-9 at 2. It is unclear from the audit information provided to the Court who this third party is. Ellis did file a return for tax year 2013. Adv. Dkt. No. 38 at 3; Adv. Dkt. No. 34 at 7.

B. Withholding Tax Assessments

MDOR asserts that it mailed the following assessments:

Withholding Tax Assessments			
Tax Period	Date Assessment Mailed	Address Mailed To	Amount
Q1 2012	03/05/2012	P.O. Box	$973.75
Q2 2012	08/22/2012	P.O. Box	$973.75
Q3 2012	11/20/2012	P.O. Box	$1,283.52
Q4 2012	02/20/2013	P.O. Box	$1,414.40
Q1 2013	05/20/2013	P.O. Box	$1,518.65
Q2 2013	08/20/2013	P.O. Box	$1,655.45
Q3 2013	11/20/2013	P.O. Box	$1,835.01
October 2013	02/20/2014	P.O. Box	$263.00
November 2013	02/20/2014	P.O. Box	$136.00

Adv. Dkt. No. 34 at 7-11; Adv. Dkt. No. 33-11.

Ellis admits that he "did not file a Withholding Tax Return for any of the 2012 periods." Adv. Dkt. No. 38 at 3. He asserts that he did file untimely returns for the first, second, and third quarters of 2013. Adv. Dkt. No. 38 at 3. Contrary to Ellis's assertion, MDOR admits it received untimely withholding tax returns for the third and fourth quarters of 2012. According to MDOR, it received these returns on January 11, 2014, and MDOR agreed with Ellis's proposed

assessments and reduced his tax liability accordingly. Adv. Dkt. No. 34 at 8-9. Ellis's liability for these quarters was reduced to $1,035.69 and $1,007.56, respectively. Adv. Dkt. Nos. 33-14, 33-17, and 34 at 8. Ellis filed untimely returns for the first, second, and third quarters of 2013 on January 11, 2014, and MDOR agreed with his proposed assessments and reduced his tax liability accordingly. Adv. Dkt. No. 34 at 9-10. Ellis's liability for these quarters was reduced to $876.56, $1,035.69, and $935.38, respectively. Adv. Dkt. Nos. 33-20, 33-23, and 33-26. On January 11, 2014, Ellis also submitted untimely withholding tax returns for the months of October and November of 2013. Adv. Dkt. No. 34 at 10-11. MDOR agreed with Ellis's proposed assessment and because these returns, though untimely, were filed prior to MDOR's issuance of an assessment for these months, Ellis's tax liability did not need to be reduced. *See* Adv. Dkt. No. 34 at 10-11.

III. Conclusions of Law

A. Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Fed. R. Bankr. P. 7056 (applying Rule 56[3] to adversary proceedings). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law. An issue is 'genuine' if the evidence is sufficient for a reasonable [fact-finder] to return a verdict for the non-moving party." *Ginsberg 1985 Real Estate P'ship v. Cadle Co.*, 39 F.3d 528, 531 (5th Cir. 1994) (citations omitted). The moving party bears the initial responsibility of apprising the court of the basis for its motion and the parts of the record which indicate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[3] For convenience, references to the Federal Rules of Civil Procedure are shortened to "Rule ___".

"Once the moving party presents the . . . court with a properly supported summary judgment motion, the burden shifts to the nonmoving party to show that summary judgment is inappropriate." *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir.1998). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). But the nonmovant must meet his burden with more than metaphysical doubt, conclusory allegations, unsubstantiated assertions, or a mere scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). A party asserting a fact is "genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials. . . ." Fed. R. Civ. P. 56(c)(1)(A).

Summary judgment must be rendered when the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

B. Count One: Tax Liability

MDOR argues that its tax assessments satisfy due process and are in the proper amount. Ellis counters that he did not receive proper notice as required by the Due Process Clauses of the United States Constitution and the Mississippi Constitution. He does not address the amounts of the assessments in his briefing, but the complaint states that "the MDOR Income and Withholding Tax assessments are based upon alternative accounting methods not permitted when adequate records exist, as in this case." Adv. Dkt. No. 1 at 6. The Bankruptcy Code provides that bankruptcy courts "may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and

whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction." 11 U.S.C. § 505(a)(1) (2010). "Section 505(a)(1) is a 'broad grant of jurisdiction' authorizing the bankruptcy court to determine certain tax issues, subject to explicit statutory exceptions and the bankruptcy court's discretion to abstain." *In re Wyly*, No. 14-35043, 2015 WL 5042756, at *4 (Bankr. N.D. Tex. Aug. 25, 2015) (citing *IRS v. Luongo (In re Luongo)*, 259 F.3d 323, 328-30 (5th Cir. 2001)). MDOR does not challenge this Court's authority to determine the validity of these tax debts, and the Court does not abstain.

1. Due Process[4]

As to the individual income tax debts, Mississippi imposes a tax "upon the entire net income of every resident individual . . . in excess of the credits provided." Miss. Code Ann. § 27-7-5(1) (1994). The rates for Mississippi's income tax are set by statute. *See id.* As to the withholding tax debts, Mississippi requires "every employer making payments of wages to employees [to] deduct and withhold from such wages an amount determined from withholding tables promulgated by [MDOR] and furnished to the employer." Miss. Code Ann. § 27-7-305(1) (2015). Regardless of whether a return is timely filed, when a tax is not paid MDOR makes a determination of an individual's income tax liability and sends that assessment "by mail or by personal delivery of the assessment to the taxpayer, which assessment shall constitute notice and demand for payment." Miss. Code Ann. §§ 27-7-53(1)(a), 27-7-53(2) (2015). There is no specific statute stating the delivery requirements for notices of withholding tax assessments, but Mississippi's tax code provides that the statutes relating to withholding tax "are supplemental to the provisions" relating to income tax "and shall not be construed to repeal any part thereof not

[4] The relevant due process clause of the U.S. Constitution reads "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend XIV, § 1. The due process clause of the Mississippi Constitution reads "[n]o person shall be deprived of life, liberty, or property except by due process of law." Miss. Const. art. III, § 14. The Court finds that these constitutional provisions are coextensive for purposes of this analysis.

in direct conflict with this article." *See* Miss. Code Ann. § 27-7-349 (1969). MDOR argues that the Court should read this to mean that the delivery provisions related to income tax also apply to withholding tax, and the Court so does. Therefore, under the current statute, Ellis is only entitled to receive notice of his income tax and withholding tax assessments through the regular mail.[5] The Court next looks to determine whether notice by regular mail satisfies due process.

"Due process does not require that a property owner receive actual notice before the government may take his property. Rather, . . . due process requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (internal citations and quotation marks omitted). Notice by regular mail has previously been held constitutionally sufficient. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition . . ."). The Court agrees with Ellis[6] and MDOR that notice by regular mail satisfies due process. Further, Mississippi law provides "a presumption that mail deposited, postage prepaid and properly addressed is timely delivered to the person addressed." *Thames v. Smith Inc. Agency, Inc.*, 710 So. 2d 1213, 1216 (Miss. 1998). To overcome this presumption, "[t]here must be something directed to the specific relevant notice before a fact question arises of whether a properly addressed letter was not delivered."

[5] Ellis seems to argue in his complaint that he is entitled to receive his tax assessments through certified mail. Adv. Dkt. No. 1 at 5. Prior versions of Section 27-7-53 did indeed require that the tax assessment be sent by certified mail, but in 1992, the Mississippi legislature amended the statute to allow for delivery by regular mail. Income Taxes—Notices and Assessments—Certified Mail, 1992 Miss. Laws, Ch. 407, § 2 ("AN ACT TO AMEND SECTIONS 27–65–35, 27–7–53 AND 27–13–23, MISSISSIPPI CODE OF 1972, TO DELETE THE REQUIREMENT OF SENDING CERTAIN TAX NOTICES OR TAX ASSESSMENTS VIA CERTIFIED MAIL; AND FOR RELATED PURPOSES.").

[6] Ellis, discussing the case law cited by MDOR in its motion, admits that "it is clear that the Mississippi statutory language that permits the mailing of assessments by regular mail would probably satisfy the constitutional due process requirements." Adv. Dkt. No. 38 at 7.

Holt v. Miss. Emp't Sec. Comm'n, 724 So. 2d 466, 471 (Miss. 1998). "[A] denial by itself [is] inadequate." *Id.*

Ellis, in his briefing, admits that MDOR mailed copies of the income tax assessments. Adv. Dkt. No. 38 at 2-3. In addition, Lauren Windmiller, the Bureau Director of Individual Income and Withholding Tax Division, stated under oath that MDOR "mailed the Notice[s] of Assessment via regular United States mail to the last known address on file at the time" for income tax years 1998 and 2000 and withholding tax for the first and second quarters of 2012. Adv. Dkt. No. 33-31 at ¶¶ 4, 7. MDOR also attached copies of the assessments for the remaining taxable periods. Adv. Dkt. Nos. 33-5 (2001 – 2004), 33-7 (2006), 33-10 (2007 – 2012), 33-13 (third quarter 2012), 33-16 (fourth quarter 2012), 33-19 (first quarter 2013), 33-22 (second quarter 2013), 33-25 (third quarter 2013), 33-27 (October 2013), and 33-29 (November 2013). But MDOR has not provided any evidence that such assessments were actually mailed. *See Fowler v. White*, 85 So. 3d 287, 291-92 (Miss. 2012) (affirming trial court's denial of presumption of delivery where affidavit did not specify that notice had been mailed and where only evidence in support of presumption of delivery was argument of counsel).

The Court grants summary judgment in favor of MDOR on the sufficiency of the notice of the income tax debts because Ellis admits that all of the assessments were mailed. The Court grants summary judgment on the sufficiency of notice as to the withholding tax assessments for the first and second quarter of 2012 because MDOR submitted a sworn affidavit that those assessments were mailed. The Court cannot, however, grant summary judgment on the remaining withholding tax assessments on either of these grounds. But the Court further finds that Ellis cannot argue that he did not have notice of the remaining withholding tax assessments because he filed returns, confessing his tax liability for those periods. The returns provided Ellis

an opportunity to be heard on his tax liability, and MDOR accepted his valuation for every submitted period. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard."). Therefore there is no dispute regarding the returns and the tax due thereunder.

2. Amount

Mississippi's tax code provides that "[i]f no return is made by a taxpayer required by this chapter to make a return, the commissioner shall determine the taxpayer's liability from the best information available, which determination shall be prima facie correct for the purpose of this article. . . ." Miss. Code Ann. § 27-7-53(2). This section applies to both income tax and withholding tax. *See* Miss. Code Ann. § 27-7-349. As discussed below, Ellis did not file returns before MDOR issued income tax assessments in the years 1998, 2000 – 2004, and 2006 – 2012 and withholding tax assessments for 2012 and the first three quarters of 2013. Ellis did file his income tax return for 2013 and withholding tax returns for October and November of 2013 before MDOR issued an assessment for these periods.

Because MDOR did not have returns from Ellis for tax years 1998 and 2000, it based its assessments of his tax liability on information obtained from the IRS. Adv. Dkt. No. 34 at 4. MDOR audited Ellis for tax years 2001 – 2004. Adv. Dkt. No. 34 at 4. Because MDOR did not have returns from Ellis for these years and because he did not respond to its request for information during the audit, MDOR based its assessment on information obtained from the IRS. Adv. Dkt. No. 34 at 4-5. Because MDOR did not have a return from Ellis for tax year 2006, it based its assessment on information obtained from the IRS. Adv. Dkt. No. 34 at 5. MDOR audited Ellis for tax years 2007 – 2012. Adv. Dkt. No. 34 at 5. On request from MDOR, Ellis provided nine months of deposit slips, some bank statements, federal income tax returns, profit

and loss statements for 2007 and 2010, and a general ledger. Adv. Dkt. No. 34 at 5-6. MDOR based its assessment on this information along with other third-party information. Adv. Dkt. No. 34 at 6. Because Ellis filed a return (and an amended return) for tax year 2013, MDOR based its assessment on that return. Adv. Dkt. No. 34 at 7. Ellis did not file timely returns for any of the relevant withholding tax periods. However, he did file returns for all but two of the periods, and he filed returns for the last two periods before MDOR sent him an assessment. Based on his untimely returns, MDOR reduced its assessments to his suggested tax liability. Adv. Dkt. No. 34 at 8-11.

The Court finds that the assessments of Ellis's income tax liability used permissible accounting methods because either Ellis provided MDOR with no information or with incomplete information for all tax years except 2013. The Court finds that MDOR's accounting method for 2013 is permissible because it was based exclusively on information provided by Ellis. The Court further finds that MDOR's assessments of Ellis's withholding tax liability for the third and fourth quarters of 2012 and all of the relevant tax periods of 2013 are likewise based on permissible accounting methods because MDOR based its assessment exclusively on the returns submitted by Ellis. MDOR, however, has not explained how it reached its assessments for the first and second quarters of 2012. While ordinarily this would be sufficient to deny summary judgment, Ellis did not challenge the amounts of any of the assessments in his responsive briefing. Because the "[f]ailure to address a claim results in the abandonment thereof[,]" the Court finds that Ellis has conceded summary judgment on his claim related to the amount of his tax debt. *See City of Canton v. Nissan N. Am., Inc.*, 870 F. Supp. 2d 430, 437 (S.D. Miss. 2012) (quoting *Sanders v. Sailormen, Inc.*, No. 3:10cv606, 2012 WL 663021, at *3 (S.D. Miss. Feb. 28, 2012)).

C. Count Two: Nondischargeability

MDOR argues that its debts are nondischargeable under multiple sections of the Bankruptcy Code: (1) that the 2013 income tax debt is a post-petition debt under Section 727(b); (2) that the withholding taxes are trust fund taxes under Section 523(a)(1)(A); (3) that Ellis's failure to file returns renders the tax debt nondischargeable under Section 523(a)(1)(B); and (4) the Ellis willfully evaded his tax liabilities under Section 523(a)(1)C). Ellis does not address any of these arguments in his responsive brief. *See City of Canton*, 870 F. Supp. 2d at 437. Because the Court finds: (1) that Ellis's 2013 income tax debt will not be discharged because it is a post-petition debt; (2) that withholding taxes are nondischargeable as trust fund taxes; and (3) that the remaining income tax debts are nondischargeable for Ellis's failure to file returns, the Court does not reach the remaining arguments.

1. Section 727(b) – Post-petition Debt

In a Chapter 7 case, the discharge "discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a[n allowed] claim . . . as if such claim had arisen before the commencement of the case." 11 U.S.C. § 727(b) (2005). "The discharge relates to obligations in existence at the date of the filing of the case, in a Chapter 7 case. Thus, if the activity creating the [debt] occurred post-filing, the obligation arising therefrom would simply be not discharged. This is different from being non-dischargeable." *Wright v. Moffit (In re Moffit)*, 146 B.R. 364, 370 (Bankr. S.D. Tex. 1992). Under Mississippi law, the state income tax "shall be paid when the return is due." Miss. Code Ann. § 27-7-45(1) (2010). Ellis filed for Chapter 7 relief on February 14, 2014, and he filed his 2013 tax return on October

14, 2014. *See* Adv. Dkt. No. 34 at 7. MDOR does not argue that this filing is untimely.[7] The Court finds that the 2013 income tax debt, although on income earned pre-petition, is a post-petition debt in this case because the activity creating the debt, i.e. the passing of the deadline to file the return, did not arise until after filing.[8] This debt is, therefore, not discharged by the Chapter 7 discharge.

2. Section 523(a)(1)(A) – Trust Fund Taxes

Tax debts "of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed" are excepted from discharge. 11 U.S.C. § 523(a)(1)(A) (2010). Through this section, debts for taxes "required to be collected or withheld and for which the debtor is liable in whatever capacity" are excepted from discharge. *See* 11 U.S.C. § 507(a)(8)(C) (2010). "This category of taxes is commonly known as 'trust fund' taxes." *Blalock v. Miss. Dep't of Revenue (In re Blalock)*, 537 B.R. 284, 305 (Bankr. S.D. Miss. 2015) (citing *Szostek v. Tex. State Comptroller of Pub. Accounts (In re Szostek)*, 429 B.R. 552, 563 (W.D. Tex. 2010)).

To determine whether a tax is a trust fund tax, the Court looks to the statutes authorizing its collection. *See, e.g., id.* at 305-06. In Mississippi, "every employer making payments of wages to employees shall deduct and withhold from such wages an amount determined from withholding tables promulgated by the commissioner and furnished to the employer." Miss.

[7] The original deadline for filing was April 15, 2014. *See* Miss. Code Ann. § 27-7-41 (1980). But that deadline can be extended upon request. Miss. Code Ann. § 27-7-50 (2005). MDOR stated in its brief that if Ellis had requested an extension his new deadline would be October 15, 2014. Adv. Dkt. No. 34 at 7.

[8] Because this case was converted from a Chapter 13 to a Chapter 7 on July 9, 2014, *see* Dkt. No. 103, the Court must consider the effect of that conversion. Claims that arise between the filing of the original petition and conversion from a Chapter 13 to a Chapter 7 case are "treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition." 11 U.S.C. § 348(d) (2010). Thus, if Ellis's 2013 income taxes were due on April 15, then that tax debt would be considered a prepetition debt. That tax debt would be entitled to priority. 11 U.S.C. § 507(a)(8)(A)(i) (2010). Because it would be entitled to priority, the 2013 income tax debt would be nondischargeable even if the filing deadline were April 15, 2014. 11 U.S.C. § 523(a)(1)(A).

Code Ann. § 27-7-305(1). Ellis is an employer within the meaning of this statute.[9] "Every employer who fails to withhold or pay to the commissioner any sums required by [Article 3 Withholding of Tax] . . ., shall be personally and individually liable. . . ." Miss. Code Ann. § 27-7-309(4) (2012). Furthermore, "any sum or sums withheld in accordance with the provisions of this article shall be deemed to be held in trust for the State of Mississippi. . . ." *Id.* It is clear from these statutes that the withholding tax debts qualify as trust fund taxes and are therefore nondischargeable.

3. Section 523(a)(1)(B) – Non-Filed Returns

Tax debts "with respect to which a return . . . if required[,] was not filed or given" are excepted from discharge. 11 U.S.C. § 523(a)(1)(B)(i) (2010). "[T]he term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." *Id.* § 523(a)(*). Ellis concedes that he did not file individual tax returns for the years 1998, 2000-2004, and 2006. Therefore, the Court finds that the tax debts for these years are nondischargeable.

For the years, 2007 – 2012, Ellis states that he used tax preparation and filing services, but MDOR claims that it did not receive any returns for these years. "A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry." Fed. R. Civ. P. 44(b); *see also* Fed. R. Bankr. P. 9017 (applying Rule 44 to bankruptcy cases). "A party may prove an official record--or an entry or lack of an entry in it--by any other method authorized by law." Fed. R. Civ. P. 44(c). The Fifth Circuit has held that "[t]o establish the fact that there is no record as to a particular matter or thing parol evidence may be given. The proof may be made by any

[9] "'Employer' means a person doing business in, or deriving income from sources within, the state, who has control of the payment of wages to an individual for services performed, or a person who is the officer or agent of the person having control of the payment of wages." Miss. Code Ann. § 27-7-303(d) (2010).

qualified person who has examined the record as well as by the custodian." *Jackson v. U.S.*, 250 F.2d 897, 901 (5th Cir. 1958). MDOR submitted a certification from J. Ed Morgan, the Commissioner of Revenue for MDOR, stating that "after a diligent search of the records of [MDOR], . . . there is no record of Mississippi Income Tax Returns for the 1998, 2000, 2001, 2002, 2003, 2004, 2006, 2007, 2008, 2009, 2010, 2011, and 2012 tax years. . . ." Adv. Dkt. No. 33-33. The Commissioner of Revenue is the "official custodian of all records of the Department of Revenue." *See* Miss. Code Ann. § 27-3-83(3) (2012). The Court finds that this statement is sufficient to meet Rule 44(b) as evidence of the absence of a record. While Ellis states that he used tax preparation services, this unsubstantiated assertion is insufficient to overcome the evidence presented by MDOR. Ellis does not state that he signed or filed any returns for these years, and he has not produced any copies of returns that he filed for these years to contradict their absence from MDOR's records. The Court, therefore, finds that the tax debts for the years 2007 – 2012 are nondischargeable.

D. Count Three: Initial Pleading

MDOR "agrees that the Debtor's complaint is the preliminary pleading by which to initiate an adversarial proceeding with regard to the present dispute. . . ." Adv. Dkt. No. 34 at 31. Ellis does not address this count in his response. *See City of Canton*, 870 F. Supp. 2d at 437.

Other Bankruptcy Courts in this state have already ruled on this same count in different cases against MDOR. *See, e.g., Sarfani, Inc. v. Miss. Dep't of Revenue (In re Sarfani, Inc.),* 527 B.R. 241, 246 (Bankr. N.D. Miss. 2015) ("It is true that the filing of a complaint in bankruptcy court commences an adversary proceeding in the same way that the filing of a complaint in district court commences a civil action. Count III is simply of no consequence, because Sarfani is not seeking any relief therein.") (internal citation omitted); *L Harris Constr. Co. v. Miss. Dep't of*

Revenue (In re L Harris Constr. Co.), 528 B.R. 664, 672 (Bankr. S.D. Miss. 2015) ("As for Count Three, the Debtor does not seek any relief, and therefore, Count Three is of no significance. Count Three simply states the obvious: the Complaint is the initial pleading by which an adversary proceeding is commenced."). The Court sees no reason to depart from their reasoning; however, those cases were ruling on motions to dismiss, whereas this Court rules on a motion for summary judgment. If MDOR had moved to dismiss this count, the Court would have granted that motion under Rule 12(b)(6).[10] But MDOR did not, and the Court now cannot. In truth, because this count of the complaint seeks no relief, the Court cannot see how granting or denying summary judgment would alter the relationship between the parties. The Court, therefore, will grant the motion for summary judgment on this count for reasons of judicial economy: granting the motion removes the count from this Court's consideration, whereas denying the motion would mean that this count would be carried forward to trial.

III. Conclusion

The Court grants summary judgment in favor of MDOR on all three counts of Ellis's complaint. First, the Court finds that Ellis received notice of the assessments sufficient to meet due process and that MDOR's accounting methods were permissible. Second, the Court finds that Ellis's tax debts are not discharged in his bankruptcy: the 2013 income tax debt is a post-petition debt; the withholding tax debts are for trust fund taxes; and Ellis did not file returns for the remaining income tax periods. Third, the Court finds that Ellis seeks no relief by asking that the Court declare his complaint the initial pleading in an adversary proceeding.

IT IS HEREBY ORDERED THAT Defendant Mississippi Department of Revenue's Motion for Summary Judgment (Adv. Dkt. No. 33) is GRANTED.

[10] Rule 12(b) applies in adversary proceedings. Fed. R. Bankr. P. 7012(b).

FURTHER ORDERED THAT within fourteen days, Defendant Mississippi Department of Revenue shall submit a proposed final judgment dismissing this adversary (14-06004-KMS) and stating the total amount of its claim against Plaintiff Dunk A. Ellis, III.

##END OF ORDER##