



SO ORDERED,

A handwritten signature in blue ink that reads "Katharine M. Samson".

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: July 6, 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: KEVIN DOUGLAS TOUSHSTONE
and LILLIAN OAKES TOUSHTONE**

CASE NO. 14-03475-KMS

DEBTORS

CHAPTER 7

**LILLIAN OAKES TOUCHSTONE and KEVIN
DOUGLAS TOUCHSTONE**

DEBTORS/PLAINTIFFS

V.

ADV. NO. 15-00012-KMS

MISSISSIPPI DEPARTMENT OF REVENUE

CREDITOR/DEFENDANT

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

This matter is before the Court on the Motion for Summary Judgment (Adv. Dkt. No. 113),¹ the Motion to Dismiss Adversary Proceeding (Adv. Dkt. No. 115), and the Motion to

¹ Unless stated otherwise, citations to the record are as follows: (1) citations to docket entries in the adversary proceeding, Adv. Proc. No. 15-00012-KMS, are cited as "Adv. Dkt. No. ____"; and (2) citations to docket entries in the main bankruptcy case, Case No. 14-03475-KMS, are cited as "Dkt. No. ____".

Strike (Adv. Dkt. No. 119) filed by Defendant Mississippi Department of Revenue (“MDOR”). The Court took these motions under advisement without hearing on April 27, 2016. Adv. Dkt. Nos. 126, 127. Having considered the motions, responses, statutory and case law, the Court finds as follows:

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 Fact

Kevin and Lillian Touchstone owned two businesses: Allen Oil Company, Inc. (“Allen Oil”) and Bonus Specialty Corporation (“Bonus Specialty”). Adv. Dkt. No. 124 at 1. MDOR conducted several audits of the Touchstones and their business interests for tax periods from January 1, 2006 through December 31, 2008, which resulted in assessments of individual income tax liability, sales tax liability, corporate income tax liability, and corporate franchise tax liability. Adv. Dkt. No. 114 at 4. The Touchstones challenged these tax assessments at a Board of Review Hearing on November 22, 2011. Adv. Dkt. No. 124 at 1. Specifically, the Touchstones challenged:

- (1) Sales tax against Allen Oil . . . for the tax periods July 1, 2006 through July 31, 2009, in the amount of \$51,272;
- (2) Sales tax against Bonus Specialty . . . for the tax periods July 1, 2006 through August 31, 2008, in the amount of \$6,078;
- (3) Corporate income tax against Allen Oil . . . for the tax periods January 1, 2008 through December 31, 2008, in the amount of \$2,350; [and]
- (4) Individual income tax against Kevin and Lillian O. Touchstone . . . for the periods January 1, 2006 through December 31, 2008, in the amount of \$68,843.

Adv. Dkt. No. 124 at 1-2. The Board of Review decisions were appealed to the Board of Tax Appeals, which upheld the Board of Review decisions. Adv. Dkt. No. 124 at 2; Adv. Dkt. No. 61 at 9-12. The Touchstones appealed the Board of Tax Appeals' decision to the Chancery Court of Pike County, Mississippi. Adv. Dkt. No. 124 at 2; Adv. Dkt. No. 61 at 13-16. On October 10 and 23, 2012, MDOR mailed Transfer Assessments to the Touchstones at a post office box address. Adv. Dkt. No. 114 at 4. The first assessment transferred liability for withholding tax for tax periods in 2009, 2010, and 2011 from Allen Oil to Kevin Touchstone. Adv. Dkt. No. 112-1 at 3. The second assessment transferred liability for withholding tax for tax periods in 2009, 2010, 2011, and 2012 and corporate and franchise tax for tax periods in 2008 from Allen Oil to Kevin Touchstone. Adv. Dkt. No. 112-2 at 3-4. On September 3, 2013, the chancery court dismissed the appeal because the Touchstones "were unable to meet the requisite bond requirement for challenging a tax assessment levied by MDOR." Adv. Dkt. No. 124 at 3; Adv. Dkt. No. 63-22 at 3-4. On February 3, 2014, MDOR mailed a Responsible Person Assessment to Kevin Touchstone at the same post office box address. Adv. Dkt. No. 114 at 5. This assessment transferred liability for sales tax for tax periods in 2008, 2009, 2010, and 2011 from Allen Oil to Kevin Touchstone. *See* Adv. Dkt. No. 112-3 at 3.

The Touchstones filed a joint petition for Chapter 7 relief on October 27, 2014, and initiated this adversary proceeding on February 17, 2015. Dkt. No. 1; Dkt. No. 32; Adv. Dkt. No. 1. They filed their third amended complaint on August 27, 2015. Adv. Dkt. No. 60. In it, they list three causes of action: (1) insufficient notice of responsible person assessments, (2) irregularities in the process used to make those assessments, and (3) the dischargeability of the Touchstones' 2008 individual income tax liability. The Touchstones are not contesting anything related to their individual income tax liability for tax years 2011 or 2012. Adv. Dkt. No. 60 at 22. In its answer,

MDOR admitted that it lacked authority to transfer liability for the corporate and franchise tax of Allen Oil to Kevin Touchstone. Adv. Dkt. No. 63 at 8 n.4. MDOR moved for summary judgment on all of the Touchstones' claims on April 5, 2016. Adv. Dkt. No. 113. On the same date, MDOR moved to strike an affidavit previously filed by Kevin Touchstone. Adv. Dkt. No. 119.

III. Conclusions of Law

A. Motion to Strike

MDOR moved to strike the affidavit of Kevin Touchstone, Adv. Dkt. No. 52, anticipating that the Touchstones would rely on it in response to MDOR's dispositive motion. Adv. Dkt. No. 119 at 1. MDOR asserts that the affidavit "is not notarized, lacks identification of the State and County in which it was executed, and is not executed under penalty of perjury." Adv. Dkt. No. 119 at 1. "[A]n unsworn affidavit is incompetent to raise a fact issue precluding summary judgment. A statutory exception to this rule exists . . . , which permits unsworn declarations to substitute for an affiant's oath if the statement . . . is made 'under penalty of perjury' and verified as 'true and correct.'" *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988) (internal footnotes omitted) (citing 28 U.S.C. § 1746 (1976)).

In response to MDOR's dispositive motion, the Touchstones attached as an exhibit an affidavit of Kevin Touchstone. *See* Adv. Dkt. No. 124-1. This renewed affidavit cures the flaws in the original affidavit because it is sworn to before a notary public. Therefore, the motion to strike is denied as moot.

B. Motion to Dismiss

MDOR styled its dispositive motion as a combined motion to dismiss and for summary judgment. MDOR attached three exhibits to its motion and referenced two exhibits docketed in the main case, specifically discovery requests and responses, a promissory note, and a deed of

trust. *See* Adv. Dkt. No. 115 at 2. A motion made under Rule 12(b)(6)² that asks the court to consider matters beyond the pleadings “must be treated as one for summary judgment under Rule 56.” Fed. R. Civ. P. 12(d); *see also* Fed. R. Bankr. P. 7012(b) (applying Rule 12(b)-(i) to adversary proceedings). Therefore, the Court will consider MDOR’s motion as a motion for summary judgment and not as a motion to dismiss. The separately docketed motion to dismiss is denied.

C. Motion for Summary Judgment

1. 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 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).

“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

² For convenience, references to the Federal Rules of Civil Procedure are shortened to “Rule ____”.

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.

2. Authority to Determine Tax Liabilities

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)). “The court may not so determine . . . the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case. . . .” 11 U.S.C. § 505(a)(2)(A). MDOR argues that the Touchstones’ tax liability had already been

determined by another tribunal before the commencement of their bankruptcy case and, therefore, the Court may not make a determination regarding these taxes.

Another bankruptcy court in this jurisdiction has recently examined Mississippi's tax appeal process with reference to the limitation in Section 505(a)(2)(A). *See generally, L Harris Constr. Co. v. Miss. Dep't of Revenue (In re L Harris Constr. Co.)*, 528 B.R. 664, 673-76 (Bankr. S.D. Miss. 2015). In *L Harris*, the debtor's case before chancery court was also dismissed for failure to post the bond. *Id.* at 683. As a result of the dismissal, the court found that the Board of Tax Appeals' decision was final, "and the Debtor's tax liability was contested and adjudicated prior to the Debtor filing its petition in bankruptcy" meeting the limitation in Section 505(a)(2)(A). *Id.* at 684. This Court will not depart from that reasoning and finds that it lacks authority to redetermine the Touchstones' liability for all issues appealed to the Chancery Court of Pike County, Mississippi:

(1) Sales tax against Allen Oil . . . for the tax periods July 1, 2006 through July 31, 2009, in the amount of \$51,272;

(2) Sales tax against Bonus Specialty . . . for the tax periods July 1, 2006 through August 31, 2008, in the amount of \$6,078;

(3) Corporate income tax against Allen Oil . . . for the tax periods January 1, 2008 through December 31, 2008, in the amount of \$2,350; [and]

(4) Individual income tax against Kevin and Lillian O. Touchstone . . . for the periods January 1, 2006 through December 31, 2008, in the amount of \$68,843.

See Adv. Dkt. No. 124 at 1-2.

3. Count One: Notice of Responsible Person Assessments³

³ The briefing for both MDOR and the Touchstones also refers to these assessments as "Transfer Assessments," but for clarity the Court will refer to them only as responsible person assessments. It is clear from the language in the assessment itself that the criteria MDOR used to transfer the tax assessments from Allen Oil to Kevin Touchstone is identical to the criteria for a responsible person assessment. *See Adv. Dkt. No. 110-1 at 1* (October 12, 2012 transfer assessment); *Adv. Dkt. No. 110-2 at 1* (October 23, 2012 transfer assessment).

MDOR may assess the tax debts of a corporate entity against an individual if that person meets the definition of a responsible person. *Donovan v. Burwell*, --- So. 3d ---, --- n.1, 2016 WL 121664, at *1 n.1 (Miss. Ct. App. Jan. 12, 2016) (“Under state and federal law, if an employer fails to collect and pay over [certain] taxes, penalties may be assessed against a ‘responsible person,’ which, in broad terms, means someone who exercises significant authority over the employer's finances.”). The Touchstones argue that they did not receive notice of the responsible person assessments sufficient to satisfy due process. This question was not previously adjudicated because the responsible person assessments were not mailed until after the Board of Tax Appeals affirmed the Board of Review orders.

“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 . . .”). Further, Mississippi law provides “a presumption that mail deposited, postage prepaid and properly addressed is timely delivered to the person addressed.” *Thames v. Smith Ins. 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.” *Holt v. Miss. Emp’t Sec. Comm’n*, 724 So. 2d 466, 471 (Miss. 1998). “[A] denial by itself [is] inadequate.” *Id.*

Responsible person assessments for sales tax are to be made using the same procedures as those for regular sales tax assessments. Miss. Code Ann. § 27-65-55(2). Mississippi law⁴ requires that notice of the assessment be sent by regular mail. *See* Miss. Code Ann. §§ 27-65-35, 27-65-37(2) (2015). There is no specific procedure for delivering notice of a responsible person assessment of withholding tax, 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 in direct conflict with this article.” *See* Miss. Code Ann. § 27-7-349 (1969). The Court reads this to mean that the delivery provisions related to income tax also apply to withholding tax. MDOR is required to send an assessment of an individual’s income tax liability “by mail or by personal delivery of the assessment to the taxpayer.”⁵ Miss. Code Ann. §§ 27-7-53(1)(a), 27-7-53(2) (2015).

MDOR attached to its answer and identified in its briefing the affidavits of three MDOR employees who swore that the assessments were generated by MDOR’s computer system, sent to the mail room for mailing, and actually placed in the mail. Adv. Dkt. No. 110 at 2-3 (employee generated October 10, 2012 and October 23, 2012 transfer assessments in computer system); Adv. Dkt. No. 112⁶ at 3 (all three assessments were printed by computer system for mailing and sent to mail room); Adv. Dkt. No. 63-30 at 4 (all three assessments were placed in the mail and

⁴ Prior versions of these statutes had required that MDOR send notice of the assessment by certified mail. *See* Taxes—Notices and Assessments—Certified Mail, 1992 Miss. Laws, Ch. 407, § 1; Taxation and Finance—Department of Revenue—Require Certain Taxpayers to Submit Returns, Schedules and Other Information Electronically, 2010 Miss. Laws Ch. 323 § 3. When MDOR mailed the notices, however, all that was required under the law was notice by regular mail.

⁵ Prior versions of Section 27-7-53 required 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 The Court notes that this affidavit is missing page three of four, but this omission does not affect the Court’s ruling because the pertinent information and the signature and affirmation of the affiant are still included in the exhibit.

sent to address reflected on Touchstones' 2011 and 2012 individual income tax returns). The Touchstones admit that all three assessments were generated by MDOR's computer system to be mailed to them. Adv. Dkt. No. 124 at 3-4. However, they deny that Kevin Touchstone received the Responsible Person Assessment sent on February 3, 2014. Adv. Dkt. No. 124-1 at 1. The Court finds that the Touchstones received constitutionally sufficient notice of the assessments, and, therefore, summary judgment is granted in favor of MDOR on Count One.

4. Count Two: Irregularities in Assessments

The Touchstones argue that there were irregularities in the assessments that render their liability and the proceedings below void. MDOR assessed the withholding tax of Allen Oil against Kevin Touchstone for periods in 2009, 2010, 2011, and 2012 and the sales tax of Allen Oil for periods in 2008, 2009, 2010, and 2011. See Adv. Dkt. No. 112-1 at 3; Adv. Dkt. No. 112-2 at 3-4; Adv. Dkt. No. 112-3 at 3. As noted above, the Court is statutorily deprived of jurisdiction to redetermine Allen Oil's sales tax liability for July 2006 through July 2009 or corporate income tax liability for 2008, Bonus Specialty's sales tax liability for July 2006 through August 2008, or the Touchstones' individual income tax liability for 2006 through 2008. Further, even if the Court were not prohibited from determining the tax liability for Allen Oil or Bonus Specialty during these periods by the Bankruptcy Code, Kevin Touchstone is deprived of standing to challenge the amount of the assessment by the Mississippi tax code. *See* Miss. Code Ann. § 27-65-55(2) (2010) ("A person being assessed under this subsection may appeal his liability . . . solely regarding the issue of the ownership interest and management requirements of this subsection."). The Court, however, can still examine the responsible person status of Kevin Touchstone.

As to responsible person status, Mississippi law provides that

Persons owning stock of ten percent (10%) or more of the total of corporations or ten percent (10%) interest in limited liability companies with thirty-five (35) or fewer owners and exercising responsibility for fiscal management, also shall be liable for sales taxes levied by this chapter upon such corporations when such taxes become due and unpaid to the extent that such taxes accrued while such person was exercising responsibility for fiscal management.

Miss. Code Ann. § 27-65-55(2) (2010). Mississippi law provides identical language for withholding taxes. Miss. Code Ann. § 27-7-307(2) (2010). “The Fifth Circuit takes a ‘broad view of who is a responsible person under’” comparable federal tax statutes.⁷ *Looney v. U.S.*, 544 F. Supp. 2d 574, 579 (S.D. Tex. 2008) (quoting *Logal v. U.S.*, 195 F.3d 229, 232 (5th Cir. 1999)).

Responsibility . . . is a matter of status, duty, power and authority; whether exercised or not. It is not necessary that an individual have the final, or sole, word as to which creditors should be paid in order to be subject to liability. . . . In fact, “responsibility does not require knowledge that one has that duty and authority.” Rather it is sufficient that the person have some power, authority, and control over the process by which corporate funds are disbursed to find that he is a “responsible person”. . . .

In re Ingram, No. 12-53579, 2014 WL 644501, at *3 (Bankr. W.D. Tex. Feb. 19, 2014) (internal citations omitted). “The crucial inquiry is whether the person had the ‘effective power’ to pay the taxes—that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed.” *Barnett v. I.R.S.*, 988 F.2d 1449, 1454 (5th Cir. 1993).

Though no single factor is dispositive, courts look to indicia of responsible person status:

(i) is an officer or member of the board of directors; (ii) owns a substantial amount of stock in the company; (iii) manages the day-to-day operations of the business; (iv) has the authority to hire or fire employees; (v) makes decisions as to the disbursement of funds and payment of creditors; and (vi) possesses the authority to sign company checks.

⁷ The Internal Revenue Service “imposes a penalty equal to the entire amount of the unpaid taxes on ‘any person’ required to collect, account for, or pay over the withheld taxes, who ‘willfully’ fails to do so. Liability for the penalty is established if a person is a ‘responsible person’ who ‘willfully’ failed to pay over the withheld taxes.” *Barnett v. I.R.S.*, 988 F.2d 1449, 1453 (5th Cir. 1993) (discussing 26 U.S.C. § 6672(a)). A “responsible person” under this statute is any “person required to collect, truthfully account for, [or] pay over any tax.” *Id.* at 1453 n.6. Rather than imposing a penalty equal to the tax, Mississippi merely makes the responsible person also liable for that same tax.

Id. at 1455. To hold Kevin Touchstone liable for the sales and withholding tax assessments made against Allen Oil, MDOR must show that (1) Kevin Touchstone was at least a ten percent owner of Allen Oil and (2) Kevin Touchstone exercised fiscal management (3) during the relevant tax periods.

As to ownership, MDOR submitted a sales tax registration application for Allen Oil signed February 22, 2010. The application lists Kevin Touchstone as the one hundred percent owner of Allen Oil. Adv. Dkt. No. 31-1 at 1. Further, the Touchstones admit in their briefing that Kevin Touchstone owned Allen Oil. Adv. Dkt. No. 124 at 1.

As to exercising fiscal management, MDOR submitted several documents. First, it submitted a change of registered agent form from July 8, 2009, naming Kevin Touchstone as the new registered agent for Allen Oil. Adv. Dkt. No. 63-8. In addition, Kevin Touchstone signed the form as president of Allen Oil. Adv. Dkt. No. 63-8 at 2. Second, MDOR submitted the above sales tax registration application signed by Kevin Touchstone as president of Allen Oil. Adv. Dkt. No. 63-9 at 1. Third, it submitted two sales tax returns for Allen Oil⁸ signed by Kevin Touchstone on February 3, 2010 and September 20, 2010. Adv. Dkt. No. 31-2; Adv. Dkt. No. 31-3. Lastly, MDOR submitted the 2011 corporate annual report of Allen Oil, signed by Kevin Touchstone as president. Adv. Dkt. No. 63-11. The Court finds that these documents show that Kevin Touchstone exercised fiscal management over Allen Oil for 2009, 2010, and 2011.

Because MDOR has not shown that Kevin Touchstone exercised fiscal management over Allen Oil for all of the applicable tax periods, summary judgment will be denied in part and granted in part. MDOR has not shown that Kevin Touchstone met the definition of a responsible person for Allen Oil for the withholding tax assessments made in 2012 or the sales tax

⁸ Allen Oil also did business under the name Kramertown Hardware, according to MDOR, and the Touchstones do not dispute this.

assessments made in 2008, and summary judgment is denied as to these tax debts. MDOR has shown that Kevin Touchstone met the definition of a responsible person for Allen Oil for all other tax periods, and summary judgment is granted as to these tax debts.

5. Count Three: Dischargeability 2008 Individual Income Tax

The Court lacks authority under the Code to redetermine the Touchstones' 2008 individual income liability because it was already adjudicated in administrative and state court proceedings. The question of dischargeability, however, has not been adjudicated. MDOR argues that the Touchstones' individual income tax liability is nondischargeable because the Touchstones did not file a tax return for that year. Adv. Dkt. No. 114 at 25. The Touchstones did not address this count in their responsive briefing.

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)(*). “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 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

Return for the 2008 tax year filed by Kevin and Lillian Touchstone. . . .” Adv. Dkt. No. 82. 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.

Because the Touchstones did not file a return, the Court finds their 2008 individual income tax liability to be nondischargeable, and summary judgment is granted in favor of MDOR.

IV. Conclusion

The Court denies as moot the motion to strike because the Touchstones filed a renewed and sworn affidavit. The motion to dismiss is denied and considered as a motion for summary judgment. The motion for summary judgment is granted in part and denied in part. This Court lacks jurisdiction to redetermine some of the tax debts at issue because they were adjudicated by another tribunal prior to bankruptcy, but it may consider other issues relevant to this adversary proceeding. First, the Court finds that the Touchstones received sufficient notice of the responsible person assessments through regular mail. Second, the Court finds that Kevin Touchstone was a responsible person for Allen Oil in 2009, 2010, and 2011, but that MDOR did not show he was a responsible person for Allen Oil in 2008 or 2012. Third, the Court finds that the Touchstones’ 2008 individual income tax liability is nondischargeable because the Touchstones did not file a tax return for that year.

IT IS THEREFORE ORDERED that the Motion to Strike (Adv. Dkt. No. 119) is DENIED AS MOOT.

FURTHER ORDERED that the Motion to Dismiss (Adv. Dkt. No. 115) is DENIED.

FURTHER ORDERED that the Motion for Summary Judgment (Adv. Dkt. No. 113) is GRANTED IN PART AND DENIED IN PART. Summary Judgment is granted as to the sufficiency of notice, Kevin Touchstone's responsible person status for the 2009, 2010, and 2011 tax debts of Allen Oil Company, Inc., and the nondischargeability of the Touchstones' 2008 individual income tax liability. Summary Judgment is denied as to Kevin Touchstone's responsible person status for the 2008 and 2012 tax debts of Allen Oil Company, Inc.

##END OF ORDER##