SO ORDERED,

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: June 10, 2019

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: JONATHAN H. MAGEE **MICHELLE L. MAGEE**	**CASE NO. 18-50587-KMS**
	CHAPTER 7
DEBTORS	
JONATHAN H. MAGEE **MICHELLE L. MAGEE**	**PLAINTIFFS**
	ADV. PROC. NO. 19-06002-KMS
V.	
MISSISSIPPI DEPARTMENT OF REVENUE	**DEFENDANT**

ORDER GRANTING SUMMARY JUDGMENT

This matter is before the Court on the Motion for Summary Judgment ("Motion") by Defendant Mississippi Department of Revenue ("MDOR"), ECF No. 17, with Response by Plaintiffs/Debtors Jonathan and Michelle Magee, ECF No. 19. By agreement of the parties, the only issue remaining in this adversary proceeding is whether the late-filed status of the Magees' 2012 state tax return renders the tax debt nondischargeable under 11 U.S.C. § 523. This proceeding is core under 28 U.S.C. § 157 (b)(2)(I) ("determinations as to the dischargeability of particular debts").

Under mandatory authority from the Fifth Circuit Court of Appeals, the tax debt is nondischargeable. Accordingly, summary judgment is granted in favor of MDOR.

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 Federal Rule of Civil Procedure 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 that 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).

UNDISPUTED FACTS

The parties stipulated to the material facts:

1. The Magees sent their no-remit state return for the 2012 tax year ("2012 Return") by U.S. mail after April 15, 2013. ECF No. 16, Stip. No. 1
2. They did not request a filing extension for the 2012 tax year. Stip. No. 4.
3. Their tax debt for the 2012 tax year is $5179 plus accrued interest. Stip. No. 17.
4. The Magees' chapter 7 case was filed on March 27, 2018. Stip. No. 8.

CONCLUSIONS OF LAW

A chapter 7 bankruptcy does not discharge "any debt . . . for a tax . . . with respect to which a return . . . was not filed or given." 11 U.S.C. § 523(a)(1)(B)(i). "[T]he term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." 11 U.S.C. § 523(a)(*).[1] Applying Mississippi filing requirements, the Fifth Circuit Court of Appeals has held that a state return that is late-filed is not a "return" for purposes of the bankruptcy discharge. *McCoy v. Miss. State Tax Comm'n*, 666 F.3d 924, 932 (5th Cir. 2012) (excepting from discharge state tax liabilities for years for which debtor filed late returns).

Here, the 2012 Return was filed late. *See* Miss. Code Ann. § 27-7-41 (requiring filing "on or before April 15"). Accordingly, under controlling Fifth Circuit authority, the 2012 Return is not a "return," and the Magees' tax liability for the 2012 tax year is not discharged.

The Magees urge this Court to deviate from *McCoy* and instead apply the test from *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986). Resp., ECF No. 19 at 1. The *Beard* test has been adopted not only in the Sixth Circuit but also in the Third, Fourth, Seventh, Ninth, and Eleventh Circuits. Justin C. Valencia, *In re Colsen and the Circuit Court Split Defining a Tax "Return,"* Am. Bankr. Inst. J., Jan. 2018, at 34.

The Magees argue that under the *Beard* test, their 2012 tax debt would be dischargeable. Br., ECF No. 20 at 6. Be that as it may, this Court is bound by *McCoy*. *See Canfield v. Orso (In re Orso)*, 214 F.3d 637, 641 n.5 (5th Cir. 2000) ("[T]he bankruptcy court is not empowered to re-think and overturn Fifth Circuit precedent on its own."), *rev'd on reh'g en banc*, 283 F.3d 686 (5th Cir. 2002).

[1] The asterisk indicates an unnumbered hanging paragraph.

ORDER

IT IS THEREFORE ORDERED that summary judgment is **GRANTED** to the Mississippi Department of Revenue; and

FURTHER ORDERED that the Magees' 2012 tax debt is excepted from the chapter 7 discharge.

END OF ORDER