IN THE UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	Bankr. Case No. 08-27159
RENE SHARP,	)	
	)	Judge Bruce Black
Debtor.	)	
	)	
RENE SHARP,	)	
	)	Adversary Case No. 08-01003
Debtor/Plaintiff,	)	
	)	Judge Bruce Black
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Creditor/Defendant.	)	

CREDITOR UNITED STATES' WITHDRAWAL OF ITS ARGUMENT
THAT TIMELINESS IS A PART OF THE DEFINITION OF "RETURN" IN 11 U.S.C. § 523(a)

The defendant United States of America submits this notice in accordance with the hearing held on Friday, September 11, 2009, in regard to this adversary proceeding. On August 14, 2009, the creditor/defendant United States of America filed a brief in response to the debtor's "Brief in Support of Discharge of Taxes." (See Docket Entry No. 14.) In its brief, the United States argued that the debtor's 2003 and 2004 federal income tax debts were nondischargeable because the debtor did not file a "return" for purposes of Section 523(a) of the Bankruptcy Code (11 U.S.C.)[1]. This argument rested on the flush language added at the end of subsection 523(a) in

[1]The parties had previously stipulated that the debtors 1998, 2000, and 2001 federal income tax debts were dischargeable, and that his 2002 income tax debt was exempt from discharge pursuant to 11 U.S.C. § 523(a)(1)(B)(i). (See Joint Stipulation of Facts, Docket Entry No. 11.) This stipulation resolved all of the remaining tax years at issue in this adversary proceeding.

2005, which at least two courts have held makes timely filing essentially a part of the definition of "return" in section 523(a)(1)(B) unless the return is prepared pursuant to 26 U.S.C. § 6020(a). See Creekmore v. Internal Revenue Service, Adv. Proc. No. 06-1171 (Bankr. N.Miss. May 30, 2008), 2008 WL 5691347; Links v. United States, Adv. Proc. No. 08-03178, Dkt. No. 20, (Bankr. N.D.Ohio August 21, 2009) (not yet reported).

Notwithstanding these two decisions, as well as the expressed view of one court of appeals judge in a dissenting opinion in a case that did not present the issue, Payne v. United States, 431 F.3d 1055, 1060 (7th Cir. 2005) (Easterbrook, J., dissenting), the United States has now determined that its initial position on this issue was incorrect and that it will no longer claim that taxes reported on and assessed in accordance with late-filed returns are excepted from discharge under section 523(a)(1)(B)(i). Although the foregoing authorities suggest that the plain language of the added definition of "return" at the end of amended section 523(a) unambiguously excludes any return that does not meet all "filing requirements," including timeliness of filing, the Internal Revenue Service has concluded that the definition is ambiguous and that the better view is that Congress did not intend to repeal the longstanding law that taxes assessed in accordance with a return filed late are governed primarily by section 523(a)(1)(B)(ii) rather than (i), so that the tax is dischargeable if more than two years elapse between the filing of the return and the bankruptcy petition. The ambiguity lies in: (1) the fact that limiting "returns" filed late to returns prepared by the Internal Revenue Service pursuant to 26 U.S.C. § 6020(a) would almost, if not completely, eviscerate section 523(a)(1)(B)(ii), since section 6020(a) returns are rare; (2) the fact that section 6020(a) returns appear by definition to be late returns makes use of the word "includes" in section 523(a)'s flush language an odd construction; and (3) the fact that section 6020(b) returns

are explicitly limited to instances where a taxpayer has failed to file a return altogether would make the exclusion of section 6020(b) returns wholly unnecessary if the first sentence in section 523(a)'s flush language were construed to eliminate late-filed returns generally.[2]

Respectfully submitted,

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/s/ Matthew Von Schuch

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Dated: September 18, 2009
Washington, D.C.

[2]The United States will continue to argue that tax liabilities assessed prior to the filing of a Form 1040 are excepted from discharge under section 523(a)(1)(B)(i) regardless of the filing of a subsequent Form 1040 confirming the correctness of the assessment. See Payne, 431 F.3d 1055 (panel majority); In re Hindenlang, 164 F.3d 1029 (6th Cir. 1999); In re Moroney, 352 F.3d 902 (4th Cir. 2003); In re Hatton, 220 F.3d 1057 (9th Cir. 2000). But see In re Colsen, 446 F.3d 836 (8th Cir. 2006). The United States maintains that Colsen is wrong for reasons not addressed in any of the cases, but that are beyond the scope of this submission since in this case the taxes were assessed based on the returns filed prior to assessment. Additionally, the flush language added to section 523(a) has essentially codified Hindenlang by defining "return" to mean a return that satisfies the requirements of the Internal Revenue Code (including the self-assessment purpose).

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2009, I electronically filed the foregoing notice, motion, and memorandum in support thereof with the Clerk of the District Court using the EM/ECF system, which sent notification of such filing to the following:

Donna B. Wallace
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Parties may access this filing through the Court's system.

And, I hereby certify that on September 18, 2009, I have mailed by the United States Postal Service the document to the following non-CM/ECF Participants:

None.

/s/ Matthew Von Schuch
MATTHEW VON SCHUCH
Trial Attorney, Tax Division
U.S. Department of Justice