UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	
	)	
STEVEN POWERS,	)	Case No. 04-16013 ABC
	)	Chapter 7
Debtor.	)	
_____	)	
	)	
STEVEN POWERS,	)	
	)	
Plaintiff,	)	Adversary No. 04-1663 ABC
v.	)	
	)	
THE UNITED STATES OF AMERICA, DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE, and STATE OF COLORADO, DEPARTMENT OF REVENUE	)	
Defendants.		

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the Cross Motions for Summary Judgment filed by Plaintiff, Steven Powers ("Plaintiff" or "Debtor") and by the Colorado Department of Revenue ("Defendant" or "Colorado"). The Court, having reviewed the file and being otherwise advised in the premises, finds as follows:

Federal Rule of Civil Procedure 56(c), which is made applicable to bankruptcy proceedings by Bankruptcy Rule 7056, provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Celotrex Corp. v. Catrett, 477 U.S. 317 (1986).

In this case, summary judgment is appropriate because the following material facts are undisputed: Plaintiff filed a petition under Chapter 7 on March 26, 2004 and received a discharge under 11 U.S.C. §727 on October 13, 2004. Colorado's claim is based on 1997 and 1998 income taxes. Colorado's Proof of Claim, filed on May 7, 2004, shows that it claims to be owed $21,939.06 for the taxes for these years, plus interest and penalties. Plaintiff filed his 1997 and 1998 state tax returns timely. Later, Plaintiff's 1997 and 1998 federal tax returns were audited by the IRS. The audit resulted in Plaintiff's income being increased substantially. The IRS reported the changes in Plaintiff's federal income to Colorado. Plaintiff did not file an amended state tax return after learning of the change in his federal income. As a result of the

increase in Plaintiff's federal income, Colorado assessed additional state income taxes for the years 1997 and 1998 on February 28, 2000. On that same date, Colorado began collection proceedings for these taxes.

Plaintiff commenced this adversary proceeding seeking a determination that the tax debt to Colorado for 1997 and 1998 income taxes was dischargeable under 11 U.S.C. 727. Colorado answered, claiming that the taxes it is owed are not dischargeable, because they fall under the dischargeability exception of 11 U.S.C. §523(a)(1)(B)(i).

Section 523 of the Bankruptcy Code provides in relevant part that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) 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....

11 U.S.C. §523(a).

Colorado's argument that its tax debt is non-dischargeable is a simple one. It claims that, upon the adjustment in income made by the IRS after its audit, the Plaintiff was required by Colorado statute to file an amended return. The relevant statute is C.R.S. §39-22-601(6)(a), which provides that:

> Any final determination of federal taxable income made pursuant to the provisions of federal law under which federal taxable income is found to differ from the taxable income originally reported to the federal government shall be reported by the taxpayer to the executive director by making and filing a Colorado amended return within thirty days of such final determination with a statement of the reasons for the difference, in such detail as the executive director may require. In addition thereto, any taxpayer filing an amended return with the federal internal revenue service that reflects any change in income reportable to the state of Colorado shall, within thirty days of such federal filing, make and file a corresponding Colorado amended return.

Because an amended return was required by this statute, and was not filed by Plaintiff, Colorado asserts that its debt is excepted from discharge by §523(a)(1)(B)(i).

Plaintiff claims that the amended return statute is an attempt by the State of Colorado to impermissably impose additional requirements for the dischargeability of taxes. He argues that since his original tax returns for the years in question were filed timely and were filed more than three years prior to the filing of his bankruptcy, he has met all of the requirements intended by Congress in order to discharge a tax debt. Plaintiff contends that the purpose of the exception in

§523(a)(1)(B)(I) is to ensure that taxing authorities receive notice of the existence of a tax liability. He claims that this purpose was satisfied when the IRS advised Colorado of the changes in his income. Thus, he asserts, to require an amended return is unnecessary and meaningless as a practical matter when the state of already aware of the change in income.

The majority, if not all, courts which have considered this issue have held that, where a state statute requires the filing of an amended return upon a change in federal income, a debtor's failure to file the amended tax return renders the state taxes non-dischargeable under §523(a)(1)(B)(I). See, In re Giacci, 213 B.R 517 (Bankr.S.D.Ohio 1997); In re Haywood, 62 B.R. 482 (Bankr.N.D.Ill. 1986). The rationale in these cases (aside from the plain meaning of the statute) is that a debtor should not be rewarded for failure to comply with state tax law requirements.

Plaintiff has cited two cases which he contends support his argument that the amended tax return referred to in the Colorado statute should not constitute a "required return" for purposes of §523(a)(1)(B)(i). However, neither is persuasive. In In re Dyer, 158 B.R. 904 (Bankr.W.D.N.Y 1993), the court applied a Georgia statute which required an amended return when the debtor's tax liability increased because the IRS disallowed some of his deductions. The Court held that the state requirement of an amended return (which the debtor did not file) would not cause the tax debt to be non-dischargeable. However, the court made a distinction between the situation where the debtor has originally timely reported all of this income and the situation where the debtor's income was not fully reported on the original return. It stated that the initial timely filed return must fully disclose all income in order to result in dischargeability of the taxes. It noted that "[i]f it is true that [the debtor] has never filed any return with the State of Georgia which reflects all of his 1986 gross income, then he cannot claim the benefit of a more liberal interpretation of §523(a)(1)(B)(i)." In our case, the original tax return did *not* list all of Plaintiff's income, so the Dyer case does not support his position.

The other case cited by Plaintiff is In re Olson, 174 B.R. 543 (Bankr.D.N.D. 1994). In this case, the court recognized the general rule that if the debtor fails to file a required tax return, the resulting tax debt is non-dischargeable. However, the North Dakota statute regarding amended returns which was at issue in the case required the debtor to file and amended return or "other information as required by the state tax commissioner." The Court held there was a fact question as to exactly what information the state required the debtors to provide. This case is distinguishable from our situation because of the difference in the statutory language. To the same effect is In re Blackwell, 115 B.R. 86 (Bankr.W.D.Va. 1990).

Authority from the Tenth Circuit supports a strict interpretation of the statutory language of §523(a)(1). In In re Bergstrom, 949 F.2d 341 (10th Cir. 1991), the 10th Circuit ruled that substitute returns prepared and filed by the IRS satisfy §523(a)(1)(B)(i)'s requirement that returns be timely filed by the debtor. Also, in an unreported decision from the Bankruptcy Court in Colorado, Morris v. Colorado Department of Revenue (In re Morris), Case No.00-1111 DEC, August 10, 2000, Judge Cordova held that, for purposes of the exception for a late-filed "required" return, the two year period in §523(a)(1)(B)(ii) runs from the date of the filing of the amended return, not from the date the original tax return was filed.

Based on the foregoing, the Defendant, Colorado Department of Revenue has demonstrated that it is entitled to a judgment as a matter of law that the Plaintiff's tax debt for the years 1997 and 1998 are non-dischargeable pursuant to 11 U.S.C. §523(a)(1)(B)(i). It is therefore,

ORDERED that the Defendant's Motion for Summary Judgment is GRANTED; and it is

FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is DENIED; and it is

FURTHER ORDERED that judgment shall enter in favor of the Colorado Department of Revenue declaring that the debt owed by Plaintiff to the Colorado Department of Revenue is non-dischargeable under 11 U.S.C. §523(a)(1)(B)(i).

Dated: this ____ day of August, 2005

BY THE COURT:

_____

A. Bruce Campbell
United States Bankruptcy Judge