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3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5

6 In re:) Case No. 08-90167-D-7
7 JEREMY CHRISTOPHER DUNN,)
8)
9 Debtor.)
10 _____)
11 JEREMY CHRISTOPHER DUNN,) Adv. Pro. No. 08-9020-D
12)
13 Plaintiff,) Docket Control No. JO-1
14)
15 v.)
16 STATE OF CALIFORNIA, FRANCHISE)
17 TAX BOARD,)
18 Defendant.)
19 _____)

20 MEMORANDUM DECISION

21 On August 5, 2008, Defendant State of California, Franchise
22 Tax Board ("FTB") filed a motion for summary judgment, bearing
23 Docket Control No. JO-1 (the "Motion"). For the reasons set
24 forth below, the Motion will be granted in part.

25 I. INTRODUCTION

26 On February 7, 2008, Plaintiff Jeremy Christopher Dunn ("the
27 debtor") filed a petition for relief under chapter 7 of the
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1 Bankruptcy Code.¹ On May 13, 2008, the debtor received a
2 bankruptcy discharge.

3 On March 19, 2008, the debtor initiated this adversary
4 proceeding, in which he seeks a determination that his state
5 income taxes for the tax years 2000 through 2003 are
6 dischargeable. On August 5, 2008, the FTB filed the Motion,
7 along with a memorandum of points and authorities, a declaration
8 of Faith Linkin, a Compliance Representative in the Bankruptcy
9 Section of the FTB, and as required by Local Bankruptcy Rule
10 7056-1(a), a separate statement of undisputed facts.

11 On August 19, 2008, the debtor filed a memorandum of points
12 and authorities in opposition to the Motion ("the Opposition"),
13 together with a declaration of Jeremy Dunn (the debtor), a
14 statement of disputed facts, and a response to the FTB's
15 statement of undisputed facts. On August 25, 2008, the FTB filed
16 a memorandum of points and authorities in reply to the debtor's
17 opposition ("the Reply"), a response to the debtor's statement of
18 disputed facts, and an objection to the declaration of Jeremy
19 Dunn.

20 On September 3, 2008, the Motion came before the court for
21 hearing, counsel appeared and presented oral argument, and the
22 matter was submitted.

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25 1. Unless otherwise indicated, all Code, chapter, section
26 and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1330, and to the Federal Rules of Bankruptcy Procedure, Rules
28 1001-9036, as enacted and promulgated after the effective date
(October 17, 2005) of the Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23
(2005).

1 The Motion presents three issues: first, whether there is a
2 justiciable case or controversy as to the dischargeability of the
3 debtor's tax debts to the FTB for tax years 2000, 2001, and 2002,
4 and if so, whether there is any genuine issue of material fact on
5 that issue; second, whether there is any genuine issue of
6 material fact as to the dischargeability of the debtor's tax
7 debt for tax year 2003; and third, whether there is any genuine
8 issue of material fact as to the dischargeability of the debtor's
9 liability for any post-petition assessments related to tax years
10 2000 through 2003.

11 II. ANALYSIS

12 This court has jurisdiction over the Motion pursuant to 28
13 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding
14 under 28 U.S.C. § 157(b)(2)(I).

15 A. Standards on Motion for Summary Judgment

16 The Motion invokes Federal Rule of Civil Procedure 56(c),
17 made applicable in this proceeding by Federal Rule of Bankruptcy
18 Procedure 7056. Where a motion for summary judgment is before
19 the court, the court is to render judgment for the moving party
20 where "the pleadings, the discovery and disclosure materials on
21 file, and any affidavits show that there is no genuine issue as
22 to any material fact and that the movant is entitled to a
23 judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving
24 party bears the burden of producing evidence showing that there
25 is no genuine issue of material fact and that it is entitled to
26 judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317,
27 322-23, 106 S. Ct. 2548, 2552 (1986).

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1 Once the moving party has met its initial burden, the non-
2 moving party must show specific facts showing the existence of
3 genuine issues of fact for trial. Anderson v. Liberty Lobby,
4 Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514 (1986). Under
5 Rule 56, the court also has authority to make an order specifying
6 what material facts are not genuinely at issue, and such facts
7 will then be treated as established in the action. Fed. R. Civ.
8 P. 56(d)(1).

9 B. Dischargeability of Tax Debts in Chapter 7

10 The Motion concerns the interplay between 11 U.S.C. §§
11 523(a)(1) and 507(a)(8). Under the former, certain tax debts are
12 nondischargeable in chapter 7; namely, taxes of the kind and for
13 the periods specified in § 507(a)(8) (§ 523(a)(1)(A)), taxes for
14 which a return either was not filed or was filed late and within
15 the two-year period prior to the bankruptcy filing (§
16 523(a)(1)(B)), and taxes with respect to which the debtor filed a
17 false return or taxes which the debtor willfully attempted to
18 evade or defeat
19 (§ 523(a)(1)(C)).

20 As indicated, § 523(a)(1)(A) refers back to § 507(a)(8).
21 Under the latter section, certain income taxes have priority in
22 bankruptcy cases -- taxes for which a return was last due,
23 including extensions, within the three years prior to the
24 bankruptcy filing (§ 507(a)(8)(A)(i)), taxes assessed within the
25 240 days prior to the bankruptcy filing (with additional
26 considerations in the event of an offer in compromise)
27 (§ 507(a)(8)(A)(ii)), and taxes, other than those of a kind
28 specified in § 523(a)(1)(B) or (C), not assessed before but

1 assessable after the commencement of the case.

2 (§ 507(a)(8)(A)(iii)).

3 C. 2000, 2001, and 2002 Tax Debts - Justiciability

4 The FTB, citing Mlincek v. United States (In re Mlincek),
5 350 B.R. 764 (Bankr. N.D. Ohio 2006), argues that it "does not
6 currently contend that Debtor owes anything related to the 2000
7 through 2002 tax years," and therefore, that "there is no case or
8 controversy relating to those tax years and the Court lacks
9 jurisdiction to make any determination related thereto." Points
10 and authorities in support of Motion, 3:1-3.

11 In Mlincek, the court dismissed the debtor's complaint to
12 determine dischargeability of tax debts, finding no presently
13 justiciable controversy. 350 B.R. at 769, 770. The case is
14 distinguishable from the one before this court. In Mlincek, the
15 Internal Revenue Service had not asserted that any obligation of
16 the debtors was nondischargeable under § 523(a)(1)(A) or (B).
17 The IRS had also stated that it had no present intention to seek
18 a nondischargeability determination under §523(a)(1)(C), and that
19 it had no reason to believe the debtors had made any attempt to
20 evade or defeat their tax obligations.

21 In the case before this court, the FTB is not as unequivocal
22 as the IRS was in Mlincek. The FTB states that it "presently
23 does not contend that Debtor owes it anything related to the
24 2000, 2001 and 2002 tax years" (Reply, at 1:28-2:1), but also
25 that it "does not presently intend to reassess the discharged

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1 liabilities." Reply, 2:13-14.² The court concludes that the
2 debtor's concerns are not unfounded, as the FTB contends, but
3 rather, that the issue is ripe for determination.

4 Several courts have found a justiciable case or controversy,
5 for purposes of determining the dischargeability of taxes even
6 before a discharge has been entered. In each of these cases, the
7 IRS contended that there would be no case or controversy until
8 the debtor (in each case, either a chapter 12 or chapter 13
9 debtor) had completed his or her plan and received a discharge.
10 The courts disagreed. See Malin v. IRS (In re Malin), 356 B.R.
11 535, 539 (Bankr. D. Kan. 2006); Swanson v. IRS (In re Swanson),
12 343 B.R. 678, 683 (Bankr. D. Kan. 2006); Craine v. United States
13 (In re Craine), 206 B.R. 598, 601 (Bankr. M.D. Fla. 1997);
14 Clavelle v. United States, 1994 U.S. Dist. LEXIS 18203, * 2-3
15 (W.D. La. 1994).

16 The various policy issues are explored in detail in Nixon v.
17 United States (In re Nixon), 2007 Bankr. LEXIS 1536 (Bankr. N.D.
18 W.Va. 2007). Obviously, the chapter 12 and chapter 13 plan
19 concerns are not in play in this case, but several other factors
20 are relevant here. First, "all the factual predicates necessary
21 for a determination of whether the tax claim would be subject to
22 discharge have already occurred, which is an 'indicator of the
23 fitness of the issue for judicial consideration.'" Nixon, 2007
24 Bankr. LEXIS 1536 * 17, citing Malin, 356 B.R. at 539.

25
26 2. In the next breath, the FTB appears to acknowledge that
27 it could not reassess discharged liabilities. Reply, 2:16-19.
28 How is that acknowledgment reconciled with the previous comment
that the FTB does not presently intend to reassess the discharged
liabilities?

1 Second, in balancing the hardships, the Nixon court found no
2 hardship to the IRS from having "an advance determination" of the
3 dischargeability issue, whereas the delay from postponing the
4 decision might leave the debtor owing additional penalties and
5 interest. 2007 Bankr. LEXIS 1536 * 18.

6 Third, the court noted as a basic consideration that Fed. R.
7 Bankr. P. 4007(b) permits the filing of this type of complaint at
8 any time. 2007 Bankr. LEXIS 1536 * 15-16.

9 Ironically, in this case, the FTB does not assert lack of
10 justiciability with respect to post-petition assessments it might
11 make related to the 2000 through 2003 tax years. Instead, it
12 seeks a judgment that "any post-petition assessments related to
13 the 2000 through 2003 tax years will not be discharged by the
14 discharge in this case." Motion, at 4:1-4. In other words, the
15 FTB seeks an immediate determination of nondischargeability with
16 respect to taxes not yet assessed (and which might never be
17 assessed), but wants to defer consideration of the
18 dischargeability of taxes already assessed. The court concludes
19 that both issues present justiciable controversies.

20 Having determined that the debtor's liabilities for tax
21 years 2000, 2001, and 2002 are ripe for determination, the court
22 will next consider whether there is any genuine issue of material
23 fact as to those liabilities that would preclude summary
24 judgment. The FTB states that the debtor's balance due for the
25 2000 tax year has been paid in full, and that it has discharged
26 the debtor's balances due for 2001 and 2002 as a result of the

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1 debtor's bankruptcy discharge in this case.³ Although the FTB
2 states that it "does not presently intend to reassess the
3 discharged liabilities" (Reply, 2:13-14), it also appears to
4 acknowledge that it could not do so (Reply, 2:16-19).

5 Thus, with respect to the debtor's liabilities for tax years
6 2000, 2001, and 2002, other than any such liabilities not
7 assessed before but properly assessable after the commencement of
8 this bankruptcy case,⁴ the court finds no genuine issue of
9 material fact, and thus, concludes that such liabilities are
10 dischargeable by operation of the debtor's discharge in this
11 case. Pursuant to Fed. R. Civ. P. 56(d)(1), and the court's
12 order on the Motion, that fact will be treated as established in
13 this action.

14 D. Dischargeability of 2003 Taxes

15 Citing § 523(a)(1)(B)(i), the FTB seeks a determination that
16 the debtor's tax debt for tax year 2003, and interest thereon, is
17 not dischargeable in this bankruptcy case, because the debtor has
18 never filed a return for that tax year. The contention is
19 supported by the testimony of Faith Linkin that "FTB records
20 indicate that Debtor has not filed his California income tax
21 return for the 2003 tax year."⁵ The debtor counters that he did
22 file a return, testifying that his federal and state returns for
23 2003 "were mailed to the addresses indicated in [his CPA's] cover
24 letter in envelopes provided by [his] CPA" shortly after June 11,

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26 3. Declaration of Faith Linkin, filed August 5, 2008, ¶¶ 7,
11, 15.

27 4. See discussion in section II(E), below.

28 5. Declaration of Faith Linkin, ¶ 21.

1 2004.⁶

2 More than three and one-half years passed between June of
3 2004 and the date of the debtor's bankruptcy filing, February 7,
4 2008; thus, if the return was filed when the debtor claims it
5 was, it easily passes the two-year test of § 523(a)(1)(B)(ii).

6 The question, then, is whether the return was actually
7 filed, or more properly on this motion for summary judgment,
8 whether there exists a genuine issue of material fact as to the
9 filing of the return. First, the FTB's objection to the debtor's
10 declaration is overruled. That the debtor did not specifically
11 state that he personally mailed the return, that it had proper
12 postage, or that it was mailed on any particular date goes to the
13 weight of his testimony, not its admissibility.⁷

14 Second, in the Ninth Circuit, under the "mail box rule,"
15 "[p]roper and timely mailing of a document raises a rebuttable
16 presumption that the document has been timely received by the
17 addressee." Lewis v. United States, 144 F.3d 1220, 1222 (9th
18 Cir. 1998); see also In re Bucknum, 951 F.2d 204, 207 (9th Cir.
19 1991) ["Mail that is properly addressed, stamped and deposited
20 into the mails is presumed to be received by the addressee."].

21 The cases cited by the FTB, Bear Creek Master Assn. v.
22

23 6. Declaration of Jeremy Dunn, filed August 19, 2008, ¶ 3.

24 7. The FTB also argues that the unsigned copy of the return
25 filed by the debtor as an exhibit "is not a return." Although
26 the debtor's declaration is drafted in such a way that the copy
27 purports to be "the State and Federal income tax returns for 2003
28" (Dunn declaration, 2:2-4), the court recognizes the copy
for what it is intended to be -- a copy of the original return.
The court believes it is not uncommon for a taxpayer to sign and
mail an original return, retaining only the copy marked by his or
her tax preparer with a "COPY" stamp in the signature block.

1 Edwards, 130 Cal. App. 4th 1470 (2005) and Jensen v. Traders &
2 General Ins. Co., 141 Cal. App. 2d 162 (1956), stand only for the
3 proposition that a presumption of receipt may be rebutted by
4 testimony denying receipt. Thus, Ms. Linkin's testimony arguably
5 rebuts the presumption raised by the debtor's testimony.
6 However, ""if the adverse party denies receipt, the presumption
7 is gone from the case. The trier of fact must then weigh the
8 denial of receipt against the inference of receipt arising from
9 proof of mailing and decide whether or not the letter was
10 received."" Bear Creek Master Assn., 130 Cal. App. 4th at 1486,
11 quoting Craig v. Brown & Root, 84 Cal. App. 4th 416, 421-22
12 (2000). Thus, the conflicting declarations in this case raise a
13 genuine issue of material fact, going directly to the issue of
14 dischargeability of the 2003 taxes, and therefore, summary
15 judgment would be inappropriate.

16 E. Dischargeability of Taxes Assessable Post-Petition

17 Finally, the FTB argues that any tax obligations arising on
18 account of post-petition assessments by the FTB will not be
19 discharged by the debtor's discharge in this case.⁸ To the
20 extent such taxes were not assessed before the bankruptcy filing,
21 but are properly assessable after the filing, the FTB is correct.
22 §§ 523(a)(1)(A) and 507(a)(8)(A)(iii); Franchise Tax Bd. v.
23 Bracey (In re Bracey), 77 F.3d 294, 295 (1996); Vitaliano v.

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25 California Franchise Tax Bd. (In re Vitaliano), 178 B.R. 205,

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27 8. In its Reply, the FTB asserts for the first time that
28 the court should not rule on this issue because there is no
justiciable case or controversy. This is plainly contrary to the
position the FTB advanced in the Motion.

1 208, 209 (9th Cir. BAP 1995).⁹

2 The court declines the debtor's invitation to follow In re
3 Doss, 42 B.R. 749 (Bankr. E.D. Ark. 1984), rather than Vitaliano.
4 The court agrees with the Bankruptcy Appellate Panel in Vitaliano
5 that Doss "involves a very dubious reading of the Bankruptcy
6 Code." 178 B.R. at 208. The court also disagrees with the
7 debtor's attempt to distinguish Vitaliano on the basis that
8 Vitaliano dealt with timely-filed returns, whereas the debtor's
9 return in this case was filed late. Such a conclusion is not
10 supported by the statutory language; additionally, it would
11 reward a debtor for filing a late return while penalizing, under
12 Vitaliano, one who files on time.

13 As a fall-back position, the debtor argues that even if
14 Vitaliano governs this case, it is too late under California law
15 for the FTB to assess further tax liability for tax years 2000,
16 2001, and 2002. The statute of limitations, in general, for the
17 mailing by the FTB of a notice of proposed deficiency assessment
18 is four years after the return was filed. Citing Rev. & Tax.
19 Code § 19057(a), the debtor argues that because his 2000, 2001,
20 and 2002 returns were filed on or before October 15, 2003
21 (declaration of Faith Linkin), more than four years before his
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23 9. At the hearing on the Motion, the debtor's counsel
24 attempted to distinguish Bracey, arguing that there, the hearing
25 to determine dischargeability occurred after the assessment had
26 been made, whereas here, the FTB merely seeks to preserve its
27 right to make further assessments. The argument seems akin to
28 the FTB's position that the dischargeability of the debtor's
2000, 2001, and 2002 taxes is not ripe for determination. The
debtor's attempt to distinguish Bracey fails. As indicated
above, Bracey is very clear that a tax deficiency not assessed
pre-petition but assessable post-petition is non-dischargeable
under §§ 523(a)(1)(A) and § 507(a)(8)(A)(iii).

1 bankruptcy filing, further liability for those tax years was no
2 longer assessable post-petition.

3 However, there are exceptions to the four-year statute of
4 limitations. See Rev. & Tax. Code § 19057(a) [false or
5 fraudulent return]; § 19058(a) [six years where taxpayer omits an
6 amount of includable gross income in excess of 25% of the amount
7 of stated gross income]; § 19059 [taxpayer reporting to FTB a
8 change or correction by the IRS]; § 19060(a) [no statute of
9 limitations where taxpayer fails to report a change or correction
10 by the IRS].

11 The debtor suggests that because he has obtained a default
12 judgment against the IRS in Adv. No. 08-9021-D, "there can be no
13 valid corrections of the federal tax returns for any of the four
14 years," and thus, there are no liabilities that could be
15 assessable post-petition. Opposition, 6:2-15. First, the court
16 does not know whether corrections were made by the IRS prior to
17 entry of the judgment. Second, the court is unable to conclude
18 that a judgment of dischargeability necessarily precludes the
19 making of changes or corrections to a tax return. Third, the
20 court doubts whether a default judgment against the IRS in an
21 action to which the FTB was not a party affects the FTB's ability
22 to make assessments. And finally, as indicated above, IRS
23 changes and corrections are not the only basis for FTB
24 assessments. In short, the court cannot conclude that the FTB
25 can make no post-petition assessments with regard to the tax
26 years in question.

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28 It is possible the FTB will attempt to assess against the

1 debtor an obligation on which the statute of limitations for
2 assessment has expired. If so, the debtor may raise the issue at
3 that time in the appropriate court.

4 In the meantime, in conclusion, the court rejects the
5 debtor's suggestion that "if the tax liability [for 2000, 2001,
6 and 2002] is discharged that would seem to bar the deficiency
7 assessment as well." Opposition, 3:9-11. The argument fails to
8 distinguish a liability based on a deficiency assessment from a
9 liability disclosed by a tax return. The latter may be
10 dischargeable by virtue of meeting the tests of § 523(a)(1),
11 while the latter, albeit for the same tax year, may remain
12 assessable under state law, and therefore, nondischargeable under
13 § 523(a)(1)(A) and 507(a)(8)(A)(iii).¹⁰

14 III. CONCLUSION

15 For the reasons set forth above, the court finds, first,
16 that there is a justiciable case or controversy as to the
17 dischargeability of the debtor's tax debts to the FTB for tax
18 years 2000, 2001, and 2002, and with respect to the debtor's
19 liabilities for those tax years, the court finds no genuine issue
20 of material fact; second, that there exists a genuine issue of
21 material fact as to the dischargeability of the debtor's debt for
22 tax year 2003, which precludes summary judgment; and third, that

24 10. The court agrees with the debtor that not all priority
25 tax debts are nondischargeable, and not all nondischargeable tax
26 claims have priority for purposes of distribution from a
27 bankruptcy estate. Judge Klein made a thorough and cogent
28 analysis of the issue in his opinion in Savaria v. United States
(In re Savaria), 317 B.R. 395, 398 (9th Cir. BAP 2004). However,
the debtor's attempt to find a distinction in the absence of a
specified time period in § 507(a)(8)(A)(iii) is unsupported and
misses the mark.

1 there is no genuine issue of material fact as to the
2 dischargeability of the debtor's liability for any post-petition
3 assessments related to tax years 2000 through 2003.

4 The court concludes that, with respect to the debtor's
5 liabilities for tax years 2000, 2001, and 2002, other than any
6 such liabilities not assessed before but properly assessable
7 after the commencement of this bankruptcy case, such liabilities
8 are dischargeable by operation of the debtor's discharge in this
9 case. The court further concludes that, with respect to any
10 post-petition assessments by the FTB, for any tax year, to the
11 extent such taxes were not assessed before the bankruptcy filing,
12 but are properly assessable after the filing, such taxes and
13 interest thereon¹¹ are not dischargeable in this bankruptcy case.

14 The court will issue an appropriate order.

15 Dated: September 15, 2008

16 _____/s/
17 ROBERT S. BARDWIL
18 United States Bankruptcy Judge
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28 11. See Ward v. Board of Equalization (In re Artisan
Woodworkers), 204 F.3d 888, 891-92 (9th Cir. 2000).