No. 16-

IN THE

Supreme Court of the United States

Martin Smith

Petitioner

v.

Internal Revenue Service,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 523 of the Bankruptcy Code excepts certain narrow categories of "nondischargeable" debts from the Code's presumptive discharge of all indebtedness. More specifically, § 523(a)(1) catches three categories of non-priority tax debts: (1) taxes for which a tax return was *never* filed, (2) taxes for which a return was filed *late*, and (3) taxes for which the return filed was *fraudulent*. 11 U.S.C. §§ 523(a)(1)(B),(C). Taxes with respect to unfiled and fraudulent returns are barred from bankruptcy discharge forever. *Id.* §§ 523(a)(1)(B)(i), (a)(1)(C). Taxes for late-filed returns are barred from discharge for two years—they are dischargeable only in bankruptcy cases filed more than two years after the tardy returns. *Id.* § 523(a)(1)(B)(ii).

The circuits are actually divided three ways as to whether late-filed returns are "returns" under § 523(a)(1)(B). The Eighth Circuit holds that a duly-filed return, even if late, is still a "return" and thus permits discharge two years after filing. Other circuits, including the Ninth Circuit below, hold that returns filed *after the IRS assesses a tax liability* are not "returns" at all, and thus trigger the permanent bar to discharge. Still other circuits have ruled that any belatedness in return filing bars discharge—even if filing occurs *before* assessment.

The question presented, on which the circuits are now deeply divided in multiple ways, is:

Whether a taxpayer who files a return after assessment has filed a "return" under §523(a)(1)(B).

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PETITION FOR A WRIT OF CERTIORARI

Martin Smith respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a–8a) is reported at 828 F.3d 1094. The opinion of the district court (Pet. App. 9a–29a) is reported at 527 B.R. 14. The decision of the bankruptcy court (Pet. App. 30a–48a) is unreported.

JURISDICTION

The Ninth Circuit entered judgement on July 13, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 11 U.S.C. § 523 provides, *inter alia*:

§ 523 – Exceptions to discharge

(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 or a customs duty--

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title,

whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required--

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

* * * *

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.[*]

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[*] This unnumbered paragraph at the end of § 523(a) is commonly called the "hanging paragraph" and cited as §523(a)(*). *See*, *e.g.*, *Fahey v. Mass. Dep't of Revenue (In re Fahey)*, 779 F.3d 1, 4 (1st Cir. 2015).

2. 26 U.S.C. 6020 provides:

§ 6020 – Returns prepared for or executed by Secretary

(a) Preparation of return by Secretary

If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.

(b) Execution of return by Secretary

(1) Authority of Secretary to execute return

If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) Status of returns

Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

STATEMENT

I. STATUTORY CONTEXT.

A. 11 U.S.C. § 523(a)(1)(B).

The Bankruptcy Code, 11 U.S.C. § 101 *et seq.,* generally allows a debtor to discharge unsecured debt. This "fresh start" reflects Congress' balancing of the debtor's obligation to repay debt with the necessity of moving on when those debts have become hopeless. *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'") (citation omitted). Of specific policy sensitivity is Congress's statutory list of "nondischargeable" debts, which shoulders some debtors with ongoing repayment obligations notwithstanding discharge. 11 U.S.C. § 523. The grounds for nondischargeability range from moral culpability (e.g., willful and intentional tort damages under § 523(a)(6)), to proper functioning of the bankruptcy system (e.g., debts unlisted on a debtor's bankruptcy schedules under § 523(a)(10)), to perceived threats to the solvency of governmental programs (e.g., student loans under § 523(a)(8)). Because nondischargeability is literally "exception[al]," 11 U.S.C. § 523, strict construction of the § 523 exceptions is a cornerstone of bankruptcy law. *See Kawaauhau v. Geiger,* 523 U.S. 57, 58 (1998) ("[E]xceptions to discharge should be confined to those plainly expressed.") (internal quotation marks omitted).

Non-priority tax debt is presumptively dischargeable.[1] Nevertheless, Congress catches three types of non-priority tax debts in § 523, two that trigger a permanent bar from discharge and one that triggers a postponement of the discharge. *See* 11 U.S.C. § 523(a)(1)(B), (C). The first pertains to *scofflaws*: debtors who refuse to file tax returns never get to discharge their debts associated with the years of the unfiled returns. *Id.*, § 523(a)(1)(B)(i). The second pertains to *frauds*: debtors who file fraudulent returns also never get to discharge the taxes associated with those fraud years. *Id.*, § 523(a)(1)(C). The third pertains to *procrastinators*. With them, Congress is even more fine-grained in its policy balancing: latecomers can discharge their taxes, but only upon waiting for two years after their late-filing dates before filing for bankruptcy. *Id.* § 523(a)(1)(B)(ii). This affords the IRS a reasonable time to audit the late returns by preventing the debtor from blindsiding the IRS with a quick bankruptcy filing before it even knows what's owed.

The statute lays out the scheme thus:

(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 or customs duty—

(A) [priority tax debts];

[1] Priority tax debt, not relevant to this petition, is generally non-dischargeable. *See* 11 U.S.C. §§ 507(a)(3), (a)(8) (pertaining to "trust fund" taxes and incurred-just-before-bankruptcy taxes).

(B) with respect to which a return, or equivalent report or notice, if required—

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax[.]

11 U.S.C. § 523(a)(1).

This tripartite approach to non-filers, late filers, and fraudulent filers carefully calibrates the bankruptcy penalty of nondischargeability: those who try to cheat the IRS may never discharge their tax debts in bankruptcy, and those who file late have to give the IRS two years to catch up before they can discharge their debts in bankruptcy like any other taxpayer.

B. Judicial Interpretation of "Return."

Notwithstanding this straightforward statutory framework, some courts reclassified many late-filing taxpayers subject to the two-year postponement under § 523(a)(1)(B)(ii) as non-filers subject to the permanent discharge bar under § 523(a)(1)(B)(i), giving rise to the instant circuit split. This reclassification was enabled by the lack of statutory definition of "return" in the Bankruptcy Code, which required resort to general tax law for a definition. That law, in turn,

was itself indeterminate, because the Internal Revenue Code also lacks a definition of "return," leaving courts to fill the gap with judicial definitions.

The most influential case used by bankruptcy courts is *Beard v. Commissioner,* 82 T.C. 766 (1984), *aff'd* 793 F.2d 139 (6th Cir. 1986). The so-called "*Beard* test" has been adopted by many circuits and lower courts beyond the Tax Court, although it has never been adopted by this Court. It synthesizes prior precedents into a four-part definitional test:

> The Supreme Court test to determine whether a document is sufficient [to be a "return"] . . . has several elements: First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury.

Id. at 777.

Although *Beard* has been widely adopted, its third prong—requiring an "honest and reasonable" attempt at compliance—has divided many courts and given rise to the reclassification of some late-filers as non-filers under § 523(a)(1)(B). Some courts, such as the Ninth Circuit below, have held that even a duly completed and filed Form 1040 may not be a "return" if it is filed so late that the IRS has already assessed a tax liability. Pet. App. 7a; *see also United States v. Payne* (*In re Payne*), 431 F.3d 1055, 1059–60 (7th Cir. 2005); *Moroney v. United States* (*In re Moroney*), 352

F.3d 902, 907 (4th Cir. 2003); *United States v. Hindenlang* (*In re Hindenlang*), 164 F.3d 1029, 1034 (6th Cir. 1999). The theory is that *Beard*'s third prong compels an examination of the *subjective* intent of the taxpayer, and taxpayers who lack a sufficiently acceptable reason for being late have not made subjectively "honest and reasonable" attempts at compliance with the tax system generally.

Others, such as the Eighth Circuit (embracing Judge Easterbrook's dissent in *Payne*), disagree, holding that an actual return is a return, regardless when filed, because *Beard*'s honesty and reasonableness prong speaks to the taxpayer's attempt *to complete the documents as a tax return. See Colsen v. United States (In re Colsen)*, 446 F.3d 836, 840 (8th Cir. 2006) (contrasting its interpretation of *Beard* as the "objective" approach); *Payne*, 431 F.3d at 1060–63 (Easterbrook, J., dissenting). The Eighth Circuit thus allows bankrupt taxpayers who file returns after the IRS' assessment of tax liability to discharge their tax debts after the two-year waiting period.

C. 26 U.S.C. §§ 6020(a), (b) and 11 U.S.C. § 523(a)(*).

Just before this disagreement had ripened into a circuit split, Congress amended § 523(a) in its 2005 overhaul of the Bankruptcy Code. *See* Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23 ("BAPCPA"). It did so in light of a specific point of confusion referenced in its legislative history: what to do with "returns" prepared under 26 U.S.C. §§ 6020(a) and 6020(b), the latter often called "SFRs" or "Substitutes for Returns." *See*, *e.g.*, *Swanson v. Comm'r*, 121 T.C. 111, 111 (2003) (referring to return under § 6020(b) as an

"SFR"). When the IRS discovers that a tax return is missing, and the taxpayer does not respond to letters cajoling filing, it has two options. First, the IRS can draft a return itself with the taxpayer's cooperation, preparing it for taxpayer signature, under 26 U.S.C. § 6020(a). This is a rarely invoked procedure that the IRS concedes arises in a trivial number of cases. *See Fahey v. Mass. Dep't of Revenue* (*In re Fahey*), 779 F.3d 1, 6 (1st Cir. 2015) ("The I.R.S.'s Chief Counsel has referred to the number of section 6020(a) returns as 'minute.'").

Second, which is more likely, the IRS can file an SFR under 26 U.S.C. § 6020(b) without the taxpayer's blessing. A § 6020(b) SFR does not trigger many of the statutory rights that follow a full tax return, (including, notably, the start of the limitations period on assessment), but does start the IRS' collection procedures. *See* 26 U.S.C. § 6501(b)(3); *Spurlock v. Comm'r*, 118 T.C. 155, 158 (2002). Whether an SFR was a "return" for purposes of § 523(a)(1)(B) had become a contested question before BAPCPA. *Compare, e.g., Ridgway v. United States (In re Ridgway),* 322 B.R. 19, 37 (Bankr. D. Conn. 2005) (holding SFR filed under § 6020(b) was a return for purposes of § 523(a)(1)(B)), *with, e.g., Lowrie v. United States (In re Lowrie)*, 162 B.R. 864, 866 (Bankr. D. Nev. 1994) ("[W]hen a debtor fails to file a tax return and the IRS prepares one for her pursuant to § 6020(b), the debtor is not considered to have filed a return for purposes of § 523(a)(1)(B)(i).").

When Congress conducted BAPCPA's overhaul of the Bankruptcy Code, it added an inartfully placed "hanging paragraph" at the end of § 523(a). *See In re Fahey*, 779 F.3d at 4 (using common reference to this amendment as the "hanging paragraph"). Styled a

definition of "return," the hanging paragraph directed bankruptcy courts to do what they were already doing: look to nonbankruptcy law (i.e., tax law) for the definition of "return." But it also added a provision settling the § 6020 dispute. In its entirety, the hanging paragraph reads:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

11 U.S.C. § 523(a)(*).

The only relevant legislative history is sparse but suggests a focus on the § 6020 debate:

> Section 714 of the Act amends section 523(a) of the Bankruptcy Code to provide that a return prepared pursuant to section 6020(a) of the Internal Revenue Code, or similar State or local law, constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer pursuant to section 6020(b) of the Internal Revenue Code, or similar State or local law, does

> not constitute filing a return (and the debt cannot be discharged).

H.R. Rep. No. 109-31, at 103 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 167.

Some courts, such as the Ninth Circuit below, have held that this amendment has no effect on *Beard*'s continued applicability; *Beard* remains the relevant test for determining whether a post-assessment return is a "return" under § 523(a)(1)(B). *See* Pet. App. 7a ("We hold that *Hatton* [a pre-BAPCPA § 523 circuit precedent applying *Beard*] applies to the bankruptcy code as amended."). Others have held that the amendment moots the *Beard* circuit split altogether, because the hanging paragraph defines returns as those that comply with "applicable filing requirements." They reason that all late returns—even those filed before an assessment of tax liability—fail to comply with at least one applicable filing requirement, namely, the requirement of filing the return on time, and so should be categorically excluded from the definition of "return." *See*, *e.g.*, *Fahey*, 779 F.3d at 10 (adopting so-called "one-day-late" interpretation). Thus, a *second* circuit split has been created, regarding the relevance of the hanging paragraph, resulting in *three different* approaches across the circuits to dischargeability for bankrupt late-filing taxpayers: treating post-assessment returns as late "returns" under *Beard* and thus only postponing discharge by two years (Eighth Circuit); treating post-assessment returns as non-"returns" under *Beard*, thereby triggering the discharge bar (Ninth Circuit below, and Fourth, Seventh, and Eleventh Circuits); and treating one-day-late returns (*and a fortiori*, all post-assessment returns) as non-"returns" under the hanging paragraph and thereby

triggering the discharge bar (First, Fifth, and Tenth Circuits).

II. PETITIONER'S TAX FILINGS AND SUBSEQUENT BANKRUPTCY.

Petitioner did not file a timely tax return for the year 2001. Receiving no responses to letters, the IRS filed a § 6020(b) SFR for him on January 5, 2004, and ultimately made an assessment on July 31, 2006. Pet. App. 49a-50a.

No collection activity occurred and the file went dormant until May 26, 2009, when Petitioner filed his belated 1040. He captioned his return "original return to replace SFR," and the IRS accepted it and notated it as "Tax return filed" on Petitioner's account transcript. Pet. App. 49-50a. On the basis of this return, which reported more gross income than the SFR, the IRS assessed Petitioner roughly an additional $60,000 of taxes, interest, and penalties. Pet. App. 49-50a.

Petitioner followed his 1040 with an Offer of Compromise in July 2009, which was rejected, and another Offer in January 2010 that was rejected in January 2011. Pet. App. 49-50a. By then, his fortunes had reversed and he was jobless. Pet App. 4a. Petitioner ultimately entered into an installment agreement with the IRS for hardship deferral on July 7, 2011, at $150 per month. *Id.*

On December 22, 2011, the still-unemployed Petitioner filed for bankruptcy. Pet. App. 35a. The IRS contended the taxes that it assessed before he filed his belated 1040 were nondischargeable as taxes for which no "return" had been filed. The Bankruptcy

Court disagreed and ruled in Petitioner's favor on summary judgment, holding that a post-assessment 1040 is a late return under § 523(a)(1)(B)(ii) and not a non-"return" under § 523(a)(1)(B)(i). Pet. App. 46a. The District court reversed, Pet. App. 29a.

The Ninth Circuit affirmed the reversal. While noting the hanging paragraph, the panel held it did not abrogate *Beard*. Pet. App. 7a ("We hold that [*Beard*] applies to the bankruptcy code as amended."). Applying *Beard*, the Ninth Circuit sided with the subjective approach circuits regarding whether *Beard*'s "honest and reasonable" prong renders post-assessment returns non-"returns" under § 523(a)(1)(B). *Id* at 6a. ("Under these circumstances, Smith's 'belated acceptance of responsibility' was not a reasonable attempt to comply with the tax code."). Petitioner's tax debts were thus permanently nondischargeable due to lack of a "return" on file, notwithstanding his filed and accepted 1040. This petition followed.

REASONS FOR GRANTING THE WRIT

The circuits are deeply divided as to whether a post-assessment return is a "return" that rescues a procrastinating taxpayer from a permanent bar on bankruptcy discharge under § 523(a)(1)(B). Had Petitioner had the good fortune to live in the Eighth Circuit, his duly completed 1040 would have triggered a two-year waiting period but otherwise rendered his non-priority tax debts fully dischargeable. *See Colsen*, 836 F.3d at 840. But because he lives in the Ninth Circuit, those debts remain forever payable, notwithstanding his "fresh start" of the bankruptcy discharge. *See* Pet App. 7a. This Court's intervention is needed to remedy the disuniformity afflicting Congress' purportedly "uniform" law on the subject of bankruptcy, U.S. Const. art. I., § 8, cl. 4 (empowering Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States"), that has now yielded not just two but three approaches. This case is an ideal vehicle to resolve this situation, and the Court should grant the petition.

I. THE CIRCUITS ARE SQUARELY SPLIT ON THE QUESTION PRESENTED, RESULTING IN AT LEAST *THREE* DIFFERENT APPROACHES FACING DEBTORS SEEKING TAX DISCHARGE IN BANKRUPTCY.

Taxpayers who file belated 1040s face the following divergent fates under § 523(a)(1)(B) if later finding themselves in bankruptcy. In the Eighth Circuit they may discharge their tax debts after a two-year waiting period if they file a return after the IRS has made an assessment. In the Fourth, Sixth, Seventh, and Ninth Circuits, they are permanently barred

from discharging their taxes if they file a return after the assessment. And in the First, Fifth, and Tenth Circuits, they may never discharge their taxes if they file their returns even one day late (i.e., even if before assessment). To understand how this sharp split in the circuits arose, it is simplest to review the case law chronologically.

A. The First Wave of Post-Assessment Return Cases: The "Subjective" Approach.

The first circuit to take up the issue of post-assessment returns in bankruptcy was the Sixth, in *United States v. Hindenlang* (*In re Hindenlang*), 164 F.3d 1029 (6th Cir. 1999). There, the taxpayer filed a late return that replicated the material on an SFR prepared by the IRS. Although noting that the belated return was "facially valid," the Sixth Circuit held that the return at that point "served no purpose" nor "had any effect" for the IRS, because it had already gone to the effort of calculating the debtor's taxes without the assistance of self-reporting that a tax return is supposed to serve. *Id.* at 1034. As such, the court held "as a matter of law that a Form 1040 is not a return if it no longer serves any tax purpose or has any effect under the Internal Revenue Code," and that such a return "cannot constitute an honest and reasonable attempt to satisfy the requirements of the tax law.'" *Id.* (invoking the *Beard* test). The Sixth Circuit's categorical rule strictly bars discharge of the underlying tax debts once the IRS has made an assessment without the debtor's 1040, essentially transferring late-filing taxpayers from § 523(a)(1)(B)(ii) to non-filers under § 523(a)(1)(B)(i).

The next circuit to confront a post-assessment tax return largely agreed, accepting *Hindenlang's* policy-driven interpretation of *Beard's* "honest and reasonable" prong to promote the purposes of self-reporting. *See Moroney*, 352 F.3d at 906 ("A reporting form filed after the IRS has completed the burdensome process of assessment without any assistance from the taxpayer does not serve the basic purpose of tax returns: to self-report to the IRS sufficient information that the returns may be readily processed and verified."). However, the Fourth Circuit resisted the categorical rule from *Hindenlang*, holding that that "[c]ircumstances not presented . . . might demonstrate that the debtor, despite his delinquency, had attempted in good faith to comply with the tax laws."). *Id.* at 907. (For simplicity, this petition does not treat the Fourth Circuit as "split" from the Sixth Circuit, even though they technically diverge, due to the overall similarity of their approaches; this simplification thus *understates* the true depth of the splits amongst the circuits.)[2]

B. The Cracks Begin to Show: The Posner-Easterbrook Debate Presages the Split.

Although many lower courts disagreed with the Sixth and Fourth Circuits, *see*, *e.g.*, *Crawley v. United States (In re Crawley)*, 244 B.R. 121, 127 (Bankr. N.D. Ill. 2000), dissent did not appear at the circuit level until the Seventh Circuit's 2005 opinion in *In re Payne*, 431 F.3d 1055 (7th Cir. 2005). A spirited debate arose between Judge Posner (for the majority)

[2] The Fourth Circuit mused that that exceptional case might arise when the debtor's belated return showed more liability owing to the IRS—the facts presented in this petition. *Moroney*, 352 F3d. at 907.

and Judge Easterbrook (in dissent) regarding the dischargeability of tax debt for post-assessment returns. Judge Posner, echoing the Sixth Circuit, argued that allowing discharge of post-assessment-return tax debt undercuts the main purpose of the requirement that taxpayers file income-tax returns: to spare the tax authorities the burden of trying to reconstruct a taxpayer's income and income-tax liability without any help from him. *Id.* at 1057.

In his dissent, Judge Easterbrook rejected Judge Posner's assertion that a "document filed after the [tax] authorities have borne [the] burden [of calculating the amount due] does not serve the purpose of the filing requirement." *Id.* at 1060 (Easterbrook, J., dissenting) ("I disagree with this view – and so does the Internal Revenue Service.") (citing 26 C.F.R. § 301.7122-1(d)). He rebutted Judge Posner's armchair conjecture that post-assessment returns lack utility, observing that they provide at least two demonstrable benefits to the IRS. First, "[p]ost-assessment returns can be useful," even if late, because they "replace estimates with facts". *Id.* Second, they help the IRS collect taxes due, because "[t]he taxpayer then will be unable to deny that he had income; the agency will be able to levy on his assets without protest that it made up the numbers. A belated return will close off some avenues [and] narrow the dispute that remains should litigation ensue . . . . When both sides have the same information, settlement is easier to achieve." *Id.* at 1061. As he pithily summarized, "Better late than never." *Id.*

C. The Circuits Split: The Eighth Circuit Follows the Easterbrook Dissent in Finding Post-Assessment Returns Satisfy *Beard* Under An "Objective" Approach.

In the next post-assessment tax return case involving a debtor in bankruptcy, the Eighth Circuit, swayed by Judge Easterbrook's recent dissent, declined to follow the Sixth, Fourth, and Seventh Circuits. *See Colsen v. United States (In re Colsen)*, 446 F.3d 836 (8th Cir. 2006). The Eighth Circuit focused on the specific language from *Beard* that it is not the *taxpayer* but the purported *return* that must "'evince' an honest and genuine attempt to satisfy the laws." *Id.* at 840. Buttressing this analysis was this Court's holding that fraudulently filed returns are still "returns" if they "'appeared on their faces to constitute endeavors to satisfy the law.'" *Id.* (quoting *Badaracco v. Comm'r*, 464 U.S. 386, 397 (1984)). The Eighth Circuit thus concluded that this Court's focus on objective aspects of the return dictated the correct interpretation of *Beard*: "We therefore hold that the honesty and genuineness of the filer's attempt to satisfy the tax laws should be determined from the face of the form itself, not from the filer's delinquency or the reasons for it. The filer's subjective intent is irrelevant." *Id.*

D. The Circuit Division Worsens with the "Hanging Paragraph" and a Third Approach.

The BAPCPA amendment, perhaps ironically, has increased rather than reduced confusion. Some courts came to hold that the hanging paragraph's purportedly plain text meant that *all* late returns (and hence, *a fortiori*, all post-assessment returns)

could not be defined as "returns," because they fail to comply with "applicable filing requirements," namely, the requirement of timely return filing. *See*, *e.g.*, *McCoy v. Miss. State Tax Comm'n (In re McCoy)*, 666 F.3d 924, 930 (5th Cir. 2012) ("We see no need to extend the reach of this [*Beard*] test when a plain language reading of § 523(a)(*) gives a clear definition of 'return' . . ."). The syllogism runs thus: (1) the hanging paragraph defines "return" as necessitating compliance with "applicable filing requirements"; (2) timely filing is a requirement of all federal and state tax laws; and therefore (3) an untimely return is per se not a "return" under the definition provided by the hanging paragraph. *McCoy* was the first circuit case to adopt this so-called "one-day-late" approach.

Two years after *McCoy*, the Tenth Circuit also adopted the one-day-late approach. *Mallo v. IRS (In re Mallo)*, 774 F.3d 1313, 1321 (10th Cir. 2014), *cert. denied,* 135 S. Ct. 2889 (2015). This was so even though the court suggested that *Colsen* and Judge Easterbrook's objective approach offered the better interpretation of *Beard*. *Id.* at 1320 ("Judge Easterbrook's dissent in *Payne* and the Eighth Circuit's decision in *Colsen* raise cogent arguments concerning the tax purposes of a postassessment Form 1040."). Notwithstanding its apparent sympathy for the objective approach to *Beard*'s "honest and reasonable" prong, the Tenth Circuit held the debate moot in light of the hanging paragraph. *Id.* at 1325.[3]

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[3] The Tenth Circuit did so over the objection of the IRS. *See Mallo*, 774 F.3d. at 1325 ("The Commissioner also disputes our plain meaning interpretation of § 523(a)(*) and instead advances the official IRS position . . . that 'a debt assessed prior to the filing of a Form 1040 is a debt for which [a] return was not

Just last year, the First Circuit decided a state-tax case, *Fahey v. Massachusetts Department of Revenue (In re Fahey)*, 779 F.3d 1 (1st Cir. 2015), that followed the Tenth Circuit in adopting the one-day-late approach, although not without dissent. *See id.* at 11–19 (Thompson, J., dissenting) (finding support in neither the text, legislative history, nor policy for the one-day-late approach).[4] Indeed, the *Fahey* majority strikingly had to concede that its interpretation of the hanging paragraph defies the "common notion of what a 'return' is." *Id.* at 3. The bankrupt debtor did not petition for certiorari.

Despite these decisions, however, other courts have held, such as the Ninth Circuit below, that no such radical restructuring of the Code was intended, let

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'filed" and therefore cannot be discharged in bankruptcy."); *see also* Chief Counsel Notice 2010-016, 2010 WL 3617597 ("Read as a whole, § 523(a) does not provide that every tax for which a return was filed late is nondischargeable.").

[4] Judge Thompson noted that the majority's interpretation would not allow for exclusion of "technical" filing requirements that even the majority expressed discomfort with. *See id.* at 12 n.16 (" [T]he majority suggests that it is unclear whether a failure to properly staple documents, even though technically an applicable filing requirement, would render the taxes deriving therefrom nondischargeable. The majority goes on, however, to answer its own hypothetical by later concluding that 'any type of return not filed in accord with 'applicable filing requirements' is not a return under our reading of the statute.'").

alone compelled, by the text of the hanging paragraph. *See*, *e.g.*, Pet. App. 7a. ("We hold that [*Beard*] applies to the bankruptcy code as amended."); Martin, 542 B.R. 479, 489 (B.A.P. 9th Cir. 2015) ("[T]he 'return' definition added by Congress in 2005 effectively codified the *Beard* test, except that Congress in the second sentence of the hanging paragraph carved out some specific rules for tax returns prepared by taxing authorities.") (rejecting suggestion BAPCPA may have created a one-day-late rule). Thus, rather than bring further clarity to this area of bankruptcy law, the BAPCPA amendments appear only to have injected further division. Late-filing bankrupt taxpayers are now subject to even more disparity on the dischargeability of their tax debts, with a third group of circuits permanently barring discharge under the one-day-late approach by reassigning essentially all late-filing taxpayers from § 523(a)(1)(B)(ii) to the non-filer category of § 523(a)(1)(B)(i).

E. The Third Approach Provokes *Another* Circuit Split (While the Underlying Split Persists).

Earlier this year, the Eleventh Circuit became the next circuit court to confront the dischargeability of tax debt for post-assessment returns. It declined to follow the one-day-late approach and instead assumed, *arguendo*, that it was "incorrect." *Justice v. United States* (*In re Justice*), 817 F.3d 738, 743 (11th Cir. 2016), *rehearing en banc denied*, No. 15-10273 (11th Cir. Sept. 19, 2016) (noting the one-day-late approach problematically limits the scope of § 523(a)(1)(B)(ii) to "unusual situations"). It nonetheless ruled against the debtor on the underlying circuit split regarding the "honest and reasonable" prong of *Beard*. Rejecting the objective approach of

the Eighth Circuit and Judge Easterbrook, it adopted the subjective approach of the Fourth, Sixth, and Seventh Circuits, holding that the debtor's lack of excuse for filing the return after the IRS' assessment rendered the return incapable of satisfying *Beard*'s requirement of "honest and reasonable" compliance with tax law. *Id.* at 746. The debtor petitioned for rehearing en banc, which was recently denied. *See Justice v. United States (In re Justice)*, No. 15-10273, Order Denying Pet. for Rehearing En Banc (11th Cir. Sept. 19, 2016).

The opinion below from the Ninth Circuit is the most recent circuit court pronouncement on the dischargeability of tax debt for post-assessment returns. And unlike the Eleventh Circuit, which revealed only discomfort with the one-day-late approach's abrogation of *Beard* in assuming *arguendo* that it was wrong, the Ninth Circuit was even more explicit and held that *Beard* remained the relevant law. *See* Pet. App. 7a ("We hold that *Hatton* [a pre-BAPCPA § 523 circuit precedent adopting *Beard*] applies to the bankruptcy code *as amended*.") (emphasis added). Applying *Beard*, the Ninth Circuit adopted the subjective approach to post-assessment returns and ruled against the debtor. *Id* at 6a. ("'Under these circumstances, Smith's 'belated acceptance of responsibility' was not a reasonable attempt to comply with the tax code."). Thus, by disagreeing with the First, Fifth, and Tenth Circuit in reaffirming the continued vitality of *Beard*, the Ninth Circuit created *another* circuit split with the circuits that have recently held that the *Beard* test was rendered moot by the hang-

ing paragraph and that essentially *all* late return tax debt is nondischargeable.[5]

F. Summary: The Crazy Quilt Regarding the Nondischargeabilty of Post-Assessment Tax Return Debt under Section 523(a)(1).

Few circuit splits get deeper. The conflicted law of post-assessment return dischargeability now leaves debtors with the following fates, with geography being the only deciding factor:

- Debtors *can* discharge tax debts after filing post-assessment 1040s, because the "honest and reasonable" prong of the *Beard* test applies to the objective completeness of the form itself, not any subjective intent justifying (or not) the late return's tardiness—*Eighth Circuit*.

- Debtors can only "*rarely*" discharge tax debts after filing post-assessment 1040s, because the "honest and reasonable" prong of the *Beard* test is not satisfied by late-filers who lack a good tardiness motivation—*Fourth, Seventh, Ninth, and Eleventh Circuits*.

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[5] The Third Circuit now has a case under submission, although the panel was unaided by oral argument. *See Giacchi v. United States* (*In re Giacchi*), 553 B.R. 35 (E.D. Pa. 2015), *appeal submitted*, No. 15-3761 (3d Cir., June 22, 2016). Such a sparsely litigated opinion is unlikely to generate any better vehicle for this Court's review than the instant petition.

- Debtors can *never* discharge tax debts after filing post-assessment 1040s, because *Beard*'s "honest but reasonable" prong is unsatisfied as a matter of law (regardless of whether there is a good excuse)—*Sixth Circuit*.

- Debtors can *never* discharge tax debts for late-filed returns, *even if the IRS has yet to make an assessment*, because the "hanging paragraph" of § 523(a)(*) forbids it—*First, Fifth, and Tenth Circuits*.

- Pending—*Third Circuit* (case filed on submission without oral argument).

This Court's intervention is desperately needed to resolve this ripe multi-circuit split that leaves the fresh start for bankruptcy debtors with old tax debt hanging in the balance.

II. THE ERRONEOUS DECISION BELOW CANNOT BE ALLOWED TO STAND.

The decision of the Ninth Circuit that a post-assessment Form 1040 somehow loses its status as a tax return violates common sense, wreaks havoc with the tripartite structure Congress erected in § 523(a)(1)'s text, and is ultimately unmoored from the context underlying the precedents of this Court that gave rise to the *Beard* test that it purports to apply.

A. A Filed and Accepted Late Tax Return Is Just That—A "Return" That Is "Late."

At the risk of stating the ontologically obvious, a tax return can have various attributes having nothing to do with its constitutive nature. It can be "helpful," "unhelpful," "aggressive," "early," or "late." But it is still a return. The Ninth Circuit's opinion below reads the statute to require that a Form 1040, which is clearly captioned "U.S. Individual Income Tax Return," cease to be a "return" when it is filed too late (namely, after the IRS makes an assessment). This result is not in any way demanded by the statutory text, and indeed violates any common understanding of what constitutes a return. No English dictionary so far as Petitioner can discover ever refers to timeliness in its definition of "return" or "tax return." *See*, *e.g.*, *Tax Return*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[The] form on which an individual, corporation or other entity reports income, deductions, and exemptions and calculates their tax liability."). It thus violates the logical interpretive principle endorsed by this Court that "[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition." *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014).

Section 523(a)(1) compels no timeliness constraint on the definition of "return." On the contrary, it reveals a tripartite structure that explicitly envisions that some returns will be late, 11 U.S.C. § 523(a)(1)(B)(ii), treating them differently from (and more favorably than) returns that are not filed, *id.*, § 523(a)(1)(B)(i), and returns that are fraudulent, § 523(a)(1)(C). The Ninth Circuit's position that the

statute implicitly embraces a distinction between "late" returns and "very late" non-returns, notwithstanding the statute's textual division between late and non-returns, is IRS-friendly policymaking cut out of whole cloth.[6]

The Ninth Circuit's erroneous conclusion that Petitioner's return is not a return follows the misstep of other courts that have read the *Beard* test's "honest and reasonable" prong subjectively and divorced from the context of synthesizing this Court's pronouncements on the nature of tax returns. (Tellingly, none of the subjective approach circuit cases discuss the facts of *Beard* itself; they merely recite its test by rote. *See*, *e.g.*, *Payne,* 431 F.3d at 1057.) *Beard*'s "honest and reasonable" prong was never intended to graft a moral analysis of taxpayer motivation for tardiness or other matters (let alone requirements of utility to the IRS) onto the definition of "return." *Beard*'s test was developed to assess two questions on the constitution of a return: (a) whether the *information provided* to the taxing authorities was sufficient to constitute a "return" even if the document

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[6] The Ninth Circuit's approach also creates textual tension with § 523(a)(1)(C). *See Payne*, 431 F.3d at 1062 (Easterbrook, J., dissenting) ("If employment of a document to avoid paying taxes renders that document a non-return, then § 523(a)(1)(C) serves no function. For it supposes that a 'return' has been filed (else § 523(a)(1)(B)(i) would foreclose discharge). If a document designed to game the system is not a 'return' in the first place, then no court ever would get to § 523(a)(1)(C)."). As this Court has cautioned, a construction of a statute that makes some of its provisions surplusage should be resisted. *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994).

so providing was not a return (i.e., a "constructive return"), *see*, *e.g.*, *Green v. Comm'r*, No. 11851-05, 2008 WL 2065187 (T.C. May 15, 2008), *aff'd*, 322 F.App'x 412 (5th Cir. 2009) (employing *Beard* to assess whether "disclosure documents" could constitute a return), and (b) whether a nominal return was actually an attempt at *dishonest subterfuge* in providing that information, such that it cannot be considered a return (i.e., a "fake"), *see*, *e.g.*, *Beard* (discussed *infra*). Never did this Court or the Tax Court suggest that that test could be used to exclude, or even have applicability to, an actual, duly completed and filed Form 1040.

The origin of the *Beard* test is found in two of this Court's decisions from the 1930s. The first is *Florsheim Bros. Drygoods Co. v. United States*, 280 U.S. 453 (1930). There, the Court had to determine whether filing a "tentative return" sufficed to start the running of a limitations period. A tentative return includes an estimate of taxes owed for purposes of paying an installment to the taxing authorities. But it does not include a statement of gross income, deductions, and credits, as required by statute. Justice Brandeis writing for the Court held that it did not suffice to start the running of the limitations period. *Id.* at 464. In contrast, the Court noted that a defective or incomplete return *would* start the running of a limitations period if it represented an honest attempt to specify income, deductions and credits as provided by the tax code. *Id.* at 462.

The second case, *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), involved a taxpayer who filed a timely tax return that included computational errors because of amendments to the tax laws. Despite the deficiencies, Justice Cardozo held for this Court that

the return was sufficient to begin running the limitations period: "Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such and evinces an honest and genuine endeavor to satisfy the law." *Id.* at 180.

Beard itself involved a taxpayer who physically tampered with margin and item captions on a 1040 in order to categorize his wages as non-taxable "receipts" (thereby reporting zero tax liability). *Beard*, 82 T.C. at 769. The IRS sought penalties for failure to file a return, notwithstanding the (doctored) 1040 on file. The Tax Court held that the document could not count as a return, as it evidenced no attempt to provide the IRS with the required information. *Id.* at 779. Indeed, this is how the Tax Court itself has subsequently interpreted the test. *Compare*, *e.g.*, *Walbaum v. Comm'r*, 106 T.C.M. (CCH) 68 (T.C. 2013) (no return; Form 1040 not "honest and reasonable" when intentionally filled out with all zeros), *with*, *e.g.*, *Sakkis v. Comm'r*, 100 T.C.M. (CCH) 459 (T.C. 2010) (return; "honest and reasonable" when proper 1040 fully completed with wages and other information listed notwithstanding "frivolous" deductions).

Thus, to the extent *Beard* counsels inquiry into the taxpayer's honesty and reasonableness, that inquiry has nothing to do with timeliness, let alone excuses for untimeliness, if the taxpayer has actually reported (or at least appears to have tried to report) all her relevant income and expenses in the prescribed format. *See Colsen*, 446 F.3d at 840. The Ninth's Circuit's superimposition of a subjective good faith requirement appears frankly based on considerations of policy, such as Judge Posner's ruminations that

post-assessment returns should not be deemed "returns" because they spare the IRS no work once it has gone to the effort of estimating a taxpayer's obligations unaided by the taxpayer herself. *See Payne*, 431 F.3d at 1057.

Finally, if the Court is concerned about policy regarding late-filed returns, it should reject Judge Posner's speculations regarding the purported uselessness of such returns to the IRS. Allegations of uselessness might be plausible if the IRS refused to accept such belated filings. But the IRS does accept such returns, gladly, as it did in this case, because it knows that the taxpayer's *voluntary concession of liability* regarding potentially disputable tax obligations has considerable value. As Judge Easterbrook reminds, the IRS actually *requires* such returns as preconditions for compromise. *Payne*, 431 F.3d at 1060 (Easterbrook, J., dissenting) (citing 26 C.F.R. § 301.7122-1(d)); *see generally Evans v. Jeff D.*, 475 U.S. 717, 732–33 (1986) (noting the benefits of settlement). Returns axiomatically accelerate (and cost-reduce) the collection process for which the IRS is responsible. This is why Congress, when amending § 523(a), clarified that a "written stipulation to a judgment or final order entered by a nonbankruptcy tribunal" can also count as a return: they settle the taxpayer's liability. 11 U.S.C. § 523(a)(*). Indeed, the belated return in this specific case had plenty of utility. When Petitioner filed his purportedly useless return, he attested to additional taxable income that the IRS had had no idea about—and was promptly assessed on this additional amount.[7]

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[7] The IRS tap-danced around this embarrassment by offering to bifurcate Smith's return into a non-return for the income already assessed and a regular

Moreover, in light of Congress' recent reminder in the hanging paragraph that bankruptcy courts are not to create their own bankruptcy-specific tax law for purposes of § 523(a)(1), the IRS' treatment of Petitioner's late return as a return for general tax law purposes (such as commencing the statute of limitations on assessment), yet not for the bankruptcy purposes of § 523(a)(1) of the Bankruptcy Code gets matters exactly backward. *See* Pet. App. 52a (coding return as "return filed"). This Court's review is needed to correct this error.

B. A Return Filed and Accepted One Day Late Is Also Still a "Return."

To reverse the Ninth Circuit, this Court will also have to reject an embedded alternative ground for affirmance, namely, the recently-emerged third approach holding that any return filed late, even by one day, cannot be a "return" under the hanging paragraph. Although three circuit courts have now so held, diverging from the contrary position of the Ninth Circuit below, this interpretation of the statute is so aberrant it can be easily dispatched by the Court in ruling on this petition.

Leaving aside the lack of readily conceivable policy why Congress would want to effect such a radical bankruptcy law change and, in the words of the Commissioner, "harsh result that appears inconsistent with the statute's intent" that "the United

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return for the new amount. No authority was cited for a return being a "partial return"—part return, part not.

States does not adopt," *Martin v. IRS (In re Martin)*, 508 B.R. 717, 727 n. 14 (Bankr. E.D. Cal. 2014) (quoting IRS submissions), there are at least three reasons why the one-day-late approach is textually indefensible.

First, none of the one-day-late cases has adequately addressed, let alone given meaningful content to, the modifier "applicable" preceding "filing requirements" in the hanging paragraph. As this Court has made clear, "applicable" does not mean "all" but rather requires analysis of context and has a standard dictionary definition of "appropriate, relevant, suitable or fit." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 70 (2011).

Here, the "appropriate," "relevant" or "suitable" filing requirements to consider are obviously those *definitional to what constitutes a return*. Importantly, § 523(a)'s "applicable filing requirements" do not appear in isolation; they are mentioned as a parenthetical subset of the "applicable nonbankruptcy law" that a return must satisfy to be deemed a return. *See* 11 U.S.C. 523(a)(*) ("The term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)."). *That* "applicable" law, of course, is the nonbankruptcy tax law applicable to *whether a filing with the IRS constitutes a "return"*—i.e., *Beard*. (The only other possible reading of "applicable nonbankruptcy law" would be "*all* law applicable to tax returns," which would be utterly absurd; for example, on that reading, if a taxpayer filed a timely return but claimed a deduction to which she was not entitled, she would be deemed to have never filed a return.)

Thus, the "applicable" filing requirements, which are described as a subset of "applicable" nonbankruptcy law, cannot be *all* filing requirements applicable to a given tax return; they are simply the *definitional requirements* that separate real returns from non-returns. They cannot include other, non-definitional filing requirements, such as rules on when the return is due, or rules on whether a check is allowed to be stapled to a return or must be enclosed loose. The one-day-late cases at best ignore "applicable" or at worst read it to mean "all."

Second, the one-day-late cases inflict even more violence upon the tripartite structure of § 523(a)(1) than the Ninth Circuit's imposition of a subjective good-faith requirement through *Beard*. In reclassifying all late returns as non-returns, they read the late-returns provision of § 523(a)(1)(B)(ii) as 100% surplusage. As this Court has recognized, "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." Marx v. Gen. Revenue Corp. 133 S. Ct. 1166, 1178 (2013).[8]

The one-day-late cases protest that they do not relegate § 523(a)(1)(B)(ii) to 100% surplusage—only 99% surplusage—because § 523(a)(1)(B)(ii) can still apply non-redundantly to the trivial number of late returns filed under § 6020(a), which the hanging paragraph defines as "returns." *See Fahey*, 779 F.3d at 6 (acknowledging that the IRS' Chief Counsel has described the number of returns filed under § 6020(a)

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[8] Only the Eighth Circuit/Easterbrook approach gives full content to the tripartite structure, offering non-redundant work for each of the late, unfiled, and fraudulent return subsections. *See*, *supra* n. 6.

as "minute," but nevertheless holding that "[w]hile section 6020(a) may only apply in a small minority of cases, the fact that a late filed section 6020(a) return can still qualify as a 'return' for section 523(a) purposes means that the two-year provision [of § 523(a)(1)(B)(ii)] still has a role to play . . . ."). This attempt to rescue § 523(a)(1)(B)(ii) from redundancy runs into two fatal roadblocks.

First, Congress does not effect radical changes to prior bankruptcy practice (as declaring debts associated with 99% of all late tax returns to be permanently nondischargeable, rather than only temporarily nondischargeable, would do) without a whiff of intention. *See Hamilton v. Lanning*, 560 U.S. 505, 517 (2010) ("[T]he Court will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.") (internal quotation marks omitted). Here, the legislative history (unsurprisingly) makes no suggestion of such a bizarre intention, *see* H.R. Rep. No. 109-31, at 103, and the closest indication in the text would be an at-best ambiguous parenthetical reference to "applicable filing requirements" (an ambiguity premised completely upon ignoring the phrase "applicable non-bankruptcy law" of which the parenthetical is a subset).

Second, consigning § 523(a)(1)(B)(ii)'s applicability to § 6020(a) returns runs smack into the absurdity doctrine. *See e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). No court, nor even any commentator, of which Petitioner is aware has yet to propose a non-absurd reason why Con-

gress might want to favor § 6020(a) returns (forms where the IRS' staff has to complete the taxpayer's return from information that taxpayer provides) from real 1040s (forms where the taxpayer bears that cost himself).[9] Both of these are returns filed *after* the IRS catches up with an initially delinquent taxpayer, but the § 6020(a) one alone imposes costs on the IRS, whereas the taxpayer internalizes his own preparation costs with a regular 1040. As such, try gamely as they might, the one-day-late cases cannot escape the charge that they read § 523(a)(1)(B)(ii) either out of the statute or into absurdity.

Finally, even leaving aside the strong bankruptcy law presumption that all statutory ambiguities in discharge exceptions should be strictly construed in favor of the debtor, *Kawaauhau*, 523 U.S. at 58, further textual embarrassments plague the one-day-late cases. Consider the hanging paragraph's explicit inclusion of § 6020(a) returns. Those are returns where the IRS catches an initial non-filer, and the non-filer cooperates to the extent of turning over all her paperwork to the IRS for the preparation of the errant return. On the one-day-late approach, these § 6020(a) returns are not returns (they were filed after the deadline), in which case their inclusion in the

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[9] Some courts have misfired and defended Congress's according more favorable treatment of § 6020(a) returns *over § 6020(b)* ones from absurdity attack. *See*, *e.g.*, *McCoy*, 666 F.3d at 931. Congress does indeed appear to have so intended, and there are eminently rational reasons for it having done so. But that provides no rebuttal to the absurdity of contending Congress wanted to accord more favorable treatment to § 6020(a) returns *over properly completed, self-financed 1040*s.

hanging paragraph has to be an exception from their already-exclusion. If the one-day-late interpertation were correct, the hanging paragraph's § 6020(a) clause would read "*Notwithstanding the foregoing*, a return prepared pursuant to section 6020(a) . . . *is nonetheless deemed* a return." But Congress' actual words were "Such term [return] *includes a return* prepared pursuant to section 6020(a) . . ." 11 U.S.C § 523(a)(*) (emphasis added). Congress did not envision § 6020(a) returns as presumptive non-returns requiring rescue from the fire; rather, it clarified that a § 6020(a) return forfeits no status as a return just because the IRS had to do the work of preparing it for signature outside the regular 1040 model.

The juxtaposed treatment of § 6020(b) SFRs buttresses this interpretation. One-day-late cases cannot explain the redundancy of the express reference to § 6020(b) SFRs in the hanging paragraph, because under the one-day-late approach, such documents are not returns in the first place (being filed late). These courts have candidly admitted this gratuitous reference to § 6020(b) is surplusage. *See Fahey*, 779 F.3d at 7 (conceding its reading creates "redundancy" in the statute). By contrast, if the provisions are read in the context of the relevant legislative history, H.R. Rep. No. 109-31, at 103, which indicates the specific references to § 6020 returns was nothing more than to settle some confusion in bankruptcy courts about whether § 6020(b) returns sufficed to count as tax returns, then the surplusage problems go away. Timeliness is a collateral—not constitutive—inquiry to the definition a tax return; the references to § 6020(a) and § 6020(b) returns (which are *both* untimely filings) are simply resolutions of technical uncertainties that had divided some courts before BAPCPA, not surplusage-laden evidence of radi-

cal reclassifications within § 523(a)(1)'s tripartite structure.

In sum, while the primary reason this Court's review is required is to resolve the circuit split between the Eighth and Ninth Circuits on the important question whether the debtor can discharge tax debts from post-assessment returns, a necessarily embedded second circuit split giving rise to a third approach will need to be resolved in answering that question: whether any return filed one day late bars the bankruptcy discharge of the underlying tax debt under a misreading of the hanging paragraph.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE DIVISIONS AMONG THE CICRUITS.

The time is ripe for this Court to bring overdue uniformity to this divided area of bankruptcy law. The First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all had their say, and the Third Circuit's case on this question is presently under submission. All the issues have been well-ventilated, and the various opinions and the dissents at the circuit court level lay out the countervailing considerations in robust detail. Further percolation is unlikely to produce additional assistance to the Court; in fact, it will only protract the confusion bedeviling the bankruptcy bar. This case in particular presents a good vehicle because of its clean presentation: there are no procedural irregularities that would otherwise provide alternative grounds for affirmance or reversal beyond the straightforward question presented of statutory interpretation of the Bankruptcy Code.

This case presents not only a clean vehicle for this Court's review but the only procedural posture in which a dispute with the IRS will reach this Court given the IRS' stated position on post-assessment returns. *See* Chief Counsel Notice 2010-016, 2010 WL 3617597 (Sept. 2, 2010) (confirming IRS rejects the one-day-late approach and favors the subjective approach to the *Beard* circuit split). Realistically, there are only two types of late tax return cases that will implicate § 523(a)(1)(B): a one-day-late return case, in which the IRS has yet to make an assessment, and a post-assessment return case, in which the IRS has already assessed taxes before the belated 1040.

Because the IRS will not object to discharge in a one-day-late case where it has yet to make an assessment, *id.*, it will never appeal a victorious debtor's bankruptcy discharge. Thus, the only type of case that will be litigated by the IRS is one with a posture, such as this, where the IRS objects to the debtor's discharge, namely, when the late tax return is filed post-assessment. As a corollary, this means the only way this Court will get to address the one-day-late approach for a federal taxpayer in bankruptcy will be in a post-assessment return case, such as this, where it will also resolve the primary circuit split on *Beard*'s "honest and reasonable" prong.

Finally, the importance and centrality of the discharge to bankrupt debtors is difficult to overstate. It is no exaggeration to say the cornerstone of the U.S. consumer bankruptcy system is its fresh start. Mistakenly denying discharge to those debtors who have tried to get their lives back on track by filing outstanding tax returns years ago and have now fallen onto hard times that require bankruptcy would be manifestly unjust. With a million Americans avail-

ing themselves of the bankruptcy courts each year, *see Bankruptcy Filings (December 31, 2015)*, Administrative Office of the U.S. Courts (Oct. 5, 2016, 11:41 p.m.), http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2015/12/31, this is no arcane academic question. Petitioner, Martin Smith, owned up to owing tens of thousands more dollars in taxes to the IRS, filed his returns (albeit late), and tried to work out a compromise agreement dealing with all his accrued penalties and other obligations. He then lost his job and eventually went bankrupt. He is the exact sort of person Congress had in mind in drafting § 523(a)(1)(B)(ii), a late-filing procrastinator—not a cheat—in need of a fresh start.

CONCLUSION

The lower courts are in disarray regarding the scope of the bankruptcy discharge for federal taxpayers filing late returns. Three different approaches to § 523(a)(1)(B) prevail among the circuits. This Court's resolution is urgently needed to bring uniformity back to Congress' purportedly "uniform" law on the subject of bankruptcies. Accordingly, the petition should be granted.

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October 11, 2016

Appendix

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE MARTIN SMITH, *Debtor*, MARTIN SMITH, *Plaintiff-Appellant*, *v.* UNITED STATES INTERNAL REVENUE SERVICE, *Defendant-Appellee.*	No. 14-15857 D.C. No. 4:13-cv-00871-YGR OPINION

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted May 12, 2016
San Francisco, California

Filed July 13, 2016

Before: Jerome Farris,
Diarmuid F. O'Scannlain, and
Morgan Christen, Circuit Judges.

Opinion by Judge Christen

SUMMARY*

Bankruptcy

The panel affirmed the district court's order reversing the bankruptcy court and entering summary judgment in favor of the IRS in a debtor's adversary proceeding seeking a determination that his federal income tax liabilities were dischargeable in bankruptcy.

The panel held that the debtor's tax liabilities were non-dischargeable under 11 U.S.C. § 523(a)(1)(B)(i), which exempts from discharge any debt for a tax with respect to which a return was not filed. The panel held that the debtor's late-filed Form 1040 did not represent an honest and reasonable attempt to satisfy the requirements of the tax law, and he therefore did not file a "return" within the meaning of § 523(a)(1)(B)(i). Agreeing with other circuits, the panel held that *In re Hatton*, 220 F.3d 1070 (9th Cir. 2000), which adopted the Tax Court's widely-accepted definition of "return," applied to the bankruptcy code as since amended.

COUNSEL

Robert L. Goldstein (argued), Law Offices of Robert L. Goldstein, San Francisco, California, for Plaintiff-Appellant.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader

Julie C. Avetta (argued) and Ellen Page DelSole, Attorneys; Tamara W. Ashford, Acting Assistant Attorney General; Tax Division, Department of Justice, Washington, D.C.;for Defendant-Appellee.

A. Lavar Taylor, Law Offices of Lavar Taylor, Santa Ana, California, as and for Amicus Curiae.

OPINION

CHRISTEN, Circuit Judge:

Martin Smith did not file a 2001 tax form on time. Instead, he filed a Form 1040 seven years after it was due, and three years after the IRS assessed a deficiency against him. Smith later filed for bankruptcy and sought to discharge his 2001 tax liability. The bankruptcy court permitted the discharge, but the district court reversed. Smith appeals the district court's ruling.

FACTUAL AND PROCEDURAL BACKGROUND

After Martin Smith failed to timely file his 2001 tax forms, the IRS prepared a Substitute for Return or "SFR" based on information it gathered from third parties. In March 2006, the IRS mailed Smith a notice of deficiency. Smith did not challenge the notice of deficiency within the allotted 90 days and the IRS assessed a deficiency against him of $70,662. Three years later, in May 2009, Smith filed a Form 1040 for the year 2001 on which he wrote "original return to replace SFR." On this late-filed

form, Smith reported a higher income than the one the IRS calculated in its assessment, thereby increasing his tax liability. The IRS added the additional arrearage to its assessment. Two months after that, in July 2009, Smith submitted an offer in compromise, hoping to resolve his tax liability. The IRS rejected his offer. Smith later lost his job and the IRS allowed him to pay his tax bill in monthly installments of $150.

After about five months, Smith declared bankruptcy and sought to discharge his 2001 tax debt before the bankruptcy court. Smith and the IRS agreed that the increase in the assessment based on Smith's late-filed form was dischargeable, but they disputed whether the IRS's original $70,662 assessment was also dischargeable. The bankruptcy court ruled that it was. The district court reversed. Smith appeals the district court's ruling. We have jurisdiction under 28 U.S.C. § 158(d), and we affirm the district court's order entering summary judgment in favor of the IRS.

STANDARD OF REVIEW

This court reviews de novo the bankruptcy court's interpretation of the bankruptcy code. *In re Hatton*, 220 F.3d 1057, 1059 (9th Cir. 2000). We also review de novo a district court's order granting a motion for summary judgment. *Ditto v. McCurdy*, 510 F.3d 1070, 1075 (9th Cir. 2007).

DISCUSSION

The bankruptcy code exempts from discharge "any . . . debt for a tax . . . with respect to which a return, or equivalent report or notice, if required . . . was not filed or given." 11 U.S.C. § 523(a)(1)(B)(i). In *In re Hatton*, we adopted the Tax Court's widely-accepted definition of "return." 220 F.3d at 1060 (internal citation omitted). There, we stated that "[i]n order for a document to qualify as a [tax] return: (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law." *Id*. at 1060–61 (internal citation and quotation marks omitted).

When we decided *Hatton*, the bankruptcy code did not define "return," *id*. at 1060, but Congress amended the bankruptcy code in 2005 and it added a definition. In pertinent part, the amendment reads:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements).

11 U.S.C. § 523(a).

We have not interpreted this new definition, but both parties and several of our sister circuits agree that *Hatton*'s four-factor test still applies, see *In re Ciotti*, 638 F.3d 276, 280 (4th Cir. 2011); *In re*

Justice, 817 F.3d 738, 740–41 (11th Cir. 2016); and the Tax Court has not wavered in its application of this common-law test in the sixteen years since we decided *Hatton*. See, e.g., *Estate of Sanders v. Comm'r of Internal Revenue*, 144 T.C. 63 (2015).

The parties' dispute centers on whether Smith's filing met the fourth requirement of the operative test: was his filing "an honest and reasonable attempt to satisfy the requirements of the tax law?" *Hatton* considered this question under similar circumstances. The taxpayer in *Hatton* failed to file a tax return and the IRS computed and assessed his tax liability by creating an SFR. *Hatton*, 220 F.3d at 1059. Throughout the process, the IRS sent numerous notices to Hatton, but it received no responses. *Id*. Hatton finally met with the IRS more than seven years after the original return was due and more than four years after the IRS assessed a deficiency. *Id*. He did not dispute his liability and the IRS agreed to a $200-a-month payment plan. *Id*. We held that Hatton's "belated acceptance of responsibility" was not an honest and reasonable attempt to comply with the tax code. *Id*. at 1061.

Here, Smith failed to make a tax filing until seven years after his return was due and three years after the IRS went to the trouble of calculating a deficiency and issuing an assessment. Under these circumstances, Smith's "belated acceptance of responsibility" was not a reasonable attempt to comply with the tax code. Many of our sister circuits have held that post-assessment tax filings are not "honest and reasonable" attempts to comply and are therefore not "returns" at all. See *In re Justice*, 817

F.3d at 746; *In re Payne*, 431 F.3d 1055, 1057–60 (7th Cir. 2005); *In re Moroney*, 352 F.3d 902, 907 (4th Cir. 2003); *In re Hindenlang*, 164 F.3d 1029, 1034–35 (6th Cir. 1999). *But see In re Colsen*, 446 F.3d 836, 840–41 (8th Cir. 2006). We need not decide the close question of whether any post-assessment filing could be "honest and reasonable" because these are not close facts; the IRS communicated with Smith for years before assessing a deficiency, and Smith waited several more years before responding to the IRS or reporting his 2001 financial information.

Smith argues that *Hatton*'s "honest and reasonable" inquiry requires looking only at the face of the filing, and that *Hatton*'s facts are distinguishable because Hatton did not file a tax form at all. We disagree. Hatton focused the "honest and reasonable" inquiry on the honesty and reasonableness of the taxpayer's conduct, not on any deficiency in the documents' form or content. *See Hatton*, 220 F.3d at 1061 ("Hatton made every attempt to avoid paying his taxes until the IRS left him with no other choice."). We hold that *Hatton* applies to the bankruptcy code as amended, and that Smith's tax filing, made seven years late and three years after the IRS assessed a deficiency against him, was not an "honest and reasonable" attempt to comply with the tax code.[1]

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[1] The IRS argues that even if Smith's filing was a return, the deficiency it assessed against Smith was not a "debt for a tax . . . with respect to which" a return was filed because Smith had not yet filed anything when it assessed the deficiency. We do not reach this argument because we hold that Smith's filing was not a return.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE MARTIN SMITH
DEBTOR.

INTERNAL REVENUE SERVICE,
APPELLANT,
V.
MARTIN SMITH,
APPELLEE,

Case No.: 13-CV-871 YGR
Bankruptcy Case No. 11-73272 RLE
Adversary Proceeding No. 12-4086

ORDER REVERSING DECISION OF BANKRUPTCY COURT; DENYING DEBTOR'S MOTION TO STRIKE (DKT. NO. 20)

This is an appeal by the Internal Revenue Service ("IRS") from the Order Granting Debtor Martin Smith's ("Debtor") Request for Summary Judgment and Denying IRS's Motion for Summary Judgment, entered by the Bankruptcy Court on January 31, 2013, and more fully explicated on the record on January 8, 2013. IRS filed a Notice of Appeal on February 14, 2013, as well as a statement of election to have the United States District Court for the Northern District of California hear its appeal of the Order. See 28 U.S.C. 158(c)(1)(A), Fed. R. Bankr. P. 8001(e), and 9th Cir. B.A.P. L.R. 8001(e)-1. The controversy

stems from the treatment, for bankruptcy purposes, of a Form 1040 submitted seven years after it was due and three years after the IRS made an assessment and commenced collection proceedings.

Having carefully reviewed the record of the proceedings in this matter, the legal determinations in the Bankruptcy Court's decision, and the parties' briefing, the Court is persuaded the approach used in a majority of the circuits across the United States in their treatment of late-filed tax returns is the appropriate method of resolving this issue presented. Accordingly, with respect to the facts presented here, the Court REVERSES the Bankruptcy Court's January 31, 2013 Order and REMANDS for further proceedings consistent with this Decision.

I. STATEMENT OF THE FACTS

Debtor filed a voluntary petition under Chapter 7, Title 11, of the United States Code on December 22, 2011. The Court issued a discharge order on May 11, 2012. The only year at issue in this adversary proceeding is 2001, a year for which Debtor did not file an income tax return timely. The IRS sent Debtor a letter requesting that he file an income tax return for 2001, but Debtor failed to do so. The IRS then began an examination regarding Debtor's liability for the 2001 tax year and determined his tax liability for 2001 based on information gathered from third parties. After making its determination, the IRS prepared a "substitute for return" (or "SFR") pursuant to 26 U.S.C. § 6020(b) for 2001.

On March 27, 2006, the IRS mailed a notice of deficiency to Debtor for the 2001 tax year showing the IRS's determination of tax liability of $70,662. Debtor had ninety days from March 27, 2006, to

challenge the notice of deficiency by filing a petition with the United States Tax Court. Debtor filed no such challenge. On July 31, 2006, the IRS assessed the $70,662 tax liability and began collection activities.

On May 22, 2009—over seven years after Debtor's 2001 tax return was due, over three years after the IRS had determined Debtor's tax liability for 2001, and after the IRS had already initiated collection activity on the debt—Debtor submitted a Form 1040 for the 2001 tax year, reporting a higher tax liability than the IRS previously had determined ("the Return at Issue").[1] He thereafter filed his bankruptcy petition on December 22, 2011. This appeal focuses on the treatment of the $70,662 tax liability assessed by the IRS in 2006, in light of the bankruptcy.

II. DISCUSSION

A. STANDARD OF REVIEW AND STATUTORY FRAMEWORK

In reviewing a bankruptcy court's decision, this Court functions as an appellate body and is authorized to affirm, reverse, modify or remand the Bankruptcy Court's ruling. 28 U.S.C. § 158(a); Fed. R. Bankr. P. 8013. In this case the relevant facts are undisputed. The Bankruptcy Court's conclusions of law are subject to *de novo* review. *Miller v. United States*, 363 F.3d 999, 1003-1004 (9th Cir. 2004).

The question presented is whether Debtor's 2001 federal income tax liabilities, assessed by the

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[1] Based on this Form 1040, the IRS assessed an additional tax liability of $40,095. The IRS does not contend that this $40,095 liability, or the associated penalties, is non-dischargeable.

IRS based upon its own examination and determination, should be (i) discharged in bankruptcy, or (ii) non-dischargeable pursuant to 11 U.S.C. section 523(a)(1)(B)(i). In general, the filing of a bankruptcy petition allows a debtor to discharge personal liability for all debts incurred prior to the filing of the petition, including unpaid taxes. 11 U.S.C. § 727(b); *see also Hatton*, 220 F.3d 1057, 1060 (9th Cir. 2000). However, Section 523(a)(1) of Bankruptcy Code sets forth certain exceptions to dischargeability identified in nineteen subsections. *See* 11 U.S.C. §523(a)(1)-(a)(19).[2] At issue here is the exception set forth in section 523(a)(1)(B) which provides:

> (a) A discharge [in bankruptcy]…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 or given; or
> (ii) was filed or given after the date on which such return…
> was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition.
>
> 11 U.S.C. § 523(a)(1)(B).

Importantly, a precise statutory definition of the term "return" does not exist. In fact, case law

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[2] As examples, section 523 makes non-dischargeable liabilities for certain priority taxes, consumer debts on luxury goods incurred within 90 days of the order for relief, domestic support obligations, intentional torts, student loans, loans from certain pension or profit-sharing plans. See 11 U.S.C. § 523(a)(1)(A), (2)(C), (3), (5), (6), (8), (18).

abounds with colorful discussions involving the meaning of the term "return" in tax-avoider cases. While the Ninth Circuit has generally held that the meaning of "return" should be the same under the Tax Code and Bankruptcy Code, the Tax Code itself does not provide a definition of "return." *Hatton*, 220 F.3d at 1060 ("[a]lthough the I.R.C. [Internal Revenue Code] does not provide a statutory definition of 'return,' the Tax Court developed a widely-accepted interpretation of that term..."). Thus, the Ninth Circuit, relying on the seminal case of *Beard v. Commissioner*, 82 T.C. 766, 774–79, 1984 WL 15573 (1984), *aff'd*, 793 F.2d 139 (6th Cir.1986)), held that whether a "document" is considered a "return" for statute of limitations purposes depends upon four elements. *Hatton*, 220 F.3d at 1060-61. Those elements, as stated in *Beard*, are:

> First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury.

Beard, 82 T.C. at 777 (relying on the definition of "return" established by the Supreme Court in *Germantown Trust Co. v. Commissioner*, 309 U.S. 304 (1940), and *Zellerbach Paper Co. v.Helvering*, 293 U.S. 172 (1934)).[3]

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[3] Courts have variously referred to the "honest and reasonable attempt" factor as the third or fourth prong of the *Beard* test. The Court opts to refer to it as

Thereafter, in 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 119 Stat. 23 (April 20, 2005) ("BAPCPA") effective October 2005 which amended Section 523(a). For the first time, through BAPCPA, the Bankruptcy Code now provided some guidance on the meaning of the term "return," even though it did not offer a precise definition. It did so with the inclusion of a new unnumbered paragra ph at the end of the subsections 523(a)(1) through 523(a)(19). This paragraph (frequently termed the "hanging paragraph") states in pertinent part:

> For purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements).[4]

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the "honest and reasonable attempt" factor for the sake of clarity while noting the discrepancy.

[4] The hanging paragraph contains the following additional language:

> Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or similar State or local law.

Section 6020(a) refers to a return prepared by the IRS after the taxpayer fails to do so, but done with the taxpayer's consent to disclose the information necessary to prepare the return. Section 6020(b) refers to a return

Id. Thus, the hanging paragraph codified, in part, what the Ninth Circuit stated in 2000 in *Hatton*: that the definition of "return" for purposes of bankruptcy law should be one that satisfies the requirements of non-bankruptcy law; there, the definition of "return" used under the Tax Code. *Hatton*, 220 F.3d at 1060.

B. LEGAL ANALYSIS

Based upon the legal framework outlined above, the Court first reviews the basis for the Bankruptcy Court's decision, including the various circuits' reasoning relative to defining the term "return." The Court will then outline the parties' respective positions, and finally, set forth its own analysis of the meaning of "return" in the context of this bankruptcy appeal.

1. BANKRUPTCY COURT'S DECISION

Here, the Bankruptcy Court found that the Return at Issue, filed some three years after the IRS assessed Debtor's tax liability, was properly discharged after the filing of the bankruptcy petition. In its decision, the Bankruptcy Court adopted the reasoning of another bankruptcy court's decision, *In re Martin*, 482 B.R. 635 (Bkrtcy. D. Colorado 2012) ("*Martin I*").[5] The *Martin I* court

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prepared by the IRS when the taxpayer fails to prepare a timely return or makes a false or fraudulent return, and the IRS must prepare the return based upon such information as it obtains itself.

[5] At the January 8, 2013 hearing, the Bankruptcy Court stated:

had adopted the reasoning of *Colsen v. United States*, 446 F.3d 836 (8th Cir. 2006). The Court first notes that *Martin I* has since been reversed on appeal by a district court sitting in the Tenth Circuit. *In re Martin*, 500 B.R. 1 (D. Colo. September 23, 2013) ("*Martin II*"). Because *Martin I*'s analysis was essentially the sole basis for the underlying decision here, the Court sets forth that analysis in some detail.

Martin I concerned the dischargeability of (i) an IRS debt for the years 2000 and 2001, (ii) due after the IRS made an assessment in 2004, and (iii) for which the debtor submitted Forms 1040 in 2005. *Martin I*, 482 B.R. 635. The debtor argued that because Form 1040s had been filed, irrespective of the timing or the debtor's motivations, the debt was dischargeable and the plain language of section 523(a)(1)(B)(i) supported the debtor's position. Said differently, the plain

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> the Court notes for the record, after careful review of all of the cases cited on the subject, that the Court finds that Judge Campbell's decision in *In re Martin* at 482 B.R. 635, a 2012 decision out of the District of Colorado [bankruptcy court], to be the most persuasive and will follow the same. For the completeness of the record, this Court will recite the analysis set forth in the same decision....

(Record On Appeal, Exh 15 at 9:15-21, *et seq.*; see also *id.* at 18:20-15 ["I've taken the liberty of basically reading Judge Campbell's decision [in *Martin I*] into the record and cited to the same, so I think that's sufficient."].)

language of Section 523(a) indicates that non-dischargability is required:

(1) for a tax...

(B) with respect to which a return...if required-

(i) was not filed....

In *Martin I*, the debtor urged that because the Form 1040s *were* submitted, section 523(a)(1)(B)(i) could not be applied to prohibit discharge of this debt, even though they were untimely. The *Martin I* court agreed.

The *Martin I* court began its analysis with the question of the definition of a return. As set forth above, no controversy exists that prior to BAPCPA, the Bankruptcy Code was silent on the meaning of the word "return." The *Martin I* court thus turned its attention to the hanging paragraph's language that "the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." *Martin I*, 482 B.R. at 638. The *Martin I* court reasoned that the reference to "applicable filing requirements" could not refer to regular time requirements and due dates for filing a tax return for three reasons: One, such a strict interpretation would mean that any late-filed return would not be a "return" for purposes of dischargeability under section 523(a)(1)(B)(i). Two, such an interpretation would render section 523(a)(1)(B)(ii) surplusage, since it sets forth a separate exception for a return filed "after such return was last due" and less than 2 years prior to the date of bankruptcy. *Martin I*, 482 B.R. at 639. Three, such an interpretation would have the effect of imposing different meanings to the term "return" as between section 523(a)(1)(B)(i) and section 523(a)(B)(ii), contrary to the normal

canons of statutory construction. *Id*. Thus, the bankruptcy court in *Martin I* concluded "'[a]pplicable filing requirements' must refer to considerations other than timeliness, such as the form and contents of a return, the place and manner of filing, and the types of taxpayers that are required to file returns." *Id*. On this basis, the *Martin I* court found that the debtors' late-filed 1040s could qualify as a "return" and were properly dischargeable as they had been filed. *Id*.

The bankruptcy court in *Martin I* then turned to the more traditional approach set forth in *Beard* to determine whether a Form 1040 filed after an assessment constituted a "return." The judge outlined the 3-to-1 split in the circuits with respect to the application of *Beard's* "honest and reasonable attempt" factor when a taxpayer files a post-assessment Form 1040. *Martin I*, 482 B.R. at 640. The Fourth and Seventh Circuits joined the Sixth Circuit in finding a post-assessment Form 1040 not to be an "honest and reasonable attempt to satisfy the requirements of the tax law." *Id*. (*citing In re Hindenlang*, 164 F.3d 1029, 1034–35 (6th Cir.1999); *In re Moroney*, 352 F.3d 902, 906 (4th Cir.2003); and *In re Payne*, 431 F.3d 1055, 1059–60 (7th Cir.2005)). In contrast, the Eighth Circuit disagreed and found the timing or subjective intent of the filer of a post-assessment Form 1040 to be irrelevant. *Colsen*, 446 F.3d at 840. The Eighth Circuit further held that this *Beard* factor should require no more than an objective determination, from the face of the form itself, of an attempt to comply, and not an "inquiry into the circumstances

under which a document was filed." *Id*.[6] The bankruptcy court in *Martin I*, citing both to *Colsen* and to Judge Easterbrook's dissent in *Payne*, reasoned that issues of the taxpayer's intent and timeliness were addressed in subsections 523(a)(1)(B)(ii) and 523(a)(1)(C)[7] and need not be

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[6] Other approaches, post-BAPCPA to the meaning of the term "return" for purposes of non-dischargeability have determined that: (1) state income tax returns filed late, but before any assessment by the taxing authority, qualified as "returns" under the terms of the hanging paragraph, *In re Gonzalez*, BAP MW 13-026, 2014 WL 888460 (B.A.P. 1st Cir. Mar. 6, 2014) (*Beard* factors unnecessary to the analysis); and (2) *any* untimely return fails to "satisfy applicable filing requirements" as stated in section 523(a)'s hanging paragraph. *In re McCoy*, 666 F.3d 924 (5th Cir. 2012). The result of the Fifth Circuit's reasoning in *McCoy* was to make non-dischargeable all tax debts arising from untimely returns, regardless of the reasons for the untimeliness. Neither Debtor nor the IRS espouses the *McCoy* position here, nor is the Court aware of authority in this Circuit to support that approach. Cf. *In re Martin*, 11-62436-B-7, 2014 WL 1330120 (Bankr. E.D. Cal. Mar.31, 2014) (declining to follow *McCoy*, and adopting *Colsen* approach); *In re Pitts*, 497 B.R. 73(Bankr. C.D. Cal. 2013) (declining to follow *McCoy*, adopting *Hindenlang/Moroney/Payne* approach); *In re Smythe*, 10-49799, 2012 WL 843435 (Bankr. W.D. Wash. Mar. 12, 2012)(declining to decide whether McCoy approach or *Hindenlang/Moroney/Payne* approach was correct, since debt was non-dischargeable under either test).

[7] Subsection 523 (a)(1)(C) provides:

incorporated into subsection (1)(B)(i). *Martin I*, 483 B.R. at 640-41.[8] On these grounds the bankruptcy court in *Martin I* found that the tax based on the post-assessment Form 1040 should be discharged, as it met the "objective" requirements of a "return" under subsection 523(a)(1)(B)(i).

2. SUMMARY OF PARTIES' ARGUMENTS

Appellant IRS contends the underlying decision here was based upon legal error. First, Appellant argues that section 523(a)(1)(B)(i) controls because

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> (a) A discharge [in bankruptcy]…does not discharge an individual debtor from any debt—
>
> (1) for a tax … —
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax

11 U.S.C. §523(a)(1)(C).

[8] The bankruptcy judge in *Martin I* dismissed, as dicta, Judge Easterbrook's interpretation of the post-BAPCPA amendments to section 523(a)(1)(B) as meaning that any late-filed return would be non-dischargeable, stating that Judge Easterbrook "may have made this aside without fully considering [its] implications." *Martin I*, 483 B.R. at 641, n.5. To the contrary, it appears significant to Judge Easterbrook's dissenting view that "[a]fter the 2005 legislation, an untimely return can not [sic] lead to a discharge-recall that the new language refers to "'applicable nonbankruptcy law (including applicable filing requirements),'" but a document filed before those amendments could be considered a "return" and dischargeable. *In re Payne*, 431 F.3d 1055, 1060 (7th Cir. 2005).

Debtor never filed a voluntary, self-assessment tax return prior to the IRS's assessment, the money owed is and remains a *tax* debt for which no return was filed thereunder, regardless of any subsequent late-filed return by Debtor. Alternatively, IRS argues that the Court should employ the *Beard* test and the majority understanding of its "honest and genuine endeavor to comply" factor to a post-assessment Form 1040 filing. While the Ninth Circuit has not specifically ruled on this issue, under the reasoning of a majority of circuits and the Ninth Circuit's decision in *Hatton*, the IRS argues that the post-assessment Form 1040 would not constitute a "return" that "satisfies the requirements of applicable nonbankruptcy law" within the meaning of the Tax Code, and would therefore not be eligible for discharge.

For his part, Debtor contends that the approach in *Martin I*, also the Eighth Circuit's approach in *Colsen*, is the correct one. Debtor argues that the filing of a Form 1040 for the 2001 tax year, even if submitted long after the IRS assessed taxes for that year, means that the debt is dischargeable, within the plain meaning of the hanging paragraph and section 523(a)(1)(B)(ii). Debtor further argues that this "objective" approach to the definition of return, which finds compliance with the *Beard* test regardless of when the "return" is submitted, is supported by the Ninth Circuit's pre-BAPCPA decision in *In re Hatton*, 220 F.3d 1057 (9th Cir. 2000) and the Bankruptcy Appellate Panel of the Ninth Circuit in *In re Nunez*, 232 B.R. 778 (B.A.P. 9th Cir. 1999), discussed below.

3. ANALYSIS

The question before the Court is whether the Return at Issue constitutes a "return" for purposes of section 523(a)'s non-dischargeability provisions. The Ninth Circuit has not squarely addressed this question post-BAPCPA for purposes of section 523(a). However, the Ninth Circuit's pre-BAPCPA ruling in *Hatton* addresses the meaning of a "return" under section 523(a) in circumstances analogous to the case at bar. *Hatton*, 220 F.3d 1057. The reasoning is instructive and not undermined by the inclusion of the BAPCPA's hanging paragraph.

In *Hatton*, as here, the IRS prepared a substitute return on the debtor's behalf when he failed to file a federal return for one tax year. *Hatton*, 220 F.3d at 1058-59. The IRS issued an assessment, and then undertook collection activities. Hatton never denied the tax liability. Only after ignoring several delinquency notices and negotiating an installment agreement with the IRS did he begin to repay the tax debt. Prior to full repayment, Hatton filed for bankruptcy and sought discharge of the remainder owed. The question before the Ninth Circuit in *Hatton* was whether the substitute return and installment agreement satisfied the *Beard* factors and constituted a "return" for purposes of section 523(a)(1)(B)(i). Id. at 1059. The court found that neither document, nor the combination, satisfied the "honest and reasonable attempt" prong of the *Beard* test. *Hatton*, 220 F.3d at 1061. The court stated that "belated acceptance of responsibility… does not constitute an honest and reasonable attempt to comply with the requirements of the tax law." *Id*. Because the debtor "made every attempt to avoid paying his taxes until the IRS left him with no

other choice" and "only cooperated with the IRS once collection became inevitable," the debt was not properly exempted from discharge under section 523. *Id.*[9]

Here, Debtor incorrectly contends that *Hatton* requires a court to apply the *Beard* factors as an "objective" test which does not consider the subjective intent of the debtor. To the contrary, the Ninth Circuit in *Hatton* held that debtors' tax liabilities are not dischargeable when they fail to comply with our tax system's voluntary self-assessment principles, and instead refuse to cooperate until well past the point of an

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[9] The Court notes that the Bankruptcy Appellate Panel of the Ninth Circuit, in *In re Nunez*, 232 B.R. 778 (B.A.P. 9th Cir. 1999), held that tax forms filed by a debtor years after the IRS had prepared substitute returns and assessed tax liability for the years in question could still be considered "honest and reasonable" attempts to comply with tax law, and therefore "returns" for tax dischargeability purposes. The Bankruptcy Appellate Panel in *Nunez* relied heavily on its own prior decision (*In re Hatton*, 216 B.R. 278 (B.A.P. 9th Cir. 1997). That decision was later reversed by the Ninth Circuit Court of Appeals in *In re Hatton*, 220 F.3d 1057, 1061 (9th Cir. 2000). Thus, the holding *in In re Nunez* is, at least arguably, implicitly overruled by the Ninth Circuit's decision in *Hatton*, 220 F.3d 1057. At a minimum, the cases may be harmonized on the reasoning that "each case should be reviewed on an individual basis" and the debtor given the opportunity to "make a specific factual showing that his or her late submissions were a reasonable attempt to comply with the tax law." *In re Rushing*, 273 B.R. 223, 227 (Bankr. D. Ariz. 2001) (declining to find the Ninth Circuit overruled *In re Nunez* in *Hatton*).

assessment. *Hatton*, 220 F.3d 1057, 1061 (9th Cir. 2000). While the other three *Beard* factors are based on objective, face-of-the-documents considerations, the "honest and reasonable attempt" factor necessarily involves an individualized review of the equities. Thus, Debtor's argument that the Ninth Circuit's "only problem with the taxpayer seeking to discharge the liability was that the taxpayer never actually filed a return" (Appellee's Opening Brief at 14:24-25) simply disregards the reasons stated in *Hatton* for finding non-dischargeability.

Likewise, a majority of the federal circuit courts have held that a late-filed, self-assessment Form 1040 does not constitute a "return" that "satisfies the requirements of applicable nonbankruptcy law" because it is not an "honest and reasonable attempt to comply with the tax law." *Hindenlang*, 164 F.3d 1029, 1034–35 (6th Cir. 1999); *In re Moroney*, 352 F.3d 902, 906 (4th Cir. 2003); *In re Payne*, 431 F.3d 1055, 1059–60 (7th Cir. 2005); see also *In re Wogoman*, No. BR 11-11044-SBB, 2011 WL 3652281 (Bankr. D. Colo. Aug. 19, 2011) *aff'd*,475 B.R. 239 (10th Cir. B.A.P. 2012) (interpreting hanging paragraph and the Tax Code to mean that a Form 1040 filed after the IRS had created a substitute return and assessed the tax liability was not a "return" for purposes of discharge of the tax liability "under the facts and circumstances of this case"); *Mendes v. C.I.R.*, 121 T.C. 308, 331 (2003) (fact that return was filed more than eight years after the due date and two years after IRS notice of deficiency were proper considerations under *Beard* test, establishing return was not an "honest and reasonable attempt" to comply with the tax laws) (Vasquez, J.,

concurring). The Fourth Circuit in *Moroney* stated the principle succinctly: "to belatedly accept responsibility for one's tax liabilities, only when the IRS has left one no other choice, is hardly how honest and reasonable taxpayers attempt to comply with the tax code." *Moroney v. United States*, 352 F.3d 902, 906 (4th Cir. 2003); see also *In re Mallo*, No. 10-12979 MER, 2013 WL 49774 (Bankr. D. Colo. Jan. 3, 2013) *aff'd*, 498 B.R. 268 (D. Colo. 2013) (late filed returns did "not represent an honest and reasonable attempt to comply with tax law[; r]ather, they are belated attempts to create a record of compliance when none really exists, long after the IRS had filed substitutes for returns and provided notices of deficiency"). Or, as Judge Posner stated in *Payne*, "a purported return that does not satisfy" the honest and reasonable attempt requirement "does not play the role that a tax return is intended to play in… our federal tax system[] of self-assessment… while a 'return' that satisfies the [other] three conditions comports with the literal meaning of the word, it does not comport with the functional meaning." *In re Payne*, 431 F.3d at 1057.

Courts taking the minority view have opined that the language of the hanging paragraph, particularly when read together with section 523(a)(B)(i) and (ii), indicates that timeliness of the return has no bearing on whether it meets the definition of "return." *Colsen*, 446 F.3d at 840. *Martin I*, 483 B.R. at 641. According to interpretation of the bankruptcy court in *Martin I*, section 523(a)(1)(B)(ii) already addresses late filing of a return, making any consideration of timeliness superfluous to the definition of "return" itself, and therefore irrelevant to section 523(a)(B)(i). *Martin*

I, 483 B.R. at 641. The Court cannot agree with this interpretation of the statutory language.

First, the hanging paragraph added by BAPCPA makes clear that a "return" must satisfy the requirements of non-bankruptcy law. Thus, the hanging paragraph in no way excludes the *Beard* factors, but indeed incorporates them since they are relevant, long-standing non-bankruptcy law on the meaning of return. Moreover, there is no inconsistency between: (1) taking late-filing, and the reasons therefore, into account in deciding whether a document is a "return" at all for purposes of *Beard*, and (2) barring discharge of returns that are filed untimely and "after two years before the date of the filing of the petition." It is easy to imagine a scenario under which a late-filed document meets the *Beard* definition of "return," *i.e.*, is filed late but in good faith, yet is still barred from discharge under section 523(a)(1)(B)(ii). Cf. *Payne*, 431 F.3d at 1058 (the *Beard* test considers whether late return is "a *reasonable* endeavor to satisfy the taxpayer's obligations, as it might be if the taxpayer had tried to file a timely return but had failed to do so because of an error by the Postal Service") (emphasis in original). Likewise, the opposing scenario – a return filed late but *within* the two years prior to the filing of the petition – would mean that discharge was not necessarily barred by section 523(a)(1)(B)(ii), unless the "return" failed the *Beard* test (as here). *Id.* at 1058 (document purporting to be a return, with all the data necessary and signed under penalty of perjury is not an honest and reasonable attempt if deliberately mailed to Arlington National Cemetery instead of IRS). Finally, the fact that the second sentence of the hanging paragraph allows a return

prepared by the IRS with the taxpayer's cooperation (under section 6020(a)) to be considered a "return" for purposes of section 523(a), but not a return prepared by the IRS without such cooperation (under section 6020(b)) is, again, completely consistent with concerns set forth in the *Beard* test: whether the taxpayer made an "honest and reasonable attempt to comply" with the tax laws. Thus, there is nothing about taking timeliness and the reasons therefore into account, per *Beard*, that renders any of the language in the hanging paragraph or section 523(a)(1)(B)(ii) superfluous or inoperable.

In examining the holdings of the various courts, the reasoning therefore, and the language of section 523(a)(1)(B) itself, the Court finds that the majority position on this issue is the correct one. Since the hanging paragraph in Section 523(a)(1) does not completely define the term "return," it is appropriate for the Court to look to long-established authority concerning the definition of "return" under "applicable nonbankruptcy law," primarily the Tax Code.[10] Similarly, the hanging

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[10] The Ninth Circuit has previously considered and rejected the argument that the term "return" must have the same meaning in all parts of the Tax Code, instead acknowledging "the possibility that the same word could have a different meaning in different parts of the code," and concluding that "where, as here, a word could well have a different meaning in different statutory contexts, a purpose-oriented approach should be used when interpreting the meaning of the word as it is used in different sections of the Code." *Conforte v. Commissioner*, 692 F.2d 587, 591 (9th Cir. 1982); see also *Payne*, 431 F.3d at 1058-59 ("return" can "mean two

paragraph does nothing to undermine the four-factor test or years of jurisprudence following *Beard*. Consistent with the Tax Code's standards for a "return," as stated in Beard and the Ninth Circuit's decision in *Hatton*, the meaning of "return" must take into account the late-filers' evidence of a good faith attempt to comply with the tax laws. Where, as here, the taxpayer and bankruptcy debtor fails to comply with self-assessment and payment of tax obligations until years after the IRS has initiated action, created a substitute return, assessed and begun collection proceedings, the Court simply cannot find his conduct to be "an honest and reasonable attempt to comply with the tax law." This approach does not mean, as Debtor argues, that the "honest and reasonable attempt" factor creates a *per se* rule barring taxpayers from filing returns once the IRS has created a substitute return. To the contrary, this prong of the test is meant to consider each case on its particular facts, an approach which necessarily precludes a *per se* determination.

In sum, Debtor's belated Form 1040 for Tax Year 2001 does not meet the definition "return" under established tax law. It follows that the tax liability assessed by the IRS for Tax Year 2001 is a "tax… with respect to which a return… was not filed or given," and is not dischargeable in bankruptcy pursuant to section 523(a)(1)(B)(i).11[11]

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different things in different parts of the federal tax law"). Debtor's arguments on this point are unpersuasive.

[11] Because the Court finds that Debtor's late-filed Form 1040 does not make his previously assessed tax liability dischargeable, the Court need not reach IRS's

III. CONCLUSION

Consequently, the Court **REVERSES** the Bankruptcy Court's Order that the subjected tax liability was excepted from discharge under 11 U.S.C. § 523(a)(1)(B)(i), and granting summary judgment in favor of Debtor.

In addition, Debtor's Motion to Strike Defendant's Notice (Dkt. No. 20) is **DENIED**. The IRS's Notice of Recent Decision (Dkt. No. 19) was not filed improperly.

This matter is **REMANDED** to the Bankruptcy Court for proceedings consistent with this Decision, including entry of judgment in favor of IRS.

IT Is So ORDERED

Date: April 29, 2014

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alternative argument that the tax assessment records a "debt" for the assessed taxes that cannot be discharged pursuant to 11 U.S.C. sections 523(a)(1)(B)(i) and (19). However, the Court notes that, post-BAPCPA, courts have reached differing decisions on the viability of this argument as well. *Cf. In re Martin*, 500 B.R. 1, 7 (D. Colo. 2013) (rejecting); *In re Mallo*, No. 10-12979 MER, 2013 WL 49774 (Bankr. D. Colo. Jan. 3, 2013) *aff'd,* 498 B.R. 268 (D. Colo. 2013) (late returns did not satisfy "return" definition of section 523(a)(19)); *In re Smythe*, 10-49799, 2012 WL 843435 (Bankr. W.D. Wash. Mar. 12, 2012)(upholding).

Entered on Docket January 31, 2013
GLORIA L. FRANKLIN, CLERK
U.S BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
The following constitutes the
order of the court.
Signed January 31, 2013
Roger L. Efremsky
U.S. Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re)
MARTIN SMITH)
Debtor)
)
MARTIN SMITH)
Plaintiff)
v.)
CALIFORNIA FRANCHISE)
TAX BOARD)
INTERNAL REVENUE SERVICE)
Defendants)

Case No.: 11-73272

Chapter 13
AP No. 12-04086

ORDER GRANTING PLAINTIFF'S REQUEST
FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Judge: Hon. Roger L. Efremsky
Place: U.S. Bankruptcy Court
1300 Clay Street, Courtroom 201
Oakland, CA 94612

For the reasons stated on the record, the Court orders as follows:

1. Plaintiff's Motion for Summary Judgment is GRANTED.

2. Defendant. United States of America, Motion for Summary Judgment is DENIED.

3. Plaintiff's IRS tax liabilities, including all interest and penalties, for tax years 2000. 2001 2002. 2003, 2004, 2005 and 2006 are discharged by the discharge issued on May 11, 2012 in case number 11-73272.

Approved as to Form and Content

Dated: 1/29/2013
/s/ Chong Hong
Chong S. Hong. Attorney for Defendant,
United States of America

****END OF ORDER****

Court Service List
NONE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re)
MARTIN SMITH,)
)
Debtor)
)
SMITH,)
Plaintiff)
v.)
)
CALIFORNIA FRANCHISE)
TAX BOARD, et al.,)
)
Defendants.)

Case No. 11-73272
Chapter 7

January 8, 2013
Oakland, California

Adversary Proceeding
Case No. 12-04086

STATUS CONFERENCE

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROGER L. EFREMSKY,
UNITED STATES BANKRUPTCY JUDGE.

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OAKLAND, CALIFORNIA - JANUARY 8, 2013 - 1:43 P.M.

THE CLERK: Line Item Number 8, Adversary Number 12-4086, Smith versus California Franchise Tax Board, et al.

THE COURT: I'm going to call this at the second to the last on the calendar.

(Matter recalled at 2:18 p.m.)

THE COURT: All right. Returning to Line Item --

THE CLERK: 8.

THE COURT: — Number 8 in the matter of Smith versus California Franchise Tax Board.

MR. HONG: Good afternoon, Your Honor. Chong Hong for the United States.

THE COURT: Good afternoon, counsel.

MS. YIU: Good afternoon, Your Honor. Karen Yiu on behalf of Defendant, California Franchise Tax Board.

THE COURT: All right.

MR. GOLDSTEIN: And good afternoon. Rob Goldstein appearing on behalf of the Debtor, Martin Smith.

THE COURT: Okay. All right. Anything else to be added? Basically, the Franchise Tax Board is following in the shoes of the IRS?

MS. YIU: Basically, but we'd like to see what the outcome of the motion for summary

judgment is to decide what the proper course of action should be for my client.

THE COURT: All right. So, basically -- but what I'm saying is that, depending on how that ruling goes with regard to the IRS, then the FTE is going to act accordingly?

MS. YIU: Yes.

THE COURT: Okay. All right. Anything else?

MR. GOLDSTEIN: Just depends what you say, Your Honor.

THE COURT: All right. Mr. Hong, anything else?

MR. HONG: No, Your Honor.

THE COURT: Okay. All right. You can have a seat. All right. The matter is submitted, then?

MR. GOLDSTEIN: It is, Your Honor.

MR. HONG: Yes, Your Honor.

THE COURT: All right. Thank you. All right. This matter comes before the Court on the cross motions for summary judgment filed by Plaintiff, Martin Smith, and by the United States of America. The Court, having reviewed the file and being otherwise advised on the premises, finds as follows.

With regards to the undisputed facts, the Debtor filed his voluntary Chapter 7 on December 22, 2011. The Court issued a discharge to Debtor on May 11, 2012. On July 31, 2006, the IRS assessed a tax against Mr. Smith for the tax year 2001 based on under the authority of 26 U.S.C. 620(b) known as IRS assessment based upon a Substitute For Return ("SFR"). The assessment included $70,662 in income tax, a $15,898.50 penalty under 26 U.S.C. Section 6651(a)(1), and a $2,823.93 penalty under 26 U.S.C. Section 6651 (a) (2) .

Mr. Smith filed an original return with the IRS on May 26, 2009 with the language "original return to replace SFR" written on the very top of Form 1040 Tax Year 2001. The SFR created by the IRS only included adjusted gross income of $195,874. Mr. Smith's original tax return reported adjusted gross income of $300,235, an increase of $104,36I in reportable taxable income. The IRS accepted Mr. Smith's original return with the language "original return to replace SFR" or. November 11, 2009. Proof of this acceptance is reflected in the fact that, based upon the totality of the information provided by the taxpayer under penalty of perjury, the IRS assessed an additional tax of $40,095 on November 23, 2009. Thus, instead of owing $70,662 in principal tax, excluding penalties and interest, Mr. Smith owed the IRS $110,757 in principal, excluding penalties and interest. With penalties and interest, the amount Mr. Smith legally owed to the IRS essentially doubled based upon his self-reporting.

In an effort to resolve the 2000 through 2006 federal tax liabilities, Mr. Smith submitted an offer in compromise to the IRS on July 14, 2009. The offer in compromise was submitted at a time when Mr. Smith was gainfully employed. The IRS rejected Mr. Smith's offer in compromise on or about December 11, 2009, demanding full payment of all liabilities, including the 2001 tax year.

After submitting the offer in compromise, Mr. Smith lost his job. On February 11, 2011, he completed IRS Form 43A, Collection Information Statement for Wage Earners and Self-Employed Individuals, and provided it to the IRS along with his unemployment compensation stubs and other documents to support a temporary non-collectable status with the IRS. On or about July 18, 2011, the

IRS sent a letter to Mr. Smith based upon a call on or about June 22, 2011 in follow-up to the hardship request granting Mr. Smith a payment plan of $150 per month to resolve the tax liabilities at issue. Per the agreement, Mr. Smith paid the IRS $150 each month up until the time he filed this bankruptcy proceeding on December 22, 2011.

Plaintiff brought his adversary proceeding against the Internal Revenue Service seeking a determination from the Court that his tax liabilities for Tax Years 2000 through 2006 are dischargeable. The United States represents its agency, the IRS, in this proceeding. Cross motions for summary judgment were brought under Bankruptcy Local Rule 1001-2, which incorporates Civil Local Rule 56 and Federal Rule of Bankruptcy Procedure 56 which incorporates Federal Rule of Civil Procedure 56. The United States does not dispute that all tax liabilities, including penalties and interest for tax years 2000, 2002, 2003, 2004, 2005 and 2006 are dischargeable. The United States does not dispute that the penalties and interest thereon for Plaintiff's 2001 tax year are dischargeable. The United States asserts that, as a matter of undisputed fact and law, Plaintiff's tax liability and interest thereon for his 2001 tax year are not dischargeable to the extent that the tax liability did not arise from a tax return submitted by Plaintiff to the Internal Revenue Service.

As noted previously, because Plaintiff did not file a tax return for 2001 tax year, the IRS determined and assessed a $70,662 tax liability for that year. After the IRS had assessed tax pursuant to its determination, Plaintiff submitted a Form 1040 U.S. Individual Income Tax Return for his 2001 tax year. The IRS made a subsequent assessment of $40,095 against Plaintiff for his 2001

tax year based on the Form 1040. The IRS does not dispute that the subsequent $40,095 tax liability is dischargeable. The IRS asserts its assessment of $70,662 against Plaintiff for his 2001 tax year based on the IRS's determination of Plaintiff's tax liability is not dischargeable because the exception to the discharge under 11 U.S.C. Section 523(a)(1)(B)(i) applies. Section 523(a)(1)(B)(i) states that a tax for which a tax return was not filed or given is not dischargeable. Because the IRS determined the $70,662 tax liability, such tax liability is not based on a tax return that Plaintiff filed or gave to the IRS. Plaintiff disagrees and contends that the tax is dischargeable.

Alternatively, the IRS contends the $70,662 tax liability is nor dischargeable because it was not related to a return under the language of 11 U.S.C. Section 523(a). Section 523(a) states that a document is a return for dischargeability purposes only if the document meets the requirements of applicable non-bankruptcy law, including applicable filing requirements. The Section 523(a)(1)(B)(i) exception applies because the Form 1040 that Plaintiff submitted more than seven years after it was due did not meet applicable filing requirements. Again, Plaintiff disagrees and contends the tax is dischargeable.

The dispute in this adversary proceeding concerns whether the Debtor's 2001 Form 1040 filed some three years after his tax liability for this year was assessed by the IRS is a return such that the taxes owed by Debtor for 2001 is dischargeable. Debtor relies on a literal reading of Section 523(a)(1)(B)(i). Debtor argues that whether a return was filed should depend on an objective analysis of the document filed, not a subjective test of the taxpayer's motivation for filing the return.

Finally, he asserts that the United States' position that a return filed after a tax debt is assessed is not a return is net logical. Debtor contends that BAPCPA amendment to Section 523(a) does not change the analysis in this case.

The United States argues that the tax return filed after assessment of the tax liability is not a return under Section 523(a)(1)(B)(i). It contends that such a return does not satisfy the requirements of applicable non-bankruptcy law as required by BAPCPA amendment because the purpose of the filing – to generate a self-assessment of tax – has been mooted by the prior IRS tax assessment. The taxpayer, by post-assessment filing, cannot alter the fact that the tax debt was not self-assessed and is therefore a tax debt for which no return was filed.

Summary Judgment Standards

Federal Rule of Civil Procedure 56(a) made applicable in the adversary proceeding by Federal Rule of Bankruptcy Procedure 7056 provides that summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law. Both Debtor and the United States contend that the undisputed facts of this case entitle them to a judgment as a matter of law.

At this point the Court notes for the record, after careful review of all of the cases cited on the subject, that the Court finds that Judge Campbell's decision in *In re Martin* at 482 B.R. 635, a 2012 decision out of the District of Colorado, to be the most persuasive and will follow the same. For the completeness of the record, this Court will recite the analysis set forth in the same decision.

Section 523 of the Bankruptcy Code

This section provides in relevant part that (a) a discharge under Section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does net discharge an individual debtor from any debt (1) for a tax, (b) with respect to which a return if required (i) was not filed.

The BAPCPA Amendment

Prior to October 2 005, the Bankruptcy Code had no definition of the term "return." BAPCPA added the following definition of "return" in an unnumbered section at the end of Section 523(a) ("the "BAPCPA Amendment"). "For purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable non-bankruptcy law, including applicable filing requirements. Such term includes a return prepared pursuant to Section 6020 (a) of the Internal Revenue Code of 1986 or similar state or local law, or a written stipulation to a judgment, or a final order entered by non-bankruptcy tribunal, but does not include a return made pursuant to Section 6020(b) of the Internal Revenue Code of 1986 or a similar state or local law."

Neither Debtor nor the United States argues that this case involves returns prepared pursuant to Section 6020(a) or 6020(b) of the Tax Code, nor does it involve a written stipulation to a judgment or a final order of a non-bankruptcy tribunal. Thus, the only sentence of the BAPCPA amendment that impacts the analysis in this case is the first, which defines a return as something that satisfies the requirements of applicable non-bankruptcy law, including applicable filing requirements.

Some courts have interpreted applicable filing requirements in the BAPCPA amendment to

encompass the time for filing a tax return. Under this reading, any late-filed return other than one prepared pursuant to Section 6020(a) of the Tax Code or a similar provision in state or local law does not meet the BAPCPA definition of a return, and all taxes relating to late-filed returns are nondischargeable under Section 523(a)(1)(B)(i). See *McCoy v. Mississippi State Tax Commission* (*In re McCoy*), 666 F.3c 924, 932 (5th Cir. 2012).

This interpretation says too much, however, essentially rendering Section 523(a) (1)(B)(ii) superfluous. Section 523(a)(1)(B)(ii) provides that taxes for which a return was filed after such return was last due and less than two years prior to the date of bankruptcy are not discharged. This section refers specifically to late-filed tax returns and is the only place in Section 523(a) where late filing is specifically referenced. To read "return" in Section 523(a)(1)(B)(i) as meaning timely-filed return would make the discharge exception of Section 523(a)(1)(B)(ii) entirely coincidental with that of Section 523(a)(1)(B)(i) except in the case of tax returns prepared under Section 6020(a) of the Tax Code more than two years prior to bankruptcy. A statute should be construed so that effect is given to all its provisions so that no part will be inoperative or superfluous, void or insignificant. See *Hibbs v. Winn*, 542 U.S. 86, 101, 124 S.Ct. 2276 (quoting *2A N. Singer, Statutes and Statutory Construction § 46.06*, Pages 181-186 (Rev. 6th Ed. 2000)).

Such an interpretation also requires the use of different definition of the term "return" in Section 523(a)(1)(B)(I) and in Section 523(a) (1) (B) (ii) . Because Section 523(a) (1) (B) (ii) speaks of returns filed after the date on which such return was last due, this contravenes the normal rule of

statutory construction that identical words used in different parts of the same act are intended to have the same meaning. See *Gustafson v. Alioyd Company, Inc.,* 513 U.S. 561, 570, 115 S.Ct. 1061 (1995).

There is nothing in the Legislative History to the BAPCPA amendment that indicates that it was intended to have such an effect on Section 523(a)(1)(B)(ii). The Legislative History says only that the amendment was intended to provide that a return prepared pursuant to Section 6020(a) of the Internal Revenue Code or similar state or local law constitutes filing of a return and the debt can be discharged, but that a return filed on behalf of a taxpayer pursuant to Section 6020(b) of the Internal Revenue Code or similar state or local .law does not constitute filing a return and the debt cannot be discharged. H.R. Rep. No. 109-31(1) (2005), reprinted in 2005, U.S.C.C.A.N. 88, 167.

For all these reasons, the Court rejects the interpretation of the BAPCPA amendment in which timeliness of a return is deemed applicable filing requirement. Applicable filing requirements must refer to considerations other than timeliness, such as the form and contents of a return, the place and manner of filing, and the types of taxpayers that are required to file returns. These applicable filing requirements are found in statutes 26 U.S.C. Section 6011, regulations, and the case law. Pre-BAPCPA case law is therefore relevant to determine whether a disputed document sufficiently complies with requirements concerning form, manner, contents and place of filing and whether a document otherwise satisfies the requirements of non-bankruptcy law so to be considered a return for purposes of Section 523(a).

Pre-BAPCPA Case Law

Prior to the effective date of BAPCPA, courts looked to the Supreme Court and Tax Court, cases to determine whether a document filed by a debtor constituted a return sufficient to avoid the discharge exception of 523(a)(1)(B)(i). The most common rubric used, referred to as the "Beard test," has four elements. To be considered a return, a document must (1) contain sufficient information to permit a tax to be calculated; (2) purport to be a return; (3) be sworn as to such; and (4) evince an honest and genuine endeavor to satisfy the law. *Beard v. Commissioner,* 82 T.C. 7 66, 774-79, 1984 WL 15573 (1984) *affd*, 793 F.2d 139 (6th Cir. 1986).

The Beard test is a compilation of factors from two Supreme Court decisions involving whether forms filed by taxpayers constituted returns for the purpose of determining the date on which the statute of limitations for deficiency assessments began to run. *In re Zellerbach Paper Company v. Helvering*, 293 U.S. 172, 180 (55 S.Ct. 127, 79 L.Ed. 264, 1934). The Court explained that perfect accuracy or completeness is not necessary to rescue a return from nullity if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law. In *Germantown Trust Co. v. Commissioner*, 309 U.S. 304, 309 (60 S.Ct. 566, 84 L.Ed. 770, 1940), the Court stated that where a taxpayer in good faith makes what he deems to be an appropriate return which discloses all of the data from which the tax can be computed, a return has been filed.

When faced with the question of whether a return has been filed for discharge purposes, if a taxpayer files a sworn 1040 containing accurate information after assessment is made by the IRS, the Courts of Appeal have differed in their

application of the fourth element of the Beard test. The Sixth Circuit has ruled in favor of the Government in this situation, finding that 1040 forms filed after an assessment has been made served no tax purpose. Thus, the debtor's actions in filing the 1040s were not an honest and reasonable attempt to satisfy the requirements of the tax law. The 1040s were not returns for purposes of Section 523(a)(1)(B)(i), and the assessed liabilities were not dischargeable. See *United States v. Hindenlang*, 164 F.3d 1029, 1C34-1035 (6th Cir. 1999).

The Fourth and the Seventh Circuits have come to the same conclusion. See *In re Moroney v. United States*, 352 F.3d 902, 906 (4th Cir. 2003). A form filed after assessment does not serve the basic self-reporting purpose of tax return. And *In re Payne*, 431 F.3d 1055, 1059-60 (7th Cir. 2005).

The opposite conclusion, however, was reached by the Eighth Circuit in *Colsen v. United States* at 446 F.3d 836 (8th Cir. 2006). Agreeing with the reasoning and conclusion of Judge Easterbrook's dissent in *Payne*, the Eighth Circuit ruled that, for the purposes of Section 523(a)(1)(B)(i), the determination of whether a document evinces an honest and genuine attempt to satisfy the law under the Beard test does not require consideration of the timing of the taxpayer's filing or of the filer's intent. Rather, this prong of the test should be an objective one determined from the face of the form itself, not from the filer's delinquency or the reasons for it. The filer's subjective intent is irrelevant. 446 F.3d at 840. Thus, where the debtor's 1040s contained data that allowed for the accurate computation of his taxes, they served a valid purpose of the tax laws and were properly found to be returns.

Accordingly, the tax liability shown on the returns was dischargeable in the debtor's bankruptcy filed four years later.

The Court agrees with the analysis of Judge Easterbrook and the Eighth Circuit. Policies promoted by excepting taxes resulting from untimely and/or fraudulent tax returns from discharge are addressed in other sections of Section 523(a)(1). Section 523(a)(1)(B)(ii) provides that if a return is not filed when due, the taxes are not discharged in any bankruptcy filed within the two-year period after the return is actually filed. Section 523(a)(1)(C) provides no discharge at all for tax debts resulting from fraudulent returns or if the debtor willfully attempts to evade or defeat a tax. To graft the concept of timeliness and fraud into the meaning of "return" in Section 523(a)(1)(B)(i) is not only unnecessary in light of Sections 523(a)(1)(B)(ii) and 523(a)(1)(C) but distorts what is otherwise plain statutory language concerned only with whether a return was filed.

The Court notes for the record that if the Internal Revenue Service had objected or moved for nondischargeability under Section 523(a)(i)(C), the result might be quite different here.

Adding the further distinction, as the United States argues in this case, between a return filed prior to an assessment and one filed after an assessment, with the former considered a return for purposes of Section 523(a)(1)(3)(i) but the latter not, does violence to the convention of statutory interpretation referenced above. Moreover, the only purpose served by this distinction is to promote self-assessment of tax liability. No matter the importance of self-assessment to the function of our system of tax collection, Congress so far has elected not specifically to include it as an additional

condition to discharge of tax liability under Section 523(a)(1)(B)(i). Congress knew how to make the date of assessment relevant to dischargeabi1ity, as it did by incorporating Section 507(a)(8)(A)(ii), taxes assessed within 240 days before the date of the filing of the petition, into the discharge exception of Section 523(a)(1)(A). If filing a return after an assessment is made was relevant to discharge under Section 523(a)(1)(B)(i), one would certainly expect a more explicit reference in the statute.

In conclusion, a document is a return for purposes of Section 523(a)(1)(B)(i) if it complies with applicable filing requirements concerning the form and contents of a return, the place and manner of filing, and the types and classification of taxpayers that are required to file returns, and if it is otherwise in compliance with requirements of non-bankruptcy law. In making the determination of whether a document evinces an honest and genuine endeavor to satisfy the law, an objective test based on the face of the document, not the timeliness of its filing, must be used. Using these tests, the undisputed fact is this case demonstrates that Debtor's 2001 Form 1040 was a return and the debt owed the United States as shown on this return is not within the discharge exception of Section 523(a)(1)(B)(i).

Accordingly, it is ordered that Plaintiff's motion for summary judgment is granted, and it is further ordered that Defendants' motion for summary judgment is denied, and it is further ordered that the judgment shall be entered in favor of Plaintiff, declaring that the debt owed by the Plaintiff to the United States for his 2000, 2001 through 2006 taxes was discharged by the

discharge issued on May 11, 2012 in Case No. 11-73272.

Any questions?

MR. GOLDSTEIN: No, Your Honor. Thank you.

THE COURT: All right. Who is going to prepare the orders and the judgments?

MR. GOLDSTEIN: I can prepare one.

THE COURT: Okay. If you can do that, and just say it's for the reasons stated on the record.

MR. HONG: Your Honor?

THE COURT: Yes, Mr. Hong?

MR. HONG: Will a written opinion be issued on this matter?

THE COURT: I'm not. I don't think -- one of the complaints I have is I think bankruptcy judges tend to write too much on things that have been already covered. I've taken the liberty of basically reading Judge Campbell's decision into the record and cited to the same, so I think that's sufficient.
So I think it can be very limited to just simply "For the reasons stated on the record."

MR. HONG: Okay.

THE COURT: All right?

MR. HONG: Okay. Thank you, Your Honor.

THE COURT: All right. Thank you. MR.

MR. GOLDSTEIN: Thank you. (Proceedings concluded at 2:43 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter.
Digitally signed by K Rehling
Kathy Rehling
Transcripts
Date: 2013.02.16 23:49:43 -06'00'
Kathy Rehling, CET**D-444
Certified Electronic Court Transcriber

IRS ACCOUNT TRANSCRIPT

Internal Revenue Service
United States Department of the Treasury

This Product Contains Sensitive Taxpayer Data

Account Transcript

Request Date: 12-21-2011
Response Date: 12-21-2011
Tracking Number: 100119478861

FORM NUMBER: 1040A
TAX PERIOD: Dec. 31, 2001

TAXPAYER IDENTIFICATION NUMBER: -3364

MARTIN D SMITH

<<<<POWER OF ATTORNEY/TAX INFORMATION AUTHORIZATION (POA/TIA) ON FILE>>>>

--- ANY MINUS SIGN SHOWN BELOW SIGNIFIES A CREDIT AMOUNT ---

ACCOUNT BALANCE:	189,330.38	
ACCRUED INTEREST:	78,888.73	AS OF: Jan. 02, 2012
ACCRUED PENALTY:	0.00	AS OF: Jan. 02, 2012

ACCOUNT BALANCE PLUS ACCRUALS
(this is not a payoff amount): 268,219.11

** INFORMATION FROM THE RETURN OR AS ADJUSTED **

EXEMPTIONS:	00
FILING STATUS:	Single
ADJUSTED GROSS INCOME:	300,235.00
TAXABLE INCOME:	295,685.00
TAX PER RETURN:	0.00
SE TAXABLE INCOME TAXPAYER:	80,400.00
SE TAXABLE INCOME SPOUSE:	0.00
TOTAL SELF EMPLOYMENT TAX:	18,274.00

RETURN DUE DATE OR RETURN RECEIVED DATE (WHICHEVER IS LATER)	Dec. 15, 2003
PROCESSING DATE	Jan. 05, 2004

TRANSACTIONS

CODE	EXPLANATION OF TRANSACTION	CYCLE	DATE	AMOUNT
150	Substitute tax return prepared by IRS 56210-347-27267-3		01-05-2004	$0.00
960	Appointed representative		09-23-2002	$0.00
140	Inquiry for non-filing of tax return		03-17-2003	$0.00
570	Additional account action pending		01-05-2004	$0.00
420	Examination of tax return		01-29-2004	$0.00
590	Tax return not filed		07-06-2004	$0.00
560	IRS can assess tax until		07-07-2006	$0.00

IRS ACCOUNT TRANSCRIPT

270	Penalty for late payment of tax	20062908 07-31-2006	$14,1
170	Penalty for not pre-paying tax	20062908 07-31-2006	$2,823.93
60	Penalty for filing tax return after the due date	20062908 07-31-2006	$15,898.95
300	Additional tax assessed by examination	20062908 07-31-2006	$70,662.00
	49247-592-20452-6		
336	Interest charged for late payment	20062908 07-31-2006	$23,123.87
270	Penalty for late payment of tax	20064108 10-23-2006	$3,533.10
290	Additional tax assessed	20064108 10-23-2006	$0.00
	98254-672-05016-6		
971	Tax period blocked from automated levy program	02-12-2007	$0.00
582	Lien placed on assets due to balance owed	05-18-2007	$0.00
360	Fees and other expenses for collection	06-11-2007	$16.00
971	Notice issued CP 071C	07-21-2008	$0.00
470	Claim pending	06-19-2009	$0.00
480	Offer in compromise received	07-14-2009	$0.00
599	Tax return filed	05-26-2009	$0.00
270	Penalty for late payment of tax	20094508 11-23-2009	$10,023.75
160	Penalty for filing tax return after the due date	20094508 11-23-2009	$9,021.38
290	Additional tax assessed	20094508 11-23-2009	$40,095.00
	19254-703-18150-9		
971	Notice issued CP 0021	11-23-2009	$0.00
481	Denied offer in compromise	12-11-2009	$0.00
480	Offer in compromise received	01-11-2010	$0.00
481	Denied offer in compromise	01-21-2011	$0.00
971	Tax period blocked from automated levy program	03-28-2011	$0.00
971	Collection due process Notice of Intent to Levy -- issued	05-27-2011	$0.00
971	Collection due process Notice of Intent to Levy -- return receipt signed	06-01-2011	$0.00
971	Installment agreement established	07-07-2011	$0.00

This Product Contains Sensitive Taxpayer Data