No. 16-

IN THE

Supreme Court of the United States

CHRISTOPHER MICHAEL JUSTICE,

Petitioner,

v.

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2005 the Bankruptcy Code was substantially changed by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Section 523(a) provides five (5) categories of tax debts which are excepted from discharge. They are:

1) Priority tax debts found under 11 U.S.C. 507(a)(8) (*i.e.*, taxes in which the bankruptcy filing date is less than three [3] years from the due date of the return or the taxes were assessed within 240 days);

2) Taxes in which a tax return was never filed. 11 U.S.C. § 523(a)(1)(B)(i);

3) Taxes in which a return was late filed within two (2) years of the bankruptcy filing date. 11 U.S.C. § 523(a)(1)(B)(ii);

4) Taxes for which the return filed was fraudulent. 11 U.S.C. § 523(a)(1)(C); and

5) Taxes for which the debtor evaded the payment of tax. 11 U.S.C. § 523(a)(1)(C).

The relevant provision in this case is late filed returns in which taxes are excepted from discharge for a two (2) year period - - *i.e.*, two (2) years from when they were filed or given to the taxing authorities. 11 U.S.C. § 523(a)(1)(B)(ii). It is widely accepted that the relevant changes by BAPCPA to Section 523 were to codify the common law standard set forth in *Beard v. Commissioner*, 82 T.C. 766 (1984), *affd.*, 793 F.2d 139 (6th Cir. 1986), and ***not*** create a separate body of law relating solely to the bankruptcy

arena. *Beard* laid out a four-part test for what constitutes a return.

The Circuit Courts of Appeal are divided four (4) ways as to whether late-filed returns constitute "returns" under 11. U.S.C. § 523(a)(1)(B). The Eighth Circuit holds that a duly filed return, even if late, constitutes a return as long as it satisfies an objective standard. The Eleventh and Ninth Circuit Courts of Appeal require application of a subjective standard looking as far back as the due date of the return. The Fifth, First, and Tenth Circuit Courts of Appeal follow the "one (1) day late" standard, which means that a return filed a single day after the original or extended due date can never constitute a tax return for bankruptcy purposes. The Fourth, Sixth, and Seventh Circuits held that returns filed after an Internal Revenue Service tax assessment serve no useful purpose.

The lower courts and the Circuit Courts of Appeal that have considered this issue seem to struggle with what is the proper test when considering the "honest and reasonable attempt to satisfy the requirements of the tax law" prong of the *Beard* test?

The question presented,* on which the courts of appeal are divided, is:

- What constitutes a "return" for purposes of bankruptcy?

*This same issue is pending before this Court on a Petition for Writ of Certiorari filed by the Debtor in *Smith v. Internal Revenue Service,* Supreme Court Case No. 16-497 arising out of the Ninth Circuit Court of Appeals [*Smith v. United States*, 828. F.3d 1094 (9th Cir. 2016)].

PARTIES TO THE PROCEEDING

Petitioner, Appellant below, is Christopher M. Justice.

Respondent, Appellee below, is the United States of America, and specifically its agency, the Internal Revenue Service, United States Department of Treasury.

CORPORATE DISCLOSURE STATEMENT

Christopher M. Justice is an individual. The United States of America is a sovereign state.

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Christopher M. Justice respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit (App. B) is reported at 817 F.3d 738. The opinion of the district court (App. C) is unreported but available at 2014 U.S. Dist. LEXIS 185505. The opinion of the bankruptcy court (App. D) is unreported.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered judgment on March 30, 2016 and denied a timely Petition for Rehearing (or Hearing) *En Banc* on September 19, 2016. (App. A). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 11 U.S.C. § 523(a) - *See*, Appendix F for complete subsection.

Section 523(a)(1)(B) provides that the following debt in not discharged in a debtor's bankruptcy (irrelevant subsections omitted):

> (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 - -

. . .

(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

. . .

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.

The italicized portions reflect the additional language BAPCPA added to the Bankruptcy Code.

2. 26 U.S.C. § 6020(b).

(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 OF THE CASE

Justice filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code on July 22, 2011, and received a Discharge of Debtor pursuant to 11 U.S.C. § 727 on November 4, 2011. On January 10, 2012, counsel for Justice filed an administrative claim seeking a determination that the tax liabilities for tax years 2000, 2001, 2002, and 2003 were not excepted from discharge. After the Internal Revenue Service ("IRS") rejected his claim for administrative relief, Justice filed his Adversary Complaint on October 30, 2012 requesting, in part, a determination that Federal income tax liabilities for 2000, 2001, 2002, and 2003 were discharged in the Chapter 7 Bankruptcy. The United States filed a Motion for Summary Judgment and Justice filed a Motion for Partial Summary Judgment. Each party responded. The Court

entered an Order Denying Plaintiff's Motion for Partial Summary Judgment and Granted Defendant's Motion for Summary Judgment on September 27, 2013.

On appeal, the District Court affirmed, on December 23, 2014, the Bankruptcy Court's Order Denying Plaintiff's Motion for Partial Summary Judgment and Granting Defendant's Motion for Summary Judgment and Judgment, each entered September 27, 2013. The District Court was acting as the court of appellate jurisdiction due to the bankruptcy appeal.

On further appeal to the Eleventh Circuit, the three-judge panel, applying a subjective test, rendered its opinion affirming the District Court Opinion on March 30, 2016 finding that the Debtor failed to establish that he made "an honest and reasonable attempt" to return to tax compliance. Justice filed a Petition for Rehearing (or Hearing) *En Banc* on May 13, 2016, which was denied on September 19, 2016.

All three (3) courts - - the Bankruptcy Court, the Federal District Court, and the Eleventh Circuit panel - - ignored extremely important and relevant facts supporting a finding that Mr. Justice exhibited "an honest and reasonable attempt to satisfy the requirements of the tax law." The undisputed facts show that Internal Revenue Service solicited unfiled tax returns from Mr. Justice, and that he prepared and hand-delivered his Forms 1040, U.S. Individual Income Tax Returns, for the Substitute for Return ("SFR") years - - 2000, 2001, 2002, and 2003, respectively - - and three (3) non-SFR years - - 2004, 2005, and 2006, respectively - - on October 22, 2007. For reasons unknown, the tax returns for the SFR tax

years were not processed and no adjustments were made at that time. The non-SFR years, 2004, 2005, and 2006 were processed and the Account Transcripts all reflect a filing date of October 22, 2007. Justice therefore brought himself back into current compliance by filing all of his unfiled tax returns.

Further, none of the courts noted that the tax returns for these same SFR years were solicited again by Internal Revenue Service two (2) years later; and Mr. Justice found and resubmitted signed copies of those Forms 1040 for tax years 2000 through 2003, respectively, on September 1, 2009. There is no evidence whatsoever in the record that the returns prepared and submitted by Mr. Justice were not true and accurate.[1] Accordingly, Mr. Justice sought to return to tax return compliance not once, but twice. The government offered no facts or evidence in support of its position other than the existence of the SFR tax assessments.

REASONS FOR GRANTING THE PETITION

This case is a compelling candidate for the Court's review, presenting a question of statutory interpretation for which the Circuit Courts of Appeal are in conflict. As stated below, there are four (4) different interpretations of

1. The record does show that a mathematical adjustment was made to the tax year 2002 Form 1040, but there is no indication that it was anything but a mathematical error. Further, no weight was given to the Affidavits of Mr. Justice or a local tax attorney noting SFR tax assessments generally overstate an individual taxpayer's liabilities since no consideration is given to business deductions, Schedule A - Itemized Deductions, Schedule E - Rental Deductions, dependency exemptions, appropriate filing status, or allowable credits.

the law based upon in which circuit the debtor resides. The pool of taxpayers affected by these decisions is enormous -- both within and outside the bankruptcy arena. Further, the Internal Revenue Service, the U.S. Department of Treasury agency charged with enforcing the Internal Revenue Code, has its own novel and unique view which is inconsistent with all four (4) Circuits of Appeal.

I. There is a 4-Way Split Among the Circuits on the Question Presented

This case presents a straightforward conflict in the Circuit Courts of Appeal on an important and recurring question of statutory interpretation. For purposes of determining what constitutes a return for bankruptcy purposes, what test should the court apply to determine if the debtor made an "honest and reasonable attempt to satisfy the requirements of the tax law?"

The Internal Revenue Code does not define "return." *In re Hindenlang*, 164 F.3d 1029, 1033 (6th Cir. 1999) ("the Internal Revenue Code, which liberally uses the concept of returns, does not formally define 'return.'"). *See* also, *In re Mallo*, 498 B.R. 268 (D. Colo. 2013) (The Internal Revenue Code contains no definition of "return."). As noted, under "applicable nonbankruptcy law," the standard for determining whether a document is a return consists of a four-part analysis known as the *Beard* test. Under the *Beard* test:

> In order for a document to qualify as a 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."

In re Hindenlang, 164 F.3d 1029, 1033 (6th Cir. 1999). As explained by the Sixth Circuit Court of Appeals in *Hindenlang*, the test was derived from two (2) decisions of the United States Supreme Court, *Zellerbach Paper Company v. Helvering*, 293 U.S. 172, 55 S. Ct. 127 (1934), *Germantown Trust Co. v. Commissioner of Internal Revenue*, 309, U.S. 304, 60 S. Ct. 566 (1940), and later articulated by the Tax Court in *Beard*. *In re Hindenlang*, 164 F.3d at 1033.[2]

The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") of 2005 added language to 11 U.S.C. § 523 which broadened the definition of a "tax return." A number of bankruptcy courts had struggled with the concept of what constitutes a return, and the Bankruptcy Code clarified this to include a return or "equivalent report or notice" that "satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." Section 523(a), as amended, expressly includes a return prepared pursuant to 26 U.S.C. § 6020(a) (prepared by the IRS and signed by a taxpayer) or a similar state or local law, and a written stipulation to a judgment or final order entered by a nonbankruptcy tribunal, but expressly excludes a return made pursuant to Section 6020(b) (a theoretical dummy return prepared by IRS, but not signed by the taxpayer). As evident by its name, a Substitute for Return ("SFR") prepared by IRS

2. *Beard* actually discusses three (3) Supreme Court cases and only mentions the *Germantown Trust Co.* case in passing. *See*, page 22, *infra*.

is not a true tax return in the general sense of the word, but rather a module which the Service must enter into its system in order to make a tax assessment. Hence, once the tax module is established, the Service can make an SFR assessment. Neither the Bankruptcy Code nor the Internal Revenue Code precludes a taxpayer from filing a subsequent return after the Service makes an SFR assessment under authority of 26 U.S.C. § 6020(b).

The majority view of pre-BAPCPA cases held that a taxpayer or debtor who files a proper tax return after the Service makes an SFR tax assessment starts the 2-year period for determining dischargeability of the debt upon the filing of his or her Form 1040, U.S. Individual Income Tax Return. These courts held expressly or implicitly that the subsequently filed Form 1040 constitutes a return for purposes of 11 U.S.C. § 523. *In re Colsen*, 446 F.3d 836 (8th Cir. 2006); *In re Savage*, 218 B.R. 126 (BAP 10th Cir. 1998); *In re Nunez*, 232 B.R. 778 (BAP 9th Cir. 1999); *In re Klein*, 312 B.R. 443 (S.D. Fla. 2004); *In re Pierchoski*, 243 B.R. 267 (W.D. Pa. 1999), *vac'd* and *rem'd*, *In re Pierchoski*, 220 B.R. 20 (Bankr. W.D. Pa. 1998); *In re Payne*, 331 B.R. 358 (N.D. Ill. 2005); *In re Colsen*, 311 B.R. 765 (Bankr. N.D. Ia. 2004); *In re Izzo*, 287 B.R. 158 (Bankr. E.D. Mich. 2002); *In re Crawley*, 244 B.R. 121 (Bankr N.D. Ill. 2000); *In re McGrath*, 217 B.R. 389 (Bankr. N.D. N.Y. 1997); *In re Ashe*, 228 B.R. 457 (C.D. Cal. 1998). A few cases, which are easily distinguishable or explained, have held that a particular debtor's filing of his or her Form 1040, U.S. Individual Income Tax Return, after an SFR-tax assessment did not commence the two (2) year period for purposes of dischargeability under 11 U.S.C. § 523. *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1998); *United States v. Ralph*, 266 B.R. 217 (M.D. Fla. 2001); *In re Olson*, 261

B.R. 752 (Bankr. M.D. Fla. 2001); *In re Mickens*, 215 B.R. 693 (Bankr. N.D. Ohio 1997).

Under the BAPCPA, whether the post-SFR tax assessment return was "filed" is no longer relevant because a return can also be "given" to IRS. Furthermore, applying applicable nonbankruptcy law, a properly completed and executed Form 1040, U.S. Individual Income Tax Return, provided to the Service after an SFR tax assessment still constitutes a "filed" return as a matter of law.

There is a split amongst the Courts interpreting this issue post-BAPCPA. Based upon our analysis of the various Court decisions, there are four (4) distinct interpretations. Therefore, whether a tax debt is excepted from discharge is based upon the Circuit in which the debtor resides. The controlling law in some of the Circuits is from pre-BAPCPA cases, but as pointed out above, BAPCPA merely codified pre-BAPCPA law, namely the *Beard* test.

One-day late Test (First, Fifth, and Tenth Circuits)

Three (3) Circuit Courts of Appeal have looked at this issue post-BAPCPA and determined that liabilities for late-filed returns will rarely qualify for discharge - - First: *Fahey v. Massachusetts Department of Revenue*, 779 F.3d 1 (1st Cir. 2015); Fifth: *McCoy v. Mississippi State Tax Commission*, 666 F.3d 924 (5th Cir. 2012); and Tenth: *Mallo v. IRS*, 774 F.3d 1313 (10th Cir. 2014). They have all reached similar conclusions that a late filed return can never satisfy applicable nonbankruptcy law because it does not satisfy applicable filing requirements. This

result violates basic rules of statutory construction, as it makes the remaining portions of the hanging paragraph in Section 523(a) meaningless and essentially renders Section 523(a)(1)(B)(ii) superfluous.

These Circuit Courts of Appeal failed to adopt the *Beard* test since a late filed return would rarely ever qualify. "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' . . .". *McCoy* at 930. It is noteworthy that the Internal Revenue Service does not agree with the *McCoy* analysis. *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 "filed" ' and therefore cannot be discharged in bankruptcy.")

Subjective Test (Eleventh and Ninth Circuits)

In the case at issue, the Eleventh Circuit did not follow the one-day late test of the First, Fifth, and Tenth Circuits, but determined that the Courts should look at the facts and circumstances of the entire time frame relevant to the Taxpayer's actions to determine whether the debtor made an honest and reasonable attempt to satisfy the tax law.

The Eleventh Circuit did not expressly and specifically reject the *McCoy* line of cases, but it also made it clear that they were suspect. (*Justice v. United States,* 817 F.3d 738, 743 (11th Cir. 2016), *rehearing en banc denied* (11th Cir. Sept. 19, 2016). Nevertheless, the panel rejected the objective standard approach of the Eighth Circuit Court

of Appeals and Judge Easterbrook's view, instead holding that a lack of an excuse for a late filed return effectively negates the "honest and reasonable" factor under the *Beard* test.

In *Smith v. United States,* 828 F.3d 1094 (9th Cir. 2016), the Ninth Circuit Court of Appeals, while rejecting the *McCoy* standard and holding that *Beard* remained the applicable nonbankruptcy law standard, opted to follow its previous precedent in *In re Hatton,* 220 F.3d 1057 (9th Cir. 2000), *rev'g, In re Hatton,* 216 B.R. 278 (BAP 9th Cir. 1997). Even though Debtor Smith had filed his own tax return reflecting approximately $60,000.00 in **additional** tax liability than that determined by Internal Revenue Service, the Ninth Circuit Court of Appeals curiously found "Smith's 'belated acceptance of responsibility' was not a reasonable attempt to comply with the tax code." *Smith* at 1097.

Objective Test (Eighth Circuit)

The Eighth Circuit in *In re Colsen,* 446 F.3d 836 (8th Cir. 2006), a pre-BAPCPA case (but issued post-BAPCPA) properly found that the "honest and reasonable attempt to satisfy the requirements of the tax law" prong should be determined from the face of the Form 1040 itself, not from the filer's delinquencies or the reasons for them. Under this proper standard, a filer's subjective intent is irrelevant as long as the tax return was prepared in good faith and evinces his or her intent to file an honest and reasonable return. This analysis most closely follows the analysis in *Beard.*

The genesis of the Eighth Circuit Court of Appeals' opinion in *Colsen* is *In re Payne* in which Judge Easterbrook reasoned "it is inappropriate for a court to proclaim that the document is worthless and hence, not a 'return', *In re Payne,* 431 F.3d 1055, 1061 (7th Cir. 2005) (J. Easterbrook dissenting). *In re Colsen* agreed citing to the Supreme Court case of *Badaracco v. Commissioner,* 464 U.S. 386 (1984), noting that even fraudulently filed returns are still "returns" if they "appeared on their faces to constitute endeavors to satisfy the law." The Eighth Circuit Court of Appeals thus concluded that the court's focus must be on the objective aspects of the tax return under a correct interpretation of *Beard.* The *Colsen* court concluded "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." *Colsen* at 840.

Post-assessment Test (Fourth, Sixth, and Seventh Circuits)

The Fourth [Moroney v. United States, 352 F.3d 902 (4th Cir. 2003)], Sixth [*United States v. Hindenlang,* 164 F.3d 1029 (6th Cir. 1999)], and Seventh [*In re Payne,* 431 F.3d 1055 (7th Cir. 2005)], Circuits, all pre-BAPCPA cases, held that a late filed return can still be a return up until the time the IRS makes an assessment and commences collection efforts. After assessment, a return filed by the Debtor serves no useful purpose and is thus not a reasonable attempt to comply with the tax laws. This result is highly questionable as Congress did not make the IRS tax assessment date the triggering event, nor does it even mention a SFR tax assessment; Congress

simply made the date a taxpayer "files" or "gives" his return to the Internal Revenue Service the requisite event necessary to satisfy Section 523(a)(1)(B)(ii).

Internal Revenue Service's Position

Even Internal Revenue Service agrees that the *McCoy* line of cases (First, Fifth, and Tenth Circuits Court of Appeal) are wrongly decided. The Internal Revenue Service's position is actually a middle ground. The Office of Chief Counsel of Internal Revenue Service issued a Notice dated September 2, 2010, documenting its current position regarding SFR tax assessments. The position of IRS is that once an SFR tax assessment is made against a taxpayer, the portion of the tax liability up to the amount of the SFR tax assessment is nondischargeable. Should a taxpayer later "file" or "give" a return after the SFR assessment, then, after the two (2) year requisite period, the portion exceeding the SFR tax assessment is dischargeable. Ironically, were this position correct and the Service's view stands, this discourages taxpayers from "making an honest and reasonable attempt to satisfy the requirements of the tax law" by filing legitimate returns unless they are reasonably certain they can pay off the full liability (and hence, wish to reduce the overall tax liability to its proper amount). Why bother? The current status of the law has a chilling effect on bringing non-filing taxpayers back into tax compliance by preparing and filing proper returns for both SFR and non-SFR years. Fortunately, the Service's position was not supported either by case precedent[3] or by the changes to BAPCPA;

3. It appears that only two (2) cases have followed the government's view - - *In re Smythe*, 2012 Bankr. LEXIS 1057

and, as Congress did not see fit to adopt this view, none of the Circuit Courts of Appeal have accepted that view.[4]

(Bankr. W.D. Wash. 2012) and *In re Casano*, 473 B.R. 504 (Bankr. E.D. N.Y. 2012) - - both decided in 2012, well after the Service announced its position in 2010. The Service's pronouncement violates the "plain language" policy of the Eleventh Circuit Court of Appeals. *In re Burns*, 887 F.2d 1541 (11th Cir. 1989).

4. The Service is seeking to interpret 11 U.S.C. § 523(a) as it would interpret provisions under Title 26 (i.e., the Internal Revenue Code). Congress has only given the Service authority to promulgate regulations under the Internal Revenue Code. 26 U.S.C. § 7805(a). These regulations fall into three (3) categories - - (1) legislative or substantive, (2) interpretative, and (3) procedural. Legislative or substantive regulations are regulations issued pursuant to a specific authorization from or direction by Congress in particular sections of the Internal Revenue Code. Some statutes state that the laws are to be interpreted under regulations promulgated by the "Secretary or his delegate." *See* for example 26 U.S.C. § 1502 (dealing with consolidated return regulations involving affiliated groups).

Obviously, the Service has no authority to enact any regulations involving a Title 11 provision as its express authority found under 26 U.S.C. § 7805(a) is limited to the Internal Revenue Code. Nor has the Service attempted to do so. The sole authority for the Service's position is the rationale set forth in the Office of Chief Counsel's Notice dated September 2, 2010, yet no support for this rationale can be gleaned from 11 U.S.C. § 523(a) itself, the legislative history, or any case law precedent.

II. The Eleventh Circuit's Decision is Incorrect - the "Honest and Reasonable Attempt to Satisfy the Requirements of the Tax Law" Prong of the *Beard* Test Requires a Focus on the Tax Return Itself and Not the Reasons for the Nonfiling of the Return.

Most courts (Federal Circuit Courts of Appeal, District Courts, and Bankruptcy Courts) addressing this issue have over-analyzed 11 U.S.C. § 523(a)(1)(B)(ii) and the flush language (hanging paragraph) added to Section 523(a). All or most courts agree that the Congressional intent was to codify the common law standard set forth in *Beard v. Commissioner*, 82 T.C. 766 (1984), *affd.*, 793 F.2d 139 (6th Cir. 1986), and ***not*** create a separate body of law relating solely to the bankruptcy arena. The interpretation of these Courts, including the panel of the Eleventh Circuit Court of Appeals, is inconsistent with (1) the common law interpretation of what constitutes a "tax return," (2) the Congressional intent, and (3) the Internal Revenue Code as a whole.

Most of the non-bankruptcy cases applying *Beard* arise in the United States Tax Court. A review and reading of those cases shows that the vast majority of the opinions analyzing and applying the four (4) prong *Beard* test involved tax protesters. Those tax protesters are individuals who, for whatever reason, believe (or want to believe) the Federal income tax system is unconstitutional or unjust, and choose to opt out. These individuals routinely alter Forms 1040 (or other tax returns) by eliminating the *jurat*, changing innocuous language, inserting all zeros, or in many cases, using the form itself, but asserting "Fifth Amendment." The Tax Court is faced with applying the *Beard* analysis to determine whether those tax protesters

provided a document, executed under penalty of perjury, which contained sufficient data to calculate the tax, and the document itself represents "an honest and reasonable attempt to satisfy the requirements of the tax law." If the tax protester is reformed and wishes to file legitimate returns, then the Tax Court finds that the documents qualify as returns under the standards of *Beard*. If the tax protester continues with his or her shenanigans by altering the document, asserting frivolous positions, or providing insufficient information to compute the tax, then the Tax Court generally finds the documents do not qualify as tax returns.

The so-called hanging paragraph of Section 523 merely clarified that the non-filer debtors could not rely upon a Section 6020(b) assessment by Internal Revenue Service as constituting a tax return "filed" or "given" for purposes of commencing the two (2) year countdown under Section 523(a)(1)(B)(ii). The reference to Section 6020(a) clarifies that taxpayers who assist the Internal Revenue Service in preparing their returns do qualify, but that number is "minute." *See, Fahey*, 779 F.3d at 6 (citing to IRS Chief Counsel Notice 2010-016 (September 2, 2010) admitting that this is rare). Had Congress intended to make an SFR-tax assessment a trigger point, then it could have so stated in Section 523(a).

Judge Holmes provided excellent background and analysis of the "honest and reasonable attempt to satisfy the requirements of tax law" prong in two (2) fairly recent Tax Court memorandum opinions.[5] In *Sakkis*

5. Under the Tax Court procedures, Tax Court Memoranda Opinions are not binding precedent, merely persuasive, since they

v. Commissioner, 100 T.C.M. (CCH) 459 (2010), Mr. Sakkis reported a frivolous deduction under 26 U.S.C. § 861 on line 21 - - Other Income - - on his Form 1040. Other than this frivolous deduction, the return was otherwise substantially correct. The Internal Revenue Service rejected the return claiming it was frivolous and issued a Statutory Notice of Deficiency ignoring the existence of the filed return. The *Sakkis* Court found that, notwithstanding the frivolous deduction, the taxpayer filed a legitimate return.

In his analysis, Judge Holmes noted:

. . .

> Although there have been many cases applying *Beard*, few of these are what one can accurately, if clumsily, call stand-alone third-prong cases. In *Beard* itself, we stated that when tax-protester arguments - - like the *section 861* deduction - - are used, "it is obvious that there is no 'honest and genuine' attempt to meet the requirements of the code." *Id.* at 779. That was however, in the context of a taxpayer who impaled himself on the first prong by intentionally tampering with the tax form in a way that prevented the Commissioner from being able to determine the tax due. We've similarly held that a taxpayer didn't make an honest and reasonable attempt to file when the

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are usually fact intensive. *See, e.g., Nico v. Commissioner*, 67 T.C. 647 (1977) ("neither revenue rulings nor Memorandum Opinions of this Court [are] controlling precedent").

> taxpayer wrote down all zeros or asterisks or similarly uninformative entries. *See, e.g., Cabirac v. Commissioner*, 120 T.C. 163, 168-69 (2003) (zeros); *Coulton v. Commissioner*, T.C. Memo. 2005-199 (same); *Turk v. Commissioner*, T.C. Memo. 1991-198 (asterisks); *Hintenberger v. Commissioner*, T.C. Memo. 1990-36 (lines blank), *affd.* without published opinion 922 F.2d 848 (11th Cir. 1990); *Thomas v. Commissioner*, T.C. Memo. 1985-241 (the word "object"). But just as in *Beard*, in all of these cases failure to satisfy the third prong was coupled with a skewering on the first prong.
>
> In most every tax-protester case that we have found, the taxpayer had either refused to enter the correct income for the year or had altered the form in some way that the form itself or the attestation at the bottom was void. The *Sakkises'* cases are more similar to the situation we analyzed in *Steines v. Commissioner*, T.C. Memo. 1991-588, *affd.* without published opinion 12 F.3d 1101 (7th Cir. 1993).

. . .

Judge Holmes, in *Green v. Commissioner*, 95 T.C.M. (CCH) 1512 (2008), rendered two (2) years earlier, also provided excellent insight concerning the *Beard* test and whether there was an "'honest and reasonable' attempt to satisfy the requirements of the tax law." He notes that even in the *Beard* case the Tax Court "acknowledged that fraudulent returns may be valid (though subjectively dishonest) if the taxpayer objectively supplies the

information in the prescribed manner. . . . But we ourselves do not seem to have decided whether this part of the test is meant to be objective or subjective - - leading to different approaches in other courts." (cites and footnote omitted). Justice respectfully disagrees. Any confusion in the Tax Court arena arises from cases outside of the Tax Court, since *Beard, supra*, *Zellerbach Paper Co., infra*, and *Badaracco, infra*, all focus upon the return itself, not the taxpayer's historical mental state.

Judge Holmes recognizes that the hottest debate has been in the bankruptcy arena, and that one of the most significant decisions is *In re Payne*, 431 F.3d 1055 (7th Cir. 2005). In a pre-BAPCPA case, Judge Easterbrook's persuasive dissent argued for an objective standard stating "[m]otive may affect the consequences of a return, but not the definition." (*Id.* at 1062). Judge Holmes found that he "can scurry away from the dispute till another day" since Green was a tax protester whose self-made documents objectively did not permit the assessment of his tax liability.

Again, the common denominator in the vast majority of the United States Tax Court cases involving *Beard* is the involvement of a tax protester.[6] Under the subjective

6. Other recent cases supporting the proposition that the *Beard* analysis relates to the facts and circumstances surrounding of the filing of the document itself and not to pre-existing acts of the taxpayer include: *Crummey v. Commissioner*, 111 T.C.M. (CCH) 1042 (2016) (taxpayer filed Forms 1041, U.S. Income Tax Return for Estates and Trusts, based upon a fictitious trust); *Hill v. Commissioner*, 108 T.C.M. (CCH) 12 (2014) (taxpayer attached a frivolous document offsetting income); *Walbaum v. Commissioner*, 106 T.C.M. (CCH) 68 (2013) (Form 1040 containing only zeros);

standard imposed by the panel in *Justice*, a reformed tax protester who abandoned his tax protest tactics and beliefs and attempted to file legitimate returns would never qualify under the panel's interpretation of the *Beard* test. The Internal Revenue Service could undoubtedly provide mounds of paper showing typical tax protest rhetoric, a failure to cooperate with agency employees, and the absence of legitimate returns for a period of time. Any tax protester or nonfiler who voluntarily withdrew from the tax system of self-reporting, who chose to bring himself back into tax compliance - - either through self-study and a better understanding of the tax laws and taxing system or coerced through the unpleasantness of dealing with the Internal Revenue Service and its enforcement tools - - would face an overwhelming obstacle to ever establish himself as making "an honest and reasonable attempt to satisfy the requirements of the tax law." The proper battleground for a dispute over a reformed tax protester's legitimate returns is 11 U.S.C. § 523(a)(1)(C), not Section 523(a)(1)(B)(ii).[7]

Flint v. Comissioner, 104 T.C.M. (CCH) 437 (2012) (no reporting of earned wages); *Parker v. Commissioner*, 103 T.C.M. (CCH) 1321 (2012) (zeros only plus other frivolous documents and tax protester rhetoric); *Richmond v. Commissioner*, 102 T.C.M. (CCH) 411 (2011) (taxpayer claiming citizen of the Sovereign State of Kansas opting out); *McNeil v. Commissioner*, 101 T.C.M. (CCH) 1718 (2011) (frivolous exemption argument); *Holmes v. Commissioner*, 101 T.C.M. (CCH) 1141 (2011) (zero wages and tax protester rhetoric); and *O'Boyle v. Commissioner*, 100 T.C.M. (CCH) 14 (2010) (Form 1040 contained frivolous position and omitted information).

7. 11 U.S.C. § 523(a)(1)(C) provides Internal Revenue Service with the tools to have tax liabilities excepted from discharge for either tax evasion ***or*** evasion of the ***payment*** of tax. *See, e.g., United States v. Mitchell (In re Mitchell)*, 633 F.3d 1319 (11th Cir. 2011); *Zimmerman v. Internal Revenue Service (In re Zimmerman)*,

Ironically, Judge Easterbrook's dissent in the Seventh Circuit case of *In re Payne*, 431 F.3d 1055 (7th Cir. 2005) is the most accurate analysis and assessment of the *Beard* test and common law. Applying the plain language and common sense approach, Judge Easterbrook believed that the courts should determine whether the information is complete and an accurate assessment of the taxpayer's tax liability. He reasoned "it is inappropriate for a court to proclaim that the document is worthless and hence, not a 'return'." *Id.* at 1061 (J. Easterbrook dissenting). Where Judge Easterbrook strayed was believing the parenthetical "... (including applicable filing requirements)", which was added to 11 U.S.C. § 523(a) (hanging paragraph), implicitly required a timely filed return.

III. The Broad Subjective Test is Inconsistent with Supreme Court Precedent and Creates Two (2) Classes of Taxpayers - - Late Filed Returns with Self-Determined Liabilities and Late Filed Returns with SFR Tax Assessments.

There are millions of unfiled tax returns each year and millions of late filed returns as well. Neither the courts nor the Internal Revenue Service have the resources to review and evaluate each late filed return to determine whether it meets the *Beard* test. Accordingly, it is clear that the Internal Revenue Service will continue its focus exclusively upon those taxpayers against which an SFR tax assessment was made. Even if the Court believes that the subjective test is applicable, the focus must be solely upon the facts and circumstances surrounding the filing

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262 Fed. Appx. 943 (11th Cir. 2008); *United States v. Jacobs (In re Jacobs)*, 490 F.3d 913 (11th Cir. 2007).

of the return, not from the date the tax return was due. What the Taxpayer thought or believed months or years earlier is simply not relevant.

A fundamental distinction between a tax protester and the typical nonfiler against whom a Substitute for Return tax assessment is made by Internal Revenue Service is that most nonfilers are not purposefully avoiding their tax obligations. In most instances, the person has gone through some hardship such as loss of job, failure of a business, a divorce, death of a close family member, serious illness or disease, alcohol or drug addictions, or a hectic life resulting in an inability to organize either tax records or themselves and focus on the need to file tax returns. Many nonfilers are wage earners who actually lose their tax refund if returns are not filed within the statutory three (3) year period. 26 U.S.C. § 6511(a). Courts of Appeal seemingly take a dim view of these taxpayers, not as individuals who need a fresh start, but as individuals who misbehaved and need to be punished by excepting their tax liabilities from their general discharge.

What the Taxpayer intended to do by submitting the tax returns to the Internal Revenue Service may be relevant, but only so far as it involves the tax returns themselves. The *Beard* Court notes that its opinion was derived from distilling the Supreme Court precedent into a four-part test. The cases are *Badaracco v. Commissioner*, 464 U.S. 386 (1984); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934); and *Florsheim Brothers Drygoods Co. v. United States*, 280 U.S. 453 (1930). A close reading of the three (3) Supreme Court cases reveal the United States Supreme Court contemplated an objective test as opposed to a subjective test. Specifically, in *Zellerbach*, Justice Cardozo stated:

> 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. This is so though at the time of filing the omissions or inaccuracies are such as to make amendment necessary.

(*Id.* at 180).

Similarly, in *Badaracco* the Supreme Court held that admitted fraudulent tax returns which were replaced with non-fraudulent returns thereafter were tax returns. They purported to be returns, were sworn to as such, and appeared on their faces to constitute endeavors to satisfy the law. In *Florsheim Brothers*, the business did not have sufficient information to file an accurate return, but filed a "tentative return" which did not purport to be a completed return. Because of this designation and since it was submitted based on exigent circumstances, the Court found it was not intended to be a list, schedule, or return.

The Eighth Circuit in *In re Colsen*, 446 F.3d 836 (8th Cir. 2006) noted the fundamental principle that exceptions from discharge ought to be strictly construed so as to give the maximum effect to the policy of the Bankruptcy Code to provide debtors with a fresh start in life. The Eighth Circuit Court of Appeals properly found that the "honest and reasonable attempt to satisfy the requirements of the tax law" prong should be determined from the face of the Form 1040 itself, not from the filer's delinquencies or the reasons for them. Under this proper standard, a filer's subjective intent is irrelevant as long as the tax return was prepared in good faith and evinces his or her intent to file an honest and reasonable return.

The interpretation of the *Justice* panel raises collateral issues which may frustrate the civil and criminal enforcement of the Internal Revenue Code, and further fails to recognize the Supreme Court precedent recognized in the *Beard* case. For example, under 26 U.S.C. § 7201, the tax evasion statute, which covers both an attempt to evade or defeat the assessment of a tax or the payment of a tax, provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . . .

By definition, such a taxpayer who knowingly and willfully understates income or overstates expenses cannot pass a broad view of the subjective test for "an honest and reasonable attempt to satisfy the requirements of the tax law." Supreme Court precedent disagrees.

Similarly, prosecutions under 26 U.S.C. § 7206(1), the false statement statute, would also be in jeopardy. This statute, in relevant part, provides:

> Any person who . . . willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony . . . .

Again, by definition, a person who knowingly and willfully omits income or overstates expenses under the *Justice* standard does not satisfy the *Beard* prong requiring "an honest and reasonable attempt to satisfy the requirements of the tax law." This conflicts with Supreme Court precedent and *Beard*.

Even a subjective standard focused solely upon the return itself - - *i.e.*, whether that particular taxpayer intended to make "an honest and reasonable attempt to satisfy the requirements of the tax law" - - raises issues in a criminal prosecution. There is no indication whatsoever of any different standard between criminal and civil law. This problem is only resolved by adopting the objective test which focuses on a taxpayer's intent to file a legitimate return, not whether a taxpayer has pure intentions in filing a return late.[8]

8. Under the *Golsen* rule, the Tax Court is bound to follow case precedent in the Federal Circuit Court of Appeal in the circuit in which a case is pending. *Golsen v. Commissioner*, 54 T.C. 742 (1970). Under the expansive subjective test imposed by the 11th Circuit panel, the taxpayer could argue that fraudulent returns did not constitute returns for purposes of tax administration.

CONCLUSION

There is a clear circuit conflict on the question in the wake of the Eleventh Circuit's decision. Because this case is an ideal vehicle in which to consider that question, the Court should grant review and resolve the conflict on the interpretation of what constitutes a "return" for bankruptcy purposes.

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Respectfully submitted,

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