APPENDIX

TABLE OF CONTENTS

APPENDIX A

[FILED: MARCH 1, 2024]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JOHN PAUL SALVADOR, Debtor.	No. 23-60008
JOHN PAUL SALVADOR, Appellant, v. UNITED STATES OF AMERICA, Appellee.	BAP No. CC-21-1252 BAP, Riverside Bankruptcy Court MEMORANDUM[*]

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Taylor, Lafferty, and Faris, Bankruptcy Judges,
Presiding

Submitted February 13, 2024[**]
Pasadena, California

Before: W. FLETCHER, NGUYEN, and LEE, Circuit Judges.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

John Salvador brought this adversary proceeding in his Chapter 7 bankruptcy seeking a determination that his federal tax debts for 2003, 2004, 2006, and 2009 were dischargeable. The Bankruptcy Court granted summary judgment for the government, and the Bankruptcy Appellate Panel (BAP) affirmed. We have jurisdiction under 28 U.S.C. § 158(d), and we affirm.

Section 523(a)(1)(B)(i) of the Bankruptcy Code provides that tax debts are only dischargeable if, among other things, the debtor has filed a return. The statute did not originally define what qualified as a "return." In the absence of a statutory definition, this court adopted the Tax Court's *Beard* test to determine whether a document filed by the debtor qualifies as a return. *See In re Hatton*, 220 F.3d 1057, 1060–61 (9th Cir. 2000) (quoting *Beard v. Comm'r of Internal Revenue*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986) (per curiam)). The *Beard* test has four 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." *Beard*, 82 T.C. at 777.

Applying *Beard*, we held in *In re Hatton* that a document filed by a debtor after the IRS has already assessed his taxes does not generally qualify as a return because such a late filing is not an "honest and reasonable attempt" to comply with the tax law. 220 F.3d at 1061.[1]

[1] The Fourth, Sixth, and Seventh Circuits held the same. *See In re Moroney*, 352 F.3d 902, 906 (4th Cir. 2003); *In re Hindenlang*, 164 F.3d 1029, 1034 (6th Cir.1999); *In re Payne*, 431 F.3d 1055, 1057 (7th Cir. 2005). The Eighth Circuit, however, held that post-assessment filings generally qualified as returns. See *In re Colsen*, 446 F.3d 836, 840 (8th Cir. 2006); see also *Payne*, 431 F.3d at 1060 (7th Cir. 2005) (Easterbrook, J., dissenting) (originally laying out this position).

Then in *In re Smith* we held that the *Beard* test remains unchanged, even though Congress later defined "return" in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCA). 828 F.3d 1094, 1097 (9th Cir. 2016);[2] *see also* 11 U.S.C § 523(a)(*) (BACPA defining "return" in part as a "return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements).").

Salvador concedes that he loses under this court's precedent. He filed his purported returns after the IRS had already assessed his tax liability. Under a straightforward application of *Beard* and *Smith*, his filing does not qualify as a return and his tax debts are nondischargeable. We thus affirm the BAP's decision upholding summary judgment for the government.

Salvador nevertheless brings this appeal to try to change the Ninth Circuit's case law. He filed a petition for initial hearing en banc, urging this court to adopt the Eighth Circuit's approach from *In re Colsen*, 446 F.3d 836 (8th Cir. 2006), a decision applying pre-BAPCA law.[3] On

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[2] The Third Circuit agrees. *In re Giacchi*, 856 F.3d 244, 247 (3rd Cir. 2017) (applying the same test). Meanwhile, the First, Fifth, and Tenth Circuits apply an even stricter approach to late filings. *See In re Fahey*, 779 F.3d 1, 7 (1st Cir. 2015) (holding that almost all late filings, even if only by one day, do not qualify as returns); *In re McCoy*, 666 F.3d 924, 932 (5th Cir. 2012) (same); *In re Mallo*, 774 F.3d 1313, 1321 (10th Cir. 2014) (same); see also *Payne*, 431 F.3d at 1060 (Easterbrook, J., dissenting) (endorsing this approach). *But see In re Shek*, 947 F.3d 770, 781 (11th Cir. 2020) (rejecting this strict approach to filings deadlines).

[3] Salvador also argues that the Ninth Circuit's precedent conflicts with the Supreme Court's decision in *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386 (1984). Not so. As Judge Posner aptly explained in *Payne*, *Badaracco* dealt with a meaningfully different context, and "there is no reason why the word 'return,' undefined in

behalf of the court, we deny Salvador's petition for initial hearing en banc, Dkt. No. 32. There is no intra-circuit split and adopting Salvador's approach would only further entrench the existing inter-circuit split.

AFFIRMED.

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either the Bankruptcy Code or the Internal Revenue Code, should carry the same meaning regardless of context." *Payne*, 431 F.3d at 1058. The hanging paragraph added by BAPCA acknowledges that the meaning of "return" depends on context, noting that the definition it outlines only controls "[f]or purposes of this subsection" and derives from "applicable" nonbankruptcy law. 11 U.S.C. § 523(a)(*).

APPENDIX B

[FILED: JANUARY 12, 2023]

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re: JOHN PAUL SALVADOR, Debtor.	BAP No. CC-21-1252-TLF Bk. No. 6:19-bk-19296-SC
JOHN PAUL SALVADOR, Appellant, v. UNITED STATES OF AMERICA, Appellee.	Adv. No. 6:20-ap-01010-SC **MEMORANDUM**[*]

Appeal from the United States Bankruptcy Court for the Central District of California
Scott C. Clarkson, Bankruptcy Judge, Presiding

Before: TAYLOR, LAFFERTY, and FARIS, Bankruptcy Judges.

[*] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, *see* Fed. R. App. P. 32.1, it has no precedential value, *see* 9th Cir. BAP Rule 8024-1.

Debtor John Paul Salvador appeals the bankruptcy court's judgment declaring that income taxes he owed to the Internal Revenue Service for the 2003, 2004, 2006, and 2009 tax years were nondischargeable in his chapter 7 bankruptcy case. As Debtor admits, however, the bankruptcy court's ruling is consistent with binding Ninth Circuit authority. Therefore, the bankruptcy court did not err, and we AFFIRM.[1]

[1] We acknowledge that we serve as a mere way station during Debtor's campaign seeking a change in the Circuit's precedent. But his arguments are based on Supreme Court authority that pre-dates the existing Circuit decisions, not subsequent statutory or case law developments. Thus, there is no basis for additional discussion of the merits except to note that we also agree with the IRS that: (1) Debtor's position on appeal was not raised before the bankruptcy court; (2) thus, the arguments on appeal are waived; and (3) exceptional circumstances do not justify their consideration.

APPENDIX C

[FILED: NOVEMBER 3, 2021]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION

In re: John Paul Salvador Debtor(s).	Case No. 6:19-bk-19296-SC CHAPTER 7 Adv. No. 6:20-ap-01010-SC **ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT RELATED TO PLAINTIFF'S TAX LIABILITIES FOR THE FOLLOWING TAX YEARS: 2003, 2004, 2006, AND 2009** Date: November 2, 2021 Time: 11:00 AM Courtroom: 126
John Paul Salvador Plaintiff(s), v. United States of America (United States) Defendant(s).	

On November 2, 2021, the Court held a hearing on Defendant's motion for partial summary judgment ("Motion") [Dk. 81]. Appearances are as noted on the record. Having reviewed the pleadings, and after

considering the oral arguments presented at the hearing,[1] and for the reasons stated on the record and more fully below, the Court finds good cause to GRANT the Motion.

I. Background

On January 24, 2020, Plaintiff initiated this adversary proceeding against the United States of America (the "Defendant" or the "United States of America"), seeking declaratory judgment that his tax liabilities for the years 2003 through 2014 are dischargeable.[2] [Dk. 1, pg. 4, 9].

On September 21, 2021, [Dk. 81], the United States of America filed its Motion seeking summary adjudication and a declaratory judgment that Plaintiff's tax liabilities for 2003, 2004, 2006, and 2009 are non-dischargeable pursuant to 11 U.S.C. § 523. Plaintiff filed his opposition on October 12, 2021 [Dk. 87, and refilled the same day as Dk. 88], and the United States of America filed a reply on October 19, 2021 [Dk. 92].

The undisputed facts are as follows: Plaintiff did not file his 2003, 2004, 2006, and 2009 returns by the original filing deadlines. [Dk. 81, pg. 3]. Plaintiff's failure to timely file his returns prompted the IRS to prepare substitute returns pursuant to 26 U.S.C. § 6020(b). *Id.* In 2009, the IRS prepared Plaintiff's substitute returns for liabilities related to tax years 2003, 2004, and 2006. *Id.* In 2012, the IRS prepared the substitute returns for liabilities related to the 2009 tax year. *Id.* The IRS issued deficiency notices to Plaintiff pursuant to 26 U.S.C. § 6212. *Id.* at 4. Plaintiff

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[1] At the November 2, 2021 hearing, Plaintiff conceded that this Court was bound by Ninth Circuit case law, and that there was no countervailing case law in the Ninth Circuit that this Court could follow in order to make a ruling in his favor.

[2] The tax liabilities for which Plaintiff seeks a dischargeability determination in the Complaint (as a whole) total approximately $206,737.73.

did not petition for redetermination of the proposed deficiencies pursuant to 26 U.S.C. § 6213. *Id.* Accordingly, the IRS assessed Plaintiff's proposed deficiencies related to the 2003, 2004, and 2006 taxes on September 6, 2010, and the proposed deficiency related to the 2009 taxes on September 16, 2013. *Id.* In 2014, the IRS began collection efforts. *Id.* Plaintiff contends his attorney submitted 1040 Forms related to the missing tax years on his behalf on May 27, 2015. *Id.* At the hearing, Plaintiff stated that the 1040 Forms had been filed by fax.

The United States of America asserts that even if Plaintiff had submitted (or filed) 1040 Forms for the 2003, 2004, 2006, and 2009 tax years[3] on May 27, 2015 (hereinafter, the "1040 Forms"), the tax liabilities are still non-dischargeable because the returns were not "honest and reasonable attempts to comply with the requirements of the tax law." *Id.* at 3; s*ee Hatton v. United States (In re Hatton)*, 220 F.3d 1057, 1060 (9th Cir. 2000).[4]

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[3] The IRS denies having any record of Plaintiff's 1040 Forms, but assumes for the purposes of this Motion that such forms were filed, as whether or not the forms were actually submitted is not dispositive of the legal issues before the Court.

[4] The Court notes the Motion includes an alternative argument, namely that the IRS' completing deficiency procedures (i.e., preparing and assessing substitute returns) forestalled Plaintiff from filing "returns" as defined under the code. [Dk. 81, pg. 6]. The Court finds this alternative argument unpersuasive, as "the IRS has not persuaded any court (pre or post BAPCPA) of the merits of this argument. More importantly, the Ninth Circuit BAP rejected this argument in *In re Martin*, 542 B.R. 479 (BAP 9th Cir. 2015)." *Van Arsdale v. IRS* (In re Van Arsdale), Nos. 13-40873 CN, 14-4035 CN, 2017 Bankr. LEXIS 1388, at *5, 119 A.F.T.R.2d (RIA) 2017-1946 (Bankr. N.D. Cal. May 18, 2017).

II. Discussion

As a preliminary matter, to be entitled to the requested relief, the United States of America must establish that there is "no genuine dispute as to any material fact and that Movant is entitled to judgment as a matter of law." Fed. R. Civ. P. § 56.

Under 11 U.S.C. § 523, debts for a tax for which no return was filed are not discharged by 11 U.S.C. § 727. 11 U.S.C. § 523(a)(1)(B)(i).[5]

The Ninth Circuit has succinctly 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**." *Smith v. United States IRS (In re Smith)*, 828 F.3d 1094, 1096 (9th Cir. 2016) (quoting *United States v. Hatton (In re Hatton)*, 220 F.3d 1057, 1060–61 (9th Cir. 2000)) (emphasis added). These four elements are referred to as the Beard test and all four must be satisfied. See *Beard v. Commissioner*, 82 T.C. 766, 774–779. (1984).

This Motion concerns the fourth factor of the Beard test. The United States of America asserts that Plaintiff, like the debtor in *Smith*, did not file a "return" within the meaning of 11 U.S.C. § 523(a) because the 1040 Forms were filed well after the IRS assessed deficiencies, and were therefore not an "honest and reasonable attempt to

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[5] The full text of 11 U.S.C. § 523(a)(1)(B)(i) states:
"(a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title [11 USCS § 727, 1141, 1192, 1228(a), 1228(b), or 1328(b)] does not discharge an individual debtor from any debt— (1) for a tax or a customs duty— (B) with respect to which a return, or equivalent report or notice, if required— (i) was not filed or given."

comply with the requirements of the tax law." This Court agrees.

In *Smith*, which is binding Ninth Circuit authority highly analogous to the undisputed facts before this Court,[6] the debtor was deemed to have not filed a return within the meaning of 11 U.S.C. § 523(a) because the purported return was filed seven years after the due date and three years after the IRS assessed a deficiency.[7]

As noted above, Plaintiff submitted the 1040 Forms on May 27, 2015. Like *Smith*, Plaintiff did not submit the 1040 Forms for the 2003, 2004, and 2006 tax returns until more than seven years after the due dates and almost five years after the IRS assessed those taxes. Additionally, Plaintiff did not submit his 1040 Forms for the 2009 tax return until at least five years after the due date and approximately twenty months after the IRS's tax assessment of that year.

In the Ninth Circuit, a taxpayer's "belated acceptance of responsibility does not qualify as an honest and reasonable attempt to comply with the tax code." *In*

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[6] As Plaintiff conceded in the November 2, 2021 hearing, the alternative Eleventh Circuit authority provided by Plaintiff in his Opposition (i.e., *Shek*) cannot be followed over *Smith*, which is binding on this Court. *See Mass. Dep't of Revenue v. Shek (In re Shek)*, 947 F.3d 770, 773 (11th Cir. 2020). Moreover, this Court notes that the facts of *Shek* are highly distinguishable from the circumstances here. In *Shek*, the debtor filed his tax return a mere seven months late. *Id.* Also in *Shek*, the liability at issue resulted from a voluntary and not substitute return, and the parties stipulated that the debtor's delinquent state tax return satisfied the Beard test. *Id.* at 775, 781. Neither are the case here.

[7] The Court disregards Plaintiff's argument contained in his Opposition that *Smith* arose out of several pre-BACPA cases. [Dk. 88, pg. 14]. *Smith* was decided after the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).

re Fremont, 748 Fed. App'x 137, 138 (9th Cir. 2019) (where the Court determined that debtor did not file a "return" within the meaning of § 523 because the debtor failed to provide the purported return until three to five years *after* the IRS assessed deficiencies).

Accordingly, the 1040 Forms submitted by Plaintiff were not an "honest and reasonable attempt to comply with the requirements of the tax law" and do not qualify as "returns" under the Beard test. Further, as they don't constitute a return, the associated taxes due are not discharged by 11 U.S.C. § 727. 11 U.S.C. § 523(a)(1)(B)(i).

III. Conclusion

For the foregoing reasons, the United States of America has met its burden to demonstrate it is entitled to judgment as a matter of law as to the 2003, 2004, 2006, and 2009 tax years and the Motion is hereby GRANTED. This Court hereby enters summary judgment in favor of Defendant and against Plaintiff as to Plaintiff's liabilities for the tax years 2003, 2004, 2006, and 2009.

IT IS SO ORDERED.

Date: November 3, 2021

Scott C. Clarkson
United States
Bankruptcy Judge

APPENDIX D

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION

In re JOHN PAUL SALVADOR, Debtor.	Case No. 6:19-bk-19296-SC Chapter 7
JOHN PAUL SALVADOR, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	Adv. No. 6:20-ap-01010-SC **JUDGMENT**

The Court renders its judgment in this proceeding as follows:

1. The discharge entered pursuant to 11 U.S.C. § 727 in *In re John Paul Salvador*, Case No. 6:19-bk-19296-SC (the "Bankruptcy Case"), did not and does not discharge the federal income tax liabilities owed by Plaintiff John Paul Salvador ("Salvador") to Defendant United States of America (the "United States"), including any assessed taxes, penalties, and interest, for the 2003, 2004, 2006 and 2009 tax years.

2. The discharge entered pursuant to 11 U.S.C. § 727 in the Bankruptcy Case discharged any and all federal income tax liabilities owed by Salvador to the United States, including any assessed taxes, penalties, and interest, for the 2010, 2011 and 2014 tax years.

3. To the extent the Complaint seeks a determination that the discharge entered pursuant to 11 U.S.C. § 727 in the Bankruptcy Case discharged any and all federal income tax liabilities owed by Salvador to the United States for the 2005, 2007, 2008, 2012 and 2013 tax years, Salvador's claim for such relief is dismissed.

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Date: January 11, 2022

Scott C. Clarkson
United States
Bankruptcy Judge

APPENDIX E

11 U.S.C. § 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date

of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

(4) Fourth, allowed unsecured claims, but only to the extent of $10,000 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods

or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $10,000; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons—

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility—

but only to the extent of $4,000 for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $1,800 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition—

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of—

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under

applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

APPENDIX F

11 U.S.C. § 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1192 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;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for the purposes of this subparagraph—

(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in Section 103 of the Truth in Lending Act; and

(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

(3) neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely

filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program

funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this

paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under Title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph(5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the

order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that—

(A) is for—

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934),

any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from—

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor; or

(20) for injury to an individual by the debtor relating to a violation of chapter 77 of title 18, including injury caused by an instance in which the debtor knowingly benefitted financially, or by receiving anything of value, from participation in a venture that the debtor knew or should have known engaged in an act in violation of chapter 77 of title 18.

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.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) 2 of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a

creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

APPENDIX G

Department of the Treasury	Internal Revenue Service	Office of the Chief Counsel	**Notice**

CC-2010-016

September 2, 2010

Subject:	Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities Reported on Late-Filed Returns and Returns Filed After Assessment	**Cancel Date:**	Effective until further notice

Purpose

This Notice provides guidance on the application of the discharge exception under section 523(a)(1)(B)(i) of the Bankruptcy Code for a debt with respect to which a return was not filed in cases in which the taxpayer filed a Form 1040 after the due date.

Distribute to: X All Personnel
X Electronic Reading Room
Filename: CC-2010-016 File copy in: CC:FM:PF

Background

Pursuant to section 523(a)(1)(B)(i), an individual's bankruptcy discharge does not discharge a tax debt for which a required return was not filed. The Government successfully argued in a number of circuits that a Form 1040 filed after assessment does not qualify as a return for discharge purposes under section 523(a)(1)(B)(i). For example, *In re Hindenlang*, 164 F.3d 1029 (6th Cir.), *cert. denied*, 528 U.S. 810 (1999), the Sixth Circuit held that a document must qualify as a federal tax return under tax law to be a return for bankruptcy purposes. The court applied the test in *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986), which held that if a document "contains sufficient information to permit a tax to be calculated" and "purports to be a return" and "is sworn to as such, and "evinces an honest and reasonable attempt to satisfy the law," it is a return. The *Hindenlang* court concluded that a Form 1040 filed after assessment serves no tax purpose and therefore was not an honest and reasonable attempt to satisfy the tax laws. Other circuits largely followed *Hindenlang*. *See In re Payne*, 431 F.3d 1055 (7th Cir. 2005); *In re Moroney*, 352 F.3d 902 (4th Cir. 2003); *In re Hatton*, 220 F.3d 1057 (9th Cir. 2000). The Eighth Circuit disagreed in *In re Colsen*, 446 F.3d 836 (8th Cir. 2006), holding that a document that on its face evinces an honest and reasonable attempt to satisfy the tax laws qualifies as a return, whether or not it was filed after assessment.

Section 523(a) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The following unnumbered paragraph was added to the end of section 523(a), effective for cases filed on or after October 17, 2005:

> For the purpose 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 of 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.

(Emphasis added.) Neither *Colsen* nor any of the prior decisions of the courts of appeal involved a bankruptcy case filed on or after October 17, 2005. In the dissent in *Payne*, Judge Easterbrook remarked that, after the 2005 legislation, an untimely return cannot lead to a discharge because of the reference to "applicable filing requirements" in the unnumbered paragraph in section 523(a). 431 F.3d at 1060. In *In re Creekmore*, 401 B.R. 748, 751 (Bankr. N.D. Miss. 2008), a post-October 17, 2005 case, the bankruptcy court agreed with Judge Easterbrook's dissent and concluded that any late-filed return can never qualify as a return for dischargeability purposes, unless it was prepared pursuant to I.R.C. § 6020(a). The bankruptcy court in *Creekmore* acknowledged that its reading of the unnumbered paragraph was harsh, but stated that debtors could avoid the problem by taking advantage of the "safe-harbor" of section 6020(a) by having the Service prepare their returns. *Creekmore*, 401 B.R. at 752.

Discussion

1. For bankruptcy cases filed on or after October 17, 2005, can a tax debt related to a late-filed Form 1040 be discharged?

Yes. Read as a whole, section 523(a) does not provide that every tax for which a return was filed late is nondischargeable. If the parenthetical "(including applicable filing requirements)" in the unnumbered paragraph created the rule that no late-filed return could qualify as a return, the provision in the same paragraph that returns made pursuant to section 6020(b) are not returns for discharge purposes would be entirely superfluous because a section 6020(b) return is always prepared after the due date. It is a cardinal principle of statutory construction that a statute should be construed so that no clause, sentence or word is rendered superfluous. *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (refusing to read one provision of the Bankruptcy Code to render another superfluous).

Section 523(a)(1)(B)(ii) provides that an individual's bankruptcy discharge does not discharge a debt for which a return was filed after the last date, including any extension, the return was due, and after two years before the date of the filing of the petition in bankruptcy. The *Creekmore* reading would limit the application of section 523(a)(1)(B)(ii) to cases in which the Service prepares a return for the taxpayer's signature under section 6020(a) of the Internal Revenue Code. By presuming that Congress intended to limit section 523(a)(1)(B)(ii)'s long-standing discharge exception for debts with respect to which a late return was filed more than two years before bankruptcy to the minute number of cases in which the Service prepares a return for the taxpayer's signature under section 6020(a), the *Creekmore* reading also

contradicts a special rule for interpreting the Bankruptcy Code. As the Supreme Court stated in *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992), "This Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." Finally, the supposed "safe harbor" of section 6020(a) is illusory. Taxpayers have no right to demand that the Service prepare a return for them under that provision. We, therefore, conclude that section 523(a) in its totality does not create the rule that every late-filed return is not a return for dischargeability purposes.

2. Whether or not a Form 1040 filed after assessment is a return under nonbankruptcy law, is the related tax debt dischargeable?

No. A debt for the portion of a tax that was assessed prior to the filing of a Form 1040 is nondischargeable under 523(a)(1)(B)(i). The debt is not dischargeable because a debt assessed prior to the filing of a Form 1040 is a debt for which is return was not "filed" within the meaning of section 523(a)(1)(B)(i).[1]

For bankruptcy discharge purposes, an income tax for any given year can be partially dischargeable and partially nondischargeable. Section 523(a)(1)(A), together with section 507(a)(8)(A), excepts debts for priority taxes from discharge. Section 507(a)(8)(A) includes three alternative rules that confer priority (and nondischargeability) on income taxes. Two of those rules

[1] Accordingly, whether a late-filed Form 1040 is a "return" – the issue addressed in *Hindenlang* and other cases on section 523(a)(1)(B)(i) – is irrelevant.

clearly allow priority to apply to only a portion of the tax for a given year. Section 507(a)(8)(A)(ii) generally confers priority (and nondischargeability) to income taxes that were assessed within 240 days of the bankruptcy petition. If only a portion of a year's income tax was assessed within the 240-day period, only that portion would be excepted from discharge. Section 507(a)(8)(A)(iii) generally confers priority (and nondischargeability) to income taxes that were unassessed but assessable after the bankruptcy case was filed. If only a portion of the income tax for a given year was unassessed but assessable, only that portion would be excepted from discharge. For discharge purposes, therefore, a given income tax is divided into dischargeable and nondischargeable debts if a criterion for discharge applies only to a portion of the tax.

As with section 523(a)(1)(A), a tax liability for any given year can be divided into dischargeable and nondischargeable debts under section 523(a)(1)(B)(i). Section 523(a)(1)(B)(i) excepts from discharge any "debt" for a tax with respect to which a return was not "filed." For bankruptcy discharge purposes, a debt for an income tax recorded by an assessment should be considered independently of any part of the tax for the same tax year that may be assessed later. If at the time of assessment no return has been filed, then the debt recorded by that assessment is a debt with respect to which a return was not filed and section 523(a)(1)(B)(i) applies to except it from discharge. If the taxpayer later files a Form 1040 that reports an additional amount of tax, only the portion of the tax that was not previously assessed would be a dischargeable debt based upon that subsection. The portion of a tax that was assessed before a Form 1040 was filed would be a debt for which no return was "filed" within the meaning of section 523(a)(1)(B)(i), because at

the time of assessment the debtor had not met the filing requirements for that portion of the tax and the assessed portion was not calculated based upon the tax reported on the Form 1040. The assessed portion of the tax was a debt for a tax that was legally enforceable by lien or levy before any return was filed. In the case of a debtor who files a Form 1040 after assessment reporting no more tax than was previously assessed, no portion of the tax would be a dischargeable debt.

Conclusion

A Form 1040 is not disqualified as a "return" under section 523(a) solely because it was filed late. Regardless of whether a Form 1040 filed after assessment is a "return" for tax purposes, the portion of a tax that was assessed before the Form 1040 was filed is nondischargeable under section 523(a)(1)(B)(i). All bankruptcy cases involving application of the discharge exception under section 523(a)(1)(B)(i) to cases involving a Form 1040 filed after assessment should be coordinated with Branch 5, Office of the Associate Chief Counsel (Procedure and Administration). Questions about this Notice should be directed to Branch 5 at (202) 622-3620.

/s/
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(Procedure &
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