KATHRYN KENEALLY
Assistant Attorney General

AARON M. BAILEY
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 616-3164
Facsimile: (202) 307-0054

Of Counsel
JOHN F. WALSH
United States Attorney
Attorneys for United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

In Re:	)	
	)	
PETER GEORGE MARTIN	)	Case No. 12-CV-3380-JLK
	)	
	)	
Debtors.	)	
	)	
	)	Bankr. No. 10-37360-ABC
PETER GEORGE MARTIN	)	Adv. Pro. No. 11-01536
	)	Chapter 7
	)	
Plaintiffs-Appellee	)	
	)	
v.	)	
	)	
THE UNITED STATES OF AMERICA	)	
	)	
Defendant-Appellant.	)	

OPENING BRIEF OF APPELLANT UNITED STATES OF AMERICA

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STATEMENT OF APPELLATE JURISDICTION

This is an appeal from the Order Granting Debtor's Motion for Summary Judgment and Denying the United States' Motion for Summary Judgment ("the Order") entered by the Bankruptcy Court on November 14, 2012. The United States filed a Notice of Appeal on November 27, 2012. The Bankruptcy Appellate Panel had initial jurisdiction over this appeal. On December 27, 2012, Debtor elected to remove the appeal to the District Court pursuant to 28 U.S.C. 158(c)(1)(B).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issue presented for review is as follows:

1. Whether a tax debt for which a taxpayer did not cooperate in the examination process and did not file a tax return until after the Internal Revenue Service had assessed the debt and undertaken collection efforts is dischargeable pursuant to 11 U.S.C. § 523(a)(1)(B) and whether the Bankruptcy Court erred in its rejection of *In re Wogoman*, 475 B.R. 239 (10th Cir. B.A.P. 2012).

STANDARD OF APPELLATE REVIEW

The standard of review applicable to the Bankruptcy Court's findings of fact is the clearly erroneous standard, pursuant to Rule 8013 of the Federal Rules of Bankruptcy Procedure. In this case the facts are undisputed. Record on Appeal ("ARA") at pp. 14-15. The Bankruptcy Court's conclusions of law are subject to *de novo* review. *Hall v. Vance*, 887 F.2d 1041, 1043 (10th Cir. 1989); *Miller v. United States*, 363 F.3d 999, 1003-1004

(9th Cir. 2004).

STATEMENT OF THE CASE

Debtor filed his bankruptcy petition on October 28, 2010. On August 4, 2011, the Debtor filed a Complaint initiating an adversary proceeding seeking a determination that his federal income tax liabilities for various periods were not excepted from the bankruptcy court's discharge order pursuant to 11 U.S.C. § 523(a)(1)(B). Only the income tax liabilities for the 2000 and 2001 tax periods, set forth in the IRS' Proof of Claim, are relevant to this appeal.

The United States filed an answer to the complaint on September 21, 2011. On February 27, 2012 the parties filed a joint stipulation of facts with the Court. ARA at pp. 14-15.[1] At the conclusion of discovery, the parties filed cross-motions for summary judgment and oppositions. On November 14, 2012, the Bankruptcy Court entered the Order which granted the Debtor's motion and denied United States' cross-motion. ARA, at pp. 169-176. The Bankruptcy Court adopted the reasoning of *Colsen v. United States*, 446 F.3d 836 (8th Cir. 2006), despite the Tenth Circuit Bankruptcy Appellate Panel's recent rejection of *Colsen*. *In re Wogoman*, 475 B.R. 239, 245-247 (10th Cir. B.A.P. 2012).

[1] References to record document numbers herein forward refer to the Bankruptcy Appellate Panel record filed in this proceeding at Rec. Doc. 10-1.

STATEMENT OF FACTS[2]

Debtor filed a voluntary petition under Chapter 7, Title 11, of the United States Code on October 28, 2010. The Court issued a discharge order on February 18, 2011. ARA at p. 18.

At the time the petition was filed, Debtor owed tax liabilities for various periods between 2000 and 2008. The only periods at issue in this adversary proceeding are 2000 and 2001. *Id.*

The Internal Revenue Service made assessments for the Debtor's 2000 and 2001 tax years after conclusion of an examination and issuance of a statutory notice of deficiency pursuant to 26 U.S.C. §§ 6212-13. *Id.* Because the Debtor did not file a timely challenge to the tax determination set forth in the notice of deficiency[3] in the United States tax Court, tax assessment was made for the 2000 and 2001 tax period on November 8, 2004, based upon the amounts set forth in the notice of deficiency. *Id.*

After the Debtor failed to pay his delinquent liabilities for 2000 and 2001, the IRS undertook collection action. On November 29, 2004, the IRS issued Notices of Intent to Levy regarding Debtor's 2000 and 2001 tax liabilities. On October 21, 2005, Notices of Federal Tax Lien were filed. *Id.*

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[2] The majority of the facts set forth below were the subject of joint stipulation by the parties. *See* ARA at pp. 14-15.

[3] A statutory notice of deficiency is prepared by the IRS after determination of a deficiency in reported (or unreported) tax. The notice is not itself a return under Section 6020(b) of the Internal Revenue Code. *Geiselman v. United States*, 961 F.2d 1, 4-5 (1st Cir. 1992).

On May 5, 2005, months after the IRS determined his tax liabilities, assessed taxes and commenced collection, did the Debtor submit a Form 1040 Federal Income Tax Return for his 2000 and 2001 federal income tax liabilities *Id.*

Based on the delinquent returns, on September 5, 2005, the IRS partially abated the 2000 and 2001 tax assessments made on November 8, 2004. After the abatements, the amount of the tax for 2000 and 2001 tax debts assessed by the IRS are equal to the amount reported on the delinquent Forms 1040 submitted by the taxpayer. *Id.*

The Debtor does not dispute the amount of the 2000 and 2001 federal income tax liabilities currently outstanding. *Id.* at p. 19.

The United States does not maintain that the penalties associated with the 2000 and 2001 income tax liabilities, to the extent they have not been abated, are excepted from discharge. *Id.*

ARGUMENT

I. THE PLAINTIFF'S DEBTS ARE EXCEPTED FROM DISCHARGE PURSUANT TO 11 U.S.C. § 523(a)(1)(B)

The statute at issue in this matter, 11 U.S.C. § 523, provides that certain tax debts are excepted from the bankruptcy court's discharge. Excepted debts include those: (1) for which no return was filed, (2) for which a return was filed within two years of the petition, and (3) where a return was fraudulently filed or there was a willful attempt to avoid or defeat tax. 11 U.S.C. § 523(a)(1). In 2005 congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), which modified this

statute. After the BAPCPA amendments, Section 523 now provides, in pertinent part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> (1) for a tax or a customs duty--
>
> (B) with respect to which a return, or equivalent report or notice, if required--
>
> (i) was not filed or given []
>
> . . .
>
> 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 written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

11 U.S.C. § 523(a)(1).

The BAPCPA amendments added the final unnumbered paragraph to this Section (sometimes referred to as "flush language" or the "hanging paragraph"). The flush language added by BAPCPA specifically excludes from the definition of "return" under Section 523 tax returns which do not "satisf[y] the requirements of applicable nonbankruptcy law (including applicable filing requirements)," as well as returns made by the Internal Revenue service under Section 6020(b) (Title 26). It is the government's position that tax debts such as those at issue in this matter are excepted from discharge because they are not debts for which a return was filed. *See* Section A.2 below.

This statute was the subject of the Tenth Circuit BAP's *Wogoman* opinion, decided

less than six months prior to the filing of the bankruptcy court's opinion in this matter. The Bankruptcy Court for the District of Colorado has also subsequently rendered an opinion based upon the same statute and analogous facts, finding, following *Wogoman*, that debts such as those here are excepted from discharge. *In re Mallo*, 2013 WL 49774 at *4 fn. 19 (Bkrptcy. D. Colo. January 3, 2012)(appeal pending).[4] The *Wogoman* panel analyzed the statute under three modes of analysis employed by various federal courts and found that returns filed after assessment by the government did not constitute "returns" for purposes of the discharge exception statute. As shown below, under each of these analyses, the debt in this matter is excepted from discharge.

A. THE 10th CIRCUIT (BAP)[5] RECENTLY ADDRESSED THIS STATUTE AND ANALOGOUS FACTS

The *Wogoman* panel reviewed a case from the same district with nearly identical facts and presenting the identical issue of law central to the instant matter: whether debt

[4] Briefing schedules have been consolidated with this matter, as both are pending before Judge Kane. Rec. Doc. 12.

[5] "Congress's purpose in establishing the BAP ["Bankrupty Appellate Panel"] was to provide a uniform and consistent body of bankruptcy law throughout the circuit." *In re Tong Seng Vue*, 364 B.R. 767, 771 (Bkrtcy. D. Or. 2007). Although it is somewhat unclear whether decisions of BAP have the binding effect of a decision from a regular panel of the Tenth Circuit, *see, e.g., In re Wenzel*, 415 B.R. 510, 517 fns. 41-42 (Bankr. D. Kan. 2009) (discussing lack of authority in the Tenth Circuit on the issue), the bankruptcy courts of this and other Circuits generally give strong deference to BAP decisions from their Circuit, particularly when, as in this case, the decision originates from the same district. *In re Tong Seng Vue* at 771 *In re Wenzel*, 415 B.R. at 517; *In re Amidon*, 423 B.R. 546, 550 fn. 12 (Bankr. D. Idaho 2010). Should this Court find Wogoman binding, the decision below should be reversed and judgment entered for the government.

for which a taxpayer files a return only after assessment and initiation of collection activities by the Internal Revenue Service constitutes a "filed return" for the purposes of 11 U.S.C. 523(a)(1)(B). *In re Wogoman*, 475 B.R. 239 (10th Cir. B.A.P. 2012). The *Wogoman* panel held that "the debtors' Form 1040 filed post-assessment is not a return" and affirmed the bankruptcy court's order. *Id.* at 241.

The primary holding of *Wogoman* is that "[a debtor's] Form 1040 filed post-assessment is not a return." *Wogoman*, 475 B.R. at 241. Thus, the panel positively affirmed the bankruptcy court's order granting summary judgment. Id. That order held the tax debt was not dischargeable because, as here, it was not based upon a return filed by taxpayers, but, upon the government's examination and assessment. *See In re Wogoman*, 2011 WL 3652281 at *5 fn.42 (Bankr. Colo. Aug. 19, 2011)(*citing In re Hindenlang*, 164 F.3d 1029, 1035 (6th Cir. 1999).

The *Wogoman* panel did note that three types of analyses had been applied by courts to the issue of defining a return under Section 523: (1) an analysis employing the *so-called "Beard*" test, employed by courts including the Sixth Circuit's *Hindenlang* panel; (2) the reasoning of *In re McCoy*, 666 F.3d 924 (5th Cir. 2012), or (3) the IRS's position regarding the implications of the post-Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") amendments to Section 523. Critically, the BAP noted under *any* of three potential analyses, the tax debt of the *Wogoman* taxpayers was not dischargeable under Section 523(a)(1)(B). *Wogoman*, 475 B.R. at 245.

The *Wogoman* panel chose not to affirmatively adopt the *McCoy* or IRS

approaches, noting as to the latter that it was "logical and easy to administer" from "a tax policy perspective[.]" *Id* at 250. Having done so, and having explicitly rejected an alternative view of the test set forth in *Beard,*[6] the panel applied the *Beard* test espoused by the majority of courts and the Sixth Circuit in *Hindenlang*. The panel affirmed the bankruptcy court's order which applied *Hindenlang*'s version of the *Beard* test analysis. Id. at 245-247; *see also In re Mallo*, 2013 WL 49774 at *4 fn. 19 (Bkrptcy. D. Colo. January 3, 2012) (noting that *Wogoman* panel had adopted *Hindenlang* and rejected the minority *Colsen* analysis). The three alternative analyses considered by the *Wogoman* panel are discussed at greater length below.

1. The Beard Test

Prior to passage of BAPCPA, the majority of courts that addressed the issue presented here, including four out of the five Circuit Courts, found that Form 1040s filed after the IRS had already made a determination and assessment of tax did not qualify as returns for purposes of determining dischargeability under § 523(a) because they failed the third prong of the *Beard* test and did not evince an honest and genuine endeavor to comply with the tax law.

With respect to the Circuit split between the Eighth Circuit's singular approach

[6] The test derives from *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986). The test states that in determining whether a document is a "return" the court should look to the following factors: "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 by signing it under penalty of perjury." Id. at 777.

and the majority of the Fourth, Sixth, Seventh and Ninth Circuits, the *Wogoman* panel specifically rejected the Eight Circuit's *Colsen* decision finding "the reasoning of the other circuit courts, i.e., that delinquency is relevant to an honest and reasonable attempt to satisfy tax law, is more persuasive." *In re Wogoman*, 475 B.R. at 247. The panel went on to note that while it was possible that the amendments to Section 523 wrought by passage of BAPCPA might create "a much more restrictive rule than the Beard test" the post-assessment return filed by the Debtors did not meet applicable filing requirements and was not an "honest and reasonable attempt to satisfy the requirements of the tax law." *Id*. at 248, 250.

To the extent the bankruptcy court below relied on the minority approach in applying the *Beard* test, found only in the Eighth Circuit *Colsen* decision, it erred. First, as noted above, the court appears to have ignored the BAP's explicit rejection of *Colsen*. *In re Wogoman*, 475 B.R. at 247. Secondly, by relying on *Colsen*, the court applied case law which does not address the current, post-BAPCPA statutory language. Lastly, the Court should have followed both *Wogoman*'s preference for the majority approach which takes a broader view of whether a late filing is a reasonable attempt to comply with the tax laws.

Among the pre-BAPCPA cases, the *Colsen* decision stands virtually alone in finding post-assessment returns such as those submitted here could, post-hoc, create a dischargeable debt. *See Mallo v. United States*, 2013 WL 49774 at *4 fn. 19 (Bkrptcy. D. Colo. January 3, 2012). The majority approach, represented by the Fourth, Sixth,

Seventh and Ninth Circuits, as well as a number of bankruptcy courts prior to 2006, found that debts for which debtors had filed returns late, and *after assessment by the IRS*, were not dischargeable. *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999), *cert. denied*, 528 U.S. 810 (1999); *In re Payne*, 431 F.2d 1055 (7th Cir. 2005); *In re Moroney*, 352 F.3d 902 (4th Cir. 2003); *In re Hatton*, 220 F.3d 1057 (9th Cir. 2000). Applying the analysis found in any of the majority opinions, Plaintiff's tax liabilities are not dischargeable.

In *Hindenlang*, the Court unequivocally held that when a debtor fails to respond to the statutory "deficiency letters sent by the IRS, and the government has assessed the deficiency, the Forms 1040 serve no tax purpose, and the government thereby has met its burden of showing that the debtor's actions were not an honest and reasonable effort to satisfy the tax law." *Hindenlang*, 164 F.3d at 1034-35. In this case, it is undisputed that Plaintiff failed to respond to the government's statutory notice and submitted a return only after the IRS had determined his liability, assessed the tax and began collection activities. *See* ARA p. 18 ¶6. There is no question that under *Hindenlang* Plaintiff's tax debt would be considered non-dischargeable.

The *Payne*, *Hatton*, and *Moroney* courts also concluded that "returns" submitted only after assessment by the IRS did not constitute a reasonable attempt to satisfy the tax law. *Payne*, 431 F.3d at 1057, *Hatton*, 220 F.3d at 1061, *Moroney* at 352 F.3d at 907. The *Payne* court noted that there "might . . . be circumstances beyond a taxpayer's control that prevented him from filing a timely return" which could be considered. *Payne*, 431 F.3d at 1059-60. No such circumstances exist in this case. In the matter below, Plaintiff

offered no example of "circumstances beyond his control" which led to his failure to file a tax return for several years. *See* ARA p. 123 ¶3. Moreover, Plaintiff's 2000 and 2001 tax returns were only two among several periods for which he filed delinquent tax returns between 2000 and 2008. *See* ARA p. 18 ¶2. The Plaintiff's failure to file a return is simply part of a larger pattern of non-compliance with the tax laws rather than "circumstances beyond his control" contemplated as a possible exception by *Payne*.

The *Moroney* court found that "the relevant inquiry is whether [the taxpayer] made an honest and reasonable attempt to comply with the tax laws, and not whether [the taxpayer's] eventual effort had some effect on his tax liability." *Id*. at 906. The *Moroney* court also noted that it "is wrong to conclude that the Bankruptcy Code implicitly condones any conduct that does not rise to the level of outright fraud or evasion." *Id*. at 907.[7] Thus a debtor "cannot seek the safe haven of bankruptcy by failing to file tax returns, waiting to see if the IRS assesses taxes on its own, and then submitting statements long after the IRS has been put to its costly proof." *Id*. Plaintiff's failure to timely self-assess, requiring a deficiency determination and assessment by the government, renders the late Form 1040 something less than a "return" under Section 523. *See Payne*, 431 F.3d at 1057 ("A return filed after the authorities have borne [the] burden [of reconstructing a taxpayer's income] does not serve the purpose of the filing

[7] Similarly, the *Hatton* court noted that "the belated acceptance of responsibility . . . does not constitute an honest and reasonable attempt to comply with the requirements of the tax law." *Hatton*, 220 F.3d at 1061. *Hatton* is somewhat unique in that the taxpayer never filed a Form 1040, but rather entered an installment payment agreement with the IRS after liabilities were assessed against him pursuant to 26 U.S.C. § 6020(b).

requirement.")

In light of the overwhelming majority of Circuit and Bankruptcy Court decisions finding that tax debts such as Plaintiff's are not dischargeable under Section 523, it is surprising, perhaps especially in light its clear rejection by the Tenth Circuit BAP, that the bankruptcy court below would explicitly adopt *Colsen v. United States*, 446 F.3d 836 (8th Cir. 2006). With the exception of *Colsen*, there is scant authority, if any, to support the bankruptcy court's determination. *Colsen* is not binding authority in this Circuit, is seriously flawed in its analysis of this issue and was specifically rejected by the *Wogoman* panel. Like the *Hindenlang*, *Payne* and *Moroney* courts, the *Colsen* court cited the "*Beard* test" as the basis for its analysis of whether a Form 1040 filed after assessment by the government could qualify as a "return" for purposes of the statute. *Colsen*, 446 F.3d at 839.

The *Colsen* court, however, conflated the third prong of the *Beard* test, which requires a determination of whether a purported return is "an honest and reasonable attempt to satisfy the requirements of the Federal income tax law," with the other three prongs which require a determination of whether "there [is] sufficient data to calculate tax liability; [whether] the document [] purports to be a return;" and whether it is executed under penalty of perjury. *Beard*, 82 T.C. at 777. The latter three prongs each require analysis of the "face of the form," but the former is not so limited in scope according to every other Circuit Court which has applied the test. Despite the redundancy it would create amongst the other prongs, the *Colsen* court chose to limit the analysis of

"reasonableness" to the face of the return itself. In addition to this redundancy, the *Colsen* analysis reduces the *Beard* test's "reasonable effort to satisfy the *tax law*" (emphasis added) prong to a determination of whether a document meets the facial requirements of return.[8] As every other court which has studied the issue has resolved, however, there is no basis for cabining the language of the *Beard* test in this manner.

Finally, the bankruptcy court's reliance on *Colsen* at all is misplaced, as the *Colsen* panel itself noted that it did not analyze this issue with the BAPCPA amendments in mind. Further, the *Colsen* panel specifically relied Judge Easterbrook's dissent in *Payne* which observed that, post-BAPCPA, "an untimely return can not lead to a discharge-recall that the new language refers to 'applicable nonbankruptcy law (including applicable filing requirements).'" *In re Payne*, 431 F.3d at 1060 (Easterbrook, J., dissenting); *Colsen*, 446 F.3d at 840 ("we find Judge Easterbrook's arguments [in *In re Payne*] persuasive."). Thus, even the *Colsen* opinion is questionable support for the Bankruptcy Court's determination here, as it is not clear that even in the Eighth Circuit *Colsen* would dictate the same result post-BAPCPA.

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[8] The *Colsen* opinion's reliance on caselaw interpreting the definition of "return" in the context of a charge under a criminal statute is an additional flaw in its analysis. *See Payne*, 431 F.3d at 1058 (noting that the Supreme Court's *Badaracco* decision is inapplicable in the context of Section 523(a)(1)(B)). As the *Payne* majority pointed out, there is no reason that definition of "return" in a case involving criminal fraud allegations must be the same as that under Section 523. *Id*. In fact, Section 523 specifically addresses fraudulent returns in a separate subsection not at issue here, making resort to external definitions supplied by cases such as *Badaracco* superfluous.

2. The IRS Position Regarding the Effect of the BAPCPA Amendments

In the view of the government, set forth in IRS Chief Counsel Notice CC-2010-016 (2010 WL 3617597), the amendments to Section 523 wrought by BAPCPA do not allow the discharge of debts relating to assessments made by the government before the filing of a valid federal tax return, when the government has made the effort to notify the taxpayer of his or her deficiency pursuant to the relevant law and assess a tax, thereby creating a debt that is immediately collectable, all without the input of the taxpayer. The emphasis of this approach is on the nature of the debt.

As explained by the Internal Revenue Service's published guidance on this issue,

> 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.

Chief Counsel Notice 2010-016.

This view allows a distinction to be made between a tax debt arising from a taxpayer's late filed return (which may be excepted from discharge pursuant to Section 523(a)(1)(B)(ii) if filed more than two years prior to the bankruptcy petition) and that debt which already exists at the time the late return is submitted. Thus, tax debts resulting

from taxpayer's filing, albeit late, which exceed the pre-existing debt accrued as the result of government action may still be discharged.

Some courts have found, as discussed below, that any late filing may indeed not constitute a return under Section 523 because the statute now requires that the purported return "satisfy . . . applicable filing requirements."[9] The government's reading of the statute, however, makes the issue of "whether a late-filed Form 1040 is a 'return' ... irrelevant." Chief Counsel Notice CC-2010-016. Rather, in the government's view, the issue is whether the *debt* Plaintiff seeks to discharge is *a debt for which a return was filed*. This approach, neither wholly rejected nor adopted by the BAP *Wogoman* panel, and reurged by the government in this matter, views debts determined and recorded by an IRS assessment prior to the filing of a return as non-dischargeable under § 523(a) because they are debts for which no return was filed. Put succinctly, the genesis of the debt in this case is in government action, not the filing of a return. There is no dispute that at the time the IRS made the assessments for these debts that they were wholly *collectible* despite the absence of a return. The subsequent filing of a Form 1040, even if the Form 1040 qualifies as a tax return, does not change the nature of these debts: these debts were not

[9] The Bankruptcy Court noted that it "reject[ed] the interpretation of the BAPCPA Amendment in which timeliness of a return is deemed an 'applicable filing requirement[,]'" noting that these requirements are "found in statutes . . . regulations, and in case law." ARA at p. 8 The court was correct that the filing requirements are found in statutes and regulations, but the court left unexplained why it felt certain of those statutes and regulations, including the self-assessment requirements of 26 U.S.C. § 6011 and the timeliness requirement of 26 U.S.C. § 6072 could simply be ignored when considering the mandate found in Section 523 that the return "satisfy" those requirements.

self-assessed and they remain not self-assessed, *i.e.*, they remain debts for which no return was filed. However, should a late filed return reflect additional liability, such debt would likely qualify as debt for which a return was filed and hence be dischargeable as to the additional liability reported.

This approach is a straightforward reading of the statutory language in § 523(a), which disallows a discharge for any "debt ... for a tax ... with respect to which a return ... was not filed or given," and there is nothing in the statutory language to suggest that filing a Form 1040 after the IRS had already made assessments for certain debts changes the nature of these debts from debts for which no return was filed, to self-assessed debts, and thus debts for which a return was filed.[10]

The *Wogoman* panel noted that this approach had not yet been adopted, but agreed with the soundness of its logic. *Wogoman*, 475 B.R. at 250. This approach leads to a less harsh result for debtors than that reached by the majority of courts analyzing this issue post-BAPCPA, as discussed below. In the view of these courts, BAPCPA amended § 523(a) to provide an unambiguous definition of "return," to mean obviation of the need to retreat to the pre-BAPCPA *Beard* test. For the reasons discussed above, however, the

[10] In fact, the flush language of § 523(a) reflects the fact this subsection recognizes that self-assessed debts should be treated differently than those debts recorded and determined by the IRS without the voluntary participation of the taxpayer. Specifically, the statute provides that returns prepared under 26. U.S.C. § 6020(a), which requires that the taxpayer "consent to disclose [to the IRS] all information necessary for the preparation" of returns by the IRS, qualify as returns for the purposes of § 523(a), but that returns prepared by the IRS under 26 U.S.C. § 6020(b), which does not contemplate the taxpayer's participation, do not qualify as returns for the purposes of § 523(a).

United States also disagrees with the harsh results dictated by *McCoy* and its progeny and, as its primary position, urges the court to adopt the analysis advocated in Chief Counsel Notice CC-2010-016.[11]

Here, Plaintiff failed to file tax returns for years after the dates on which the returns were due and only after the IRS had expended government resources reconstructing Plaintiff's income and assessing the income tax due did Plaintiff file "returns." Even then, Plaintiff only filed his "returns" after the IRS began collection activities on what was already a collectible debt. Plaintiff's late-filed returns thus served primarily as a vehicle to allow him make a claim for dischargeability at a later date, not as a means of self-assessing a tax debt. Accordingly, the Plaintiff's debt should be deemed excepted from discharge pursuant to Section 523(a)(1)(B(i) because it is not a debt arising from a filed return. If the Court chooses not to adopt this analysis, however, the vast weight of pre-BAPCPA authority, following a *Hindenlang*-type analysis, clearly militates against dischargeability of the Mr. Martin's debt, as discussed above.

3. The Fifth Circuit McCoy Decision

After BAPCPA amended § 523(a) to create a definition for a return which required that the return must satisfy "applicable filing requirements," many courts have dispensed with the *Beard* test and applied this definition to determine that such late-filed Forms

[11] As an example, under the government's reading of the statute any debt attributable to a late-filed Form 1040 which reflects an additional liability above the IRS's initial assessment may be discharged, whereas under the *McCoy* approach it may not.

1040 could never qualify as returns because they failed to satisfy applicable filing requirements. *See, e.g., In re McCoy*, 666 F.3d 924 (5th Cir. 2012) (holding that a return that is filed late under applicable nonbankruptcy law is not a return for dischargeability purposes under § 523(a), unless it qualifies as a return under § 6020(a) or similar state provision);[12] *Cannon v. United States (In re Cannon)*, 451 B.R. 204, 206 (Bankr. N.D. Ga. 2011); *Links v. United States (In re Links)*, Nos. 08–3178, 07–31728, 2009 WL 2966162, at *5 (Bankr. N.D.Ohio Aug. 21, 2009); *Creekmore v. Internal Revenue Serv. (In re Creekmore)*, 401 B.R. 748, 751 (Bankr. N.D. Miss.2008) ("The definition of 'return' in amended § 523(a) apparently means that a late filed income tax return, unless it was filed pursuant to § 6020(a) of the Internal Revenue Code, can never qualify as a return for dischargeability purposes because it does not comply with the 'applicable filing requirements' set forth in the Internal Revenue Code."); *cf. Pansier v. Wisc. Dep't of Revenue*, No. 10–C–0550, 2010 WL 4025884, at *5 (E.D.Wis. Oct. 14, 2010) (observing that § 523(a) strengthens the Seventh Circuit's pre-BAPCPA position that a late-filed, post-assessment tax return cannot qualify as a return for discharge purposes).

The United States does not advocate adoption of *McCoy*, as it leads to harsh results that would penalize taxpayers who file even a day late and without requiring government intervention to assess the tax.

[12] Although the tax debts at issue in *McCoy* were state, not federal, *McCoy* analyzes aspects of the Chief Counsel Notice CC-2010-016.

CONCLUSION

The Bankruptcy Court's rejection of *Wogoman* is unwarranted. Regardless of whether the court was compelled to follow *Wogoman*, adoption of a minority position that is itself based upon a superceded statute was error. In the post-BAPCPA period, the ruling below stands virtually alone in holding that returns filed after assessment of a tax debt convert an otherwise excepted debt into a dischargeable debt. *See, e.g.*, *In re McCoy*, 666 F.3d at 924; *In re Mallo*, 2013 WL 49774 at *4; *Cannon*, 451 B.R. at 206; *Links*, 2009 WL 2966162, at *5; *Creekmore*, 401 B.R. at 751; *In re Casano*, 473 B.R. 504, 508 (E.D.N.Y. 2012); *In re Smythe*, 2012 WL 843435 at *5 (W.D. Wash. Bankr. March 12, 2012); *In re Shinn*, 2012 WL 986752 at *6 (Bankr. C.D. Ill. March 22, 2012). While the reasoning of the courts have varied between adoption of *McCoy* approach and the *Hindenlang* approach, the results have not. For the reasons set forth above, the Court should reverse the decision of the Bankruptcy Court and enter a determination that the Debtor's federal tax debts are excepted from discharge pursuant to 11 U.S.C. § 523(a)(1)(B)(i).

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DATED this 19th day of February, 2013.

Respectfully submitted,

KATHRYN KENEALLY
Assistant Attorney General

/s/ Aaron M. Bailey
AARON M. BAILEY
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 616-3164
Facsimile: (202) 307-0054
Attorneys for United States of America

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing BRIEF has been made this 19th day of February, 2013, by placing a copy thereof in the United States' Mail addressed to the following:

Charles S. Parnell
4891 Independence Street
Suite 150
Wheat Ridge, CO 80033
(*Attorney for Debtors*)

Peter George Martin
1750 30th Street, No. 521
Boulder, CO 80301

U.S. Trustee's Office
999 18th Street, Suite 1551
Denver, CO 80202

/s/ Aaron M. Bailey
AARON M. BAILEY
Trial Attorney, Tax Division
U.S. Department of Justice