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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

In Re: EDSON PAMITTAN MALLO and LIANA CAROL MALLO Debtors.	)	Case No. 13-CV-00098-JLK
EDSON PAMITTAN MALLO and LIANA CAROL MALLO Plaintiffs-Appellant v. THE UNITED STATES OF AMERICA Defendant-Appellee.	)	Bankr. No. 10-12979-MER Adv. Pro. No. 11-01624-MER Chapter 7

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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STATEMENT OF APPELLATE JURISDICTION

This is an appeal from the Order Denying Debtors' Motion for Summary Judgment and Granting the United States' Motion for Summary Judgment ("the Order") entered by the Bankruptcy Court on January 3, 2013. The Debtors filed a Notice of Appeal on January 15, 2013, electing review by the District Court in lieu of the Bankruptcy Appellate Panel of the Tenth Circuit.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issue presented for review is as follows:

1. Whether the banktuptcy court, in following the Tenth Circuit Bankruptcy Appellate Panel and several Circuit Courts of Appeal, correctly determined that 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).

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. 14-16. 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

Appellants filed their bankruptcy petition on February 18, 2010. On September 17, 2011, the Appellants 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 January 3, 2012, the Bankruptcy Court entered the Order which denied the Appellants' motion and granted the United States' cross-motion. The Bankruptcy Court found that the Tenth Circuit Bankruptcy Appellate Panel's recent ruling on this issue in the matter of *In re Wogoman*, 475 B.R. 239, 245-247 (10th Cir. B.A.P. 2012) was compelling precedent in making its determination.

STATEMENT OF FACTS[2]

Appelants filed a petition under Chapter 13, Title 11, of the United States Code on

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

[2] The majority of the facts set forth below were the subject of joint stipulation by the parties. *See* ARA at pp. 14-17. To the extent any additional facts are recounted, they were not disputed during the Bankruptcy Court proceedings.

February 18, 2010, which was converted to Chapter 7 on March 23, 2011. The Court issued a discharge order on July 5, 2011.

At the time the petition was filed, Appellants owed tax liabilities for various periods between 2000 and 2009. The only periods at issue in this adversary proceeding are 2000 and 2001. ARA at pp. 14-17.

The Internal Revenue Service made assessments for the Appellants' 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 Appellants 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 assessments were made for Mrs. Mallow for the 2000 tax period on July 10, 2006 and for Mr. Mallow for the 2001 tax period on July 11, 2005, based upon the amounts set forth in the notice of deficiency. *Id.*

After the Appellants failed to pay their delinquent liabilities for 2000 and 2001, the IRS undertook collection action. On November 13, 2006, the IRS issued a Notice of Intent to Levy to Mrs. Mallo regarding her 2000 tax year liabilities. On January 7, 2006, and again on February 15, 2006, the IRS issued a Notice of Intent to Levy to Mr. Mallo regarding his 2001 tax year liabilities.

On or about April 6, 2007, only after the IRS conducted an examination, issued a

[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).

statutory notice of deficiency, and assessments were made, did Appellants submit a joint Form 1040 signed under penalty of perjury to the Internal Revenue Service for their 2001 federal income tax liability. Similarly, six months later, Appellants submitted a joint Form 1040 signed under penalty of perjury to the Internal Revenue Service for their 2000 federal income tax liability on or about October 7, 2007.[4]

An additional tax assessment in the amount of $4,576 was made jointly against the Appellants as a result of their untimely submission of the joint Form 1040 for 2000. After the additional assessment of $4,576, the amount of tax assessed against the Appellants for 2000 is equal to the amount reported on the joint Form 1040 submitted in October 2007.

No additional tax assessment was made as a result of the submission of the untimely joint Form 1040 for 2001. Rather, the IRS reduced the amount of Appellants' joint liability for 2001based on this return. After this abatement, the amount of tax assessed against Appellants for 2001 is equal to the amount reported on the joint Form 1040 submitted in April 2007.

The Appellants do not dispute the amount of the 2000 and 2001 federal income tax liabilities currently outstanding. *Id.*

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

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[4] It is curious that Appellants spend several pages of their opening brief discussing IRS "coding" in the records of their accounts. It has been stipulated that Appellants filed no returns for the 2000 and 2001 periods until 2007. To suggest that short-hand codes in the record suggest that some other "return" was filed is irrelevant at best and certainly disingenuous.

from discharge. *Id.*

ARGUMENT

The Appellants argue that the bankruptcy court erred by refusing to adopt reasoning rejected by the Tenth Circuit BAP on the very issue presented less than six months prior to the Court's order. *In re Wogoman*, 475 B.R. 239, 245-247 (10th Cir. B.A.P. 2012). The Appellants would have the Court adopt a line of reasoning that has been rejected by virtually all bankruptcy courts and Circuit Courts which have spoken on the issue, with the exception of the Eighth Circuit. Moreover, the Eighth Circuit decision touted by Appellants appears to admit, at least tacitly, that its reasoning does not apply in the current statutory context. While the Appellants' brief does not appear to directly address the actual decision appealed from or its basis, it is the contention of the government that the bankruptcy court correctly held that the taxes at issue are excepted from discharge pursuant to 11 U.S.C. § 523(a)(1)(B)(i).

To the extent that each of the Appellants filed respective Forms 1040 after the IRS had taken measures to determine their tax liabilities and make assessments, and years after their statutory due dates in 2001 and 2002, these returns do no qualify as "returns" as defined by 11 U.S.C. § 523, nor do the debts at issue qualify as debts for which a return has been filed, as defined by the vast majority of courts which have considered the issue, including the Tenth Circuit Bankruptcy Appellate Panel. The United States has fully briefed the history of the statute in its Opening Brief in the companion case, *Martin v. United States*, 1:12-CV-3380-JLK (Rec. Doc. 13), the pertinent arguments in which it

incorporates by reference. Below, the United States responds to arguments set forth by the Appellants.

I. THE BANKRUPTCY COURT'S DECISION

The opinion of the court below, following *Wogoman*, found that debts such as those here are excepted from discharge. *ARA at pp. 205-206*. The bankruptcy court correctly noted that the *Wogoman* panel analyzed the statute under three modes of analysis employed by various federal courts. The bankruptcy court stated that *Wogoman* panel applied the analysis found in *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999) and applied the same analysis in rendering its decision:

> Synonymous with the discussions in *Hindenlang* and its progeny, the 2007 returns filed by the Mallos do not represent an honest and reasonable attempt to comply with tax law. Rather, they are belated attempts to create a record of compliance when none really exists, long after the IRS had filed substitutes for returns and provided notices of deficiency. "[T]o belatedly accept responsibility for one's tax liabilities, only when the IRS has left one with no other choice, is hardly how honest and reasonable taxpayers attempt to comply with the tax code."

ARA at p. 205.

To the extent that *Wogoman*, and hence *Hindenlang*, is controlling or at the very least strongly persuasive authority here with respect to the application of Section 523 to tax debts arising from government assessment rather than returns, the bankruptcy court's opinion below is unassailably correct. To the extent that the Appellants filed their federal income tax returns for the 2000 and 2001 tax periods years after they were due, so late in fact that the government had taken steps to reconstruct their income and assess the taxes,

the liabilities are excepted from discharge. ARA at pp. 33-34, ¶¶12 & 21.

II. THE GOVERNMENT'S INTERPRETATION OF SECTION 523

Appellants correctly note that the government's primary position on the issue before the Court is set forth in IRS Chief Counsel Notice CC-2010-016 (2010 WL 3617597). The Appellants' characterizations of the position, however, are misguided and inaccurate. Appellants assert that the government is simply re-arguing a position which was rejected by *In re Savage*, 218 B.R. 126 (10th Cir. BAP 1998). First, as the *Wogoman* panel found, the arguments put forward by the government in *Savage* did not include potential application of the *Beard* test, as here. *Wogoman*, 475 B.R. at 250 fn. 58. Moreover, *Savage*, in light of *Wogoman*, is at best now a dead letter. But the characterization is also inaccurate, because government's current primary position is focused upon the nature of the debt, not the purported "return" as was argued in *Savage*. The tax debts of the Appellants (2000 for Mrs. Mallo, 2001 for Mr. Mallo) were created by government action, by the assessment under 26 U.S.C. § 6212, et seq., without the benefit of a tax return. Indeed, the Appellants shirked their obligation to file a return. The debt arising from the assessment was immediately collectable and underwent no transformation, either as a financial matter or legal matter, when the Appellants filed their returns.

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.

The Appellants' belated submission of a Form 1040 did not alter the fact that the assessment, at least as to one of the Appellants for each period, was made by the IRS without a signed return. *See* Statement of Facts, p. 7. In this case the IRS assessed individual liabilities for Mrs. Mallo for 2000 and Mr. Mallo for 2001. The Mallos chose to file joint returns for both periods, thereby incurring additional debt for Mr. Mallo for the 2000 period and for Mrs. Mallo for 2001. The government does not dispute that this additional debt, attributable to the returns filed by each respective Appellant, is dischargeable.

Appellants seem to assert that the government position is unfair because they believe it "treats the same document . . . [as] a tax return for one party but not the other" in situations where Appellants filed a late joint return and only one of them was previously assessed the liability by the government.[5] This supposed contradiction is

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[5] Appellants also claim that there is some conflicting "statutory interpretation" at issue with the government and the majority of courts' treatment of late-filed returns and the treatment of "returns" made pursuant to 26 U.S.C. § 6020(a) & (b) under the language added to Section 523 by BAPCPA. Appellants Brief at fn. 24. Rather to the contrary, this language, the so-called hanging paragraph, recognizes that self-assessed debts should be treated differently than

illusory. A taxpayer who is assessed prior to filing a Form 1040 has a debt, for which no return is filed. A taxpayer who is not previously assessed, but elects, belatedly, to file a return where there was no liability has a debt "for which a return was filed" under Section 523. The belated election of two taxpayers to file a joint return, where taxpayer A has failed to file a timely return but has been assessed liability by IRS action and taxpayer B has no previous assessed liability, does not change the fact that taxpayer A has a debt originating prior to submitting a return. Indeed, many late filers are able to submit returns prior to the IRS conducting an audit or making an assessment, leaving them with a debt which, in the view of the government, would be dischargeable.

Divisibility of tax debt into dischargeable and non-dischargeable portions is, contrary to Appellants' intimations, provided for by statute. 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 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

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those debts recorded and determined by the IRS without the voluntary participation of the taxpayer. Namely, the flush language provides that returns prepared under 26. U.S.C. § 6020(a), which requires that the taxpayer "consent to disclose all information necessary for the preparation thereof," 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).

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. The criterion at issue here, whether a debt originated from government activity or from the compliance with the tax laws and a filed return, allows the court to make a distinction, for example, between the pre-existing, non-discharageeable debt of Mrs. Mallo for the year 2000 and the dischargeable debt of Mr. Mallo for the same tax period. 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.[6]

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. Under the government's reading of the statute, any debt attributable to a late-filed Form 1040 which reflects an additional liability above the

[6] *See* footnote 5, *supra*.

IRS's initial assessment may be discharged.

Here, to the extent Appellants failed to file tax returns for years after the dates on which the returns were due, and then filed returns only after the IRS had expended government resources reconstructing Appellants' income and assessing the tax (2001 for Mr. Mallo, 2000 for Mrs. Mallo), the debts are excepted from discharge. The United States has conceded that the additional debt created by the returns filed after assessment is dischargeable (2000 for Mr. Mallo, 2001 for Mrs. Mallo). Appellants' preference for an all or nothing is, as noted above, a false choice in light of the bankruptcy code's provision for divisibility of debts. As discussed below, if the Court chooses not to adopt this analysis, however, the vast weight of pre-BAPCPA authority, strongly militates against dischargeability of the Appellants' debts.

III. *THE BANKRUPTCY COURT CORRECTLY ADOPTED THE TENTH CIRCUIT BAP'S APPROACH TO THE BEARD TEST*

Appellants suggest that the proper method for analyzing whether a return has been filed under Section 523 is to resort to what has been called the *Beard*[7] test for determining what constitutes a tax return. 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

[7] 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

with the tax law. The majority approach, is represented decisions rendered by the Fourth, Sixth, Seventh and Ninth Circuits. *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). In fact, the Sixth Circuit (*Hindenlang*), was responsible for considering an appeal of the original *Beard* case and affirming its holding. *Beard v. Commissioner*, 793 F.2d 139 (6th Cir. 1986). Under this majority understanding of the *Beard* test, as adopted by the Tenth Circuit BAP and applied by the bankruptcy court below, there is no question that the Appellants' tax debts are excepted from discharge to the extent that the debts were assessed prior to any return being filed.

In the Tenth Circuit, the *Wogoman* BAP specifically rejected the Appellants' suggested approach, *i.e.*, adoption of the Eighth Circuit's version of the *Beard* test, finding that the majority courts' reasoning "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. Among the pre-BAPCPA cases, the Eight Circuit's *Colsen* decision stands virtually alone in finding post-assessment returns such as those submitted here could, post-hoc, create a dischargeable debt. The *Wogoman* 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 returns 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.

Here, the bankruptcy court correctly noted that the *Wogoman* panel had adopted the majority's application of the *Beard* test in the context of Section 523. The *Payne*, *Hatton*, and *Moroney* courts 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, Appellants offered no example of "circumstances beyond their control" which led to their failure to file a tax return for several years. *See* ARA p. 139 ¶3.[8] Moreover, Appellants' 2000 and 2001 tax returns were only two among several periods for which they filed delinquent tax returns between 2000 and 2009. *See* ARA p. 18 ¶2. The Appellants' failure to file a return is simply part of a larger pattern of non-compliance with the tax laws rather than "circumstances beyond their control" contemplated as a possible exception by *Payne*.[9]

Moreover, Appellants' insistence that the lack of "fraud" or at least a finding of fraud, is somehow relevant is misplaced. The *Moroney* court found that "the relevant inquiry is whether [the taxpayer] made an honest and reasonable attempt to comply with

[8] The Appellants cite loss of a job and deaths of family members as reasons for failure to file. Neither of these circumstances meets the definition of "financial disability" which, for example, might excuse a belated attempt to file. *See* 26 U.S.C. 6511(h).

[9] The Tax Code provides for such exceptions specifically. *See, e.g.*, 26 U.S.C. § 6511(h). Appellants neither pled nor submitted evidence in support of an argument that they were unable to file due to such circumstances.

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.[10] 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 requirement."). The fact that there has been no allegation under one subsection of the statute (Section 523(a)(1)(C)(exception due to fraud)) is simply irrelevant to the issue before the Court.

Appellants ask the Court to reject *Wogoman* and the majority rule in favor of explicitly adopting *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

[10] 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).

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.[11] As every other court which has studied the issue has resolved,

[11] 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.

however, there is no basis for cabining the language of the *Beard* test in this manner.

The *Colsen* panel itself noted that it did not analyze this issue with the BAPCPA amendments in mind. Finally, the *Colsen* panel specifically relied on 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.[12]

CONCLUSION

The bankruptcy court correctly applied the *Wogoman* panel's method of analysis and its decision should be affirmed. Regardless of whether the court was compelled to follow *Wogoman*, adoption of a minority position that is itself based upon a superceded statute would be error. In the post-BAPCPA period, virtually every case has found that

[12] The government notes that 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 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); *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 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.

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 affirm 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).

DATED this 14th day of March, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing BRIEF has been made this 14th day of March, 2013, by placing a copy thereof in the United States' Mail addressed to the following:

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