UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In general, the issue to be decided is whether Plaintiff's 2000 and 2001 federal income tax liabilities are excepted from discharge pursuant to 11 U.S.C. § 523 (a)(1)(B)(i) or (ii). More specifically, the issue is whether the 1040's filed by the Plaintiff on May 5, 2005 for the 2000 and 2001 tax periods are tax returns.

STANDARD OF APPELLATE REVIEW

There are no factual issues on appeal. Legal issues are reviewed *de novo*.[1]

STATEMENT OF THE CASE[2]

Mr. Martin 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 11, 2011.

Mr. Martin filed an Adversary Proceeding on August 4, 2011 requesting the Court enter an Order that the tax liabilities for 2000 and 2001 were debts discharged by the Discharge Order issued on February 11, 2011. Record on Appeal (hereinafter "ROA") at pp. 6-8. Defendant-Appellant filed an answer on September 21, 2011. ROA at pp. 9-13.

The dischargeability of the taxes in question is controlled by 11 U.S.C. § 523 (a)(1). This paragraph has three subparagraphs that indicate when a tax is not dischargeable. This first subparagraph refers to 11 U.S.C. § 507 (a)(8)(A). This renders any priority tax nondischargeable. The parties are in agreement that the 2000 and 2001 taxes are not priority taxes. The third subparagraph renders a tax liability nondischargeable if a fraudulent return is filed or if the debtor willfully attempted to evade or defeat the tax. The parties are in agreement that there is no fraud in this situation. The second subparagraph renders any tax liability nondischargeable if a return was not filed, or was filed within the two years preceding the filing of the Bankruptcy. This is the issue that is in dispute. The IRS position is that returns were never filed. Mr. Martin asserts returns were filed. The dischargeability of the penalties in question is controlled by 11 U.S.C. § 523(a)(7). There is no dispute as to the dischargeability of the penalties. The penalties are dischargeable.[3]

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[1] *In re Bergstrom*, 949 F.2d 341, 343 (10th Cir. 1991).

[2] There are four other cases with substantially similar facts. One of these cases, *In re Mallo*, 2013-1 U.S. Tax Cas. (CCH) P50,133 is also on appeal in front of this Court. The other three cases are: *In re Chaj Ajtun*, No. 11-1538, *In re Reneau*, No. 11-1539, and *In re Urban*, No. 11-1540. The Bankruptcy Court is holding these cases in abeyance pending the appeals of this case and *Mallo*.

[3] *In re Roberts*, 906 F.2d 1440 (10th Cir. 1990).

On November 14, 2012, the Court, entered an Order, ROA at 177-185, Granting Martin's Motion for Summary Judgement, ROA commencing at page 75, and Denying the Defendant-Appellant's Motion for Summary Judgement, ROA commencing at page 17. The Order recognizes the 1040's as tax returns. On November 27, 2012, the Defendant-Appellant filed a timely appeal of the Court's final order. On December 28, 2012, Mr. Martin filed a Notice of Election to have this appeal heard by the District Court. The District Court has jurisdiction to hear appeals of final orders and judgements of the Bankruptcy Court pursuant to 11 U.S.C. § 158(a)(1).

STATEMENT OF FACTS

The parties submitted, ROA at pp. 14-16, the following stipulated facts to the Court:

1. Mr. Martin 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 11, 2011.

2. At the time the petition was filed, Martin owed tax liabilities for various periods between 2000 and 2008.[4] The only periods at issue in this adversary proceeding are 2000 and 2001.

3. The Internal Revenue Service (hereinafter "IRS") made an assessment for Mr. Martin for the 2000 and 2001 tax periods after conclusion of an examination and issuance of a statutory notices of deficiency pursuant to 26 U.S.C. §§6212-13. It is unknown whether a §6020(b) certificate was also issued.

4. Mr. Martin did not file a timely challenge to the tax determinations set forth in the notices of deficiency.

5. The tax assessments were made for the 2000 and 2001 tax periods on November 8, 2004, based upon the notices of deficiency.

6. Mr. Martin submitted Forms 1040 signed under penalty of perjury to the IRS for his 2000 and 2001 federal income tax liabilities on or about May 5, 2005. ROA at pp. 134-143.

7. The IRS partially abated Mr. Martin's 2000 and 2001 tax liabilities in September 2005. After abatement, the amount of the tax liabilities for 2000 and 2001 are equal to the amounts reported on the Forms 1040 submitted in May of 2005.

8. There is no dispute as to the amount of the 2000 and 2001 federal tax liabilities.

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[4]The parties have not put forth the status of periods where the parties are in agreement as to dischargeability. This language is added by Counsel and is not part of the stipulated facts.

Although not part of the stipulated facts, it is important to note that there is no suggestion of fraud in this situation. In addition, other than the fact the 2000 and 2001 returns were filed after completion of the Substitute for Return[5] process, no information has been provided to suggest the tax returns filed by Mr. Martin did not meet the requirements of a return. The IRS has conceded, that regardless of the outcome of this issue, the penalties for the 2000 and 2001 periods are dischargeable, ROA at p. 19 ¶ 10.

ARGUMENT

I. CONTROLLING AUTHORITY

There are three primary Supreme Court opinions regarding what constitutes a tax return. These cases are *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 55 S. Ct. 127, 79 L. Ed. 264 (1934), *Germantown Trust Co. v. Commissioner*, 309 U.S. 304, 60 S. Ct. 566, 84 L. Ed. 770 (1940) and *Badaracco v. Commissioner*, 464 U.S. 386, 104 S. Ct. 756, 78 L. Ed.2d 549 (1984).

There is no direct controlling authority on the issue of whether filing the tax return after completion of the Substitute for Return process effects whether the document is a tax return. Neither the Supreme Court nor the 10th Circuit has ruled on this issue.

There are two 10th Circuit Bankruptcy Appellate Panel (hereinafter "BAP") decisions on this issue.[6] The two cases arrive at the opposite conclusion. The precedential effect of a BAP opinion is unclear. The *Wogoman BAP* decision did not see *Savage* as controlling its decision. Neither the Bankruptcy Court judge in this case or the companion *Mallo* case treated either BAP decision as controlling. There is nothing in statutes or 10th Circuit case law that suggests *Savage* or *Wogoman BAP* are controlling for this Court.

II. MR. MARTIN'S POSITION

The dischargeability of taxes is controlled by 11 U.S.C. § 523(a)(1).[7] This section

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[5]This process is described in section IV of the brief.

[6]*In re Savage*, 218 B.R. 126 (10th Cir. B.A.P. 1998) and *Wogoman v. IRS (In re Wogoman)*, 475 B.R. 239 (10th Cir. B.A.P. 2012). To differentiate between the Bankruptcy Court decision and the BAP decision in *Wogoman*, the BAP decision will be referred to as *Wogoman BAP* for the remainder of the brief.

[7](a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or

indicates there are three situations that make a tax nondischargeable: 1) if the tax is a priority tax, 2) if the return was not filed, or was filed within the two years prior to the filing of the Bankruptcy, or 3) if fraud has occurred.[8] A priority tax[9] is defined in 11 U.S.C. § 507(a)(8).[10]

This subparagraph sets out three instances where an income tax is a priority: 1) if the tax was due in the three years prior to the filing of the Bankruptcy, 2) if the tax was assessed in the 240 days prior to the filing of the Bankruptcy, or 3) in certain circumstances, an unassessed tax

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allowed;
(B) with respect to which a return, or equivalent report or notice, 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;

[8]There has been no suggestion of fraud. The IRS is not asserting the tax is non-dischargeable pursuant to § 523(a)(1)(C).

[9]11 U.S.C. § 508(a)(3) has no application in this situation. The other portions of 11 U.S.C. § 507(a)(8) do not apply to income taxes.

[10](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 fo 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.

that is still assessable.[11] Therefore, there are five instances when a tax is not dischargeable, the three instances in which a tax is a priority, failure to file a return or filing a return within two years of the filing of a bankruptcy, and fraud.[12]

The tax is dischargeable because none of the five events that make a tax nondischargeable are present.

1. The 2000 return was due on April 15, 2001. The 2001 return was due on April 15, 2002. Extensions were filed for each period, extending the due date to October 15th of each year. Each date, October 15, 2001 and October 15, 2002 is more than three years prior to the filing of the petition.

2. Mr. Martin filed tax returns for each period on May 5, 2005. May 5, 2005 is more than two years prior to the filing of the petition.

3. The assessments were made on November 8, 2004 and adjusted in September of 2005. Each date is more than 240 days prior to the filing of the petition.

4. The taxes in question have been assessed. There is no indication of any unassessed but assessable taxes.

5. Mr. Martin has not committed fraud.

The IRS is in agreement with the exception of the second event.

III. THE IRS POSITION

A. CHIEF COUNSEL NOTICE 2010-016

The official IRS position is set out in a Chief Counsel Notice.[13] This Notice takes the position that there are potentially two pieces of the tax liability when a taxpayer files a return after the Substitute For Return (hereinafter "SFR") process has been completed. The first piece

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[11]There are no prior Bankruptcies, Collection Due Process Requests or Offers in Compromise. Therefore, the tolling provisions in § 507(a)(8)(A)(ii)(I) and (II) and the hanging paragraph at the end of § 507(a)(8) have no application in this case.

[12]Many discussions of dischargeability focus on just three or four of these requirements, omitting unassessed but assessable taxes and/or the no fraud requirement.

[13]IRS Office of Chief Counsel Notice CC-2010-016, dated September 2, 2010 (position reiterated in IRS Memorandum of September 28, 2011 Control Number SBSE-05-0911-078). ROA at pp. 92-102.

is the amount of the assessment that existed before the taxpayer filed the return, or what is left of it. The second piece is the additional assessment, if any, after the filing of the return.

The theory in the Chief Counsel Notice, which *Savage* indicated was absurd,[14] has been put forth since the 1990's. The theory attempts to create a per se rule that the assessment created by an SFR is nondischargeable regardless of whether a taxpayer later files a return. This blends the concept of assessment and the filing of a return. As will be pointed out later, this is not consistent with the statutory scheme. Until *In re Wogoman*, 2011 WL 3652281 (Bankr. D. Colo. 2011), no Court had accepted this theory.[15]

The Chief Counsel Notice rejects a line of thinking put forth in the 5th Circuit case *In re McCoy*, 666 F.3d 924 (5th Cir. 2012).[16] This case dealt with Mississippi state taxes, not Federal taxes. However, the Court ruled that late filed returns were not returns. This result is arrived at after a tortured and illogical analysis of the statute. The Chief Counsel Notice specifically rejects this interpretation as a misreading of the statute. See ROA at pp. 94-95. In addition, Appellant concedes *McCoy* is a misreading of the statute in its brief, see ROA at pp. 22-23.

B. THE ALTERNATIVE IRS POSITION

Alternatively, the IRS contends the tax returns filed in May of 2005 are not tax returns. This position follows a set of pre-BAPCPA[17] cases that start with *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999). Generally, speaking, these cases find that a tax return filed after the SFR process is completed is not a tax return.

There is no dispute as to whether this is a priority tax, the tax returns were due more than three years prior to the filing of the bankruptcy, the assessments occurred more than 240 days prior to the filing of the bankruptcy, and there is no unassessed but assessable tax. There is also

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[14] *Id* at 132.

[15] "The Court concludes that the tax debt here is nondischargeable because it came into existence prior to the filing of the Form 1040 by the Wogomans in 2006" on page 10. The *Wogoman BAP* decision upheld this ruling without specifically using this reasoning. Subsequently, two other cases have followed this rationale: *In re Smythe*, 2012 WL 843435 (Bkrtcy. W.D. Wash. 2012) and *In re Casano*, (Bkrtcy. E.D. N.Y. 2012). The Bankruptcy Court ruling will be referred to as *Wogoman BK* for the remainder of the brief.

[16] The Chief Counsel Notice is issued prior to *McCoy*. However, *McCoy* uses the same logic as the case cited in the Notice. See *In re Creekmore*, 401 B.R. 748 (Bankr. N.D. Miss. 2008).

[17] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 119 Stat. 23 (April 20, 2005).

no dispute that § 523(a)(1)(c) has no application to this case. There is no dispute the IRS received 1040's for 2000 and 2001 more than two years prior to the filing of the case. The IRS contends the initial assessment is a tax for which a return was not filed. Alternatively, the IRS contends the tax returns filed in 2005, on which the current assessments are based and which IRS records indicate were filed, are not tax returns.

IV. THE SUBSTITUTE FOR RETURN PROCESS

The SFR process starts with the IRS determining there is a filing requirement that has not been fulfilled. The IRS enters the taxpayer's biographical information on the first few lines of a 1040. No other information is entered. At the beginning of the process, a module is created. Each tax period has a separate module. Several codes of note are notated in the module:

1) the module is marked as an SFR,
2) an assessment code of 150[18] for $0 is created,
3) the filing status of single or married filing separate is entered,[19] and
4) the ASED[20] is set at 000000.

The IRS then issues a proposed assessment. If there is no response to the proposed assessment, the IRS issues the Statutory Notice of Deficiency. If the taxpayer does not file a tax court petition or a tax return, the proposed deficiency is then assessed.[21]

If the taxpayer files a tax court petition, the parties work toward a stipulated decision or a decision is entered after trial. An assessment is made based on the decision.

Before discussing what occurs when a taxpayer files a 1040 after an SFR, a discussion of what occurs when a taxpayer files a 1040 prior to the completion of the SFR process is useful. In such a situation, there is no SFR assessment and there is no question the taxpayer has filed a return. First, if the 1040 does not meet the basic requirements of a return, the IRS ignores the

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[18]In non-SFR situations, the 150 code is used for the initial assessment based on the tax reported by the taxpayer.

[19]Pursuant to statute, a joint return is an election, 26 U.S.C. § 6013. By definition, a joint filed tax return can only be filed by taxpayers. All SFR's are created for individuals. Therefore, all SFR modules start with a single or married filing separate filing status.

[20]ASED stands for Assessment Statute Expiration Date. This date is controlled by 26 U.S.C. 6501(a). The IRS has three years to audit a return filed by a taxpayer. The ASED is in a MMDDYY format. A return filed on November 25, 2012 would have an ASED of 112515.

[21]The taxpayer may or may not receive this material. Personal service is not required. This material is mailed to the last known address.

1040 and the SFR process continues.[22] If the 1040 is deemed a return, the following important notations are made in the module:

1) an entry in the tax module is made to show receipt of a tax return. The coding for such receipt is 599. An 89 closing code is one of a number of closing codes used to indicate a return collected from the taxpayer, and
2) anytime a tax return is received, an indicator of the ASED is set, and
3) an assessment matching the tax reported on the return is entered, and
4) the filing status and personal exemptions are altered to match the return.

Of note, the SFR notation is never removed despite the fact the SFR process was never completed. In addition, despite the fact the SFR process was not completed, the normal 150 coding associated with an assessment for a taxpayer filed return is not used.

Next, what happens to the module after a taxpayer files a 1040 subsequent to the SFR process? The process is the same. First, if the 1040 does not meet the basic requirements of a return, the IRS ignores the 1040. If the 1040 is deemed a return, the following notations are made:

1) an entry in the tax module is made to show receipt of a tax return. The coding for such receipt is 599. An 89 closing code is one of a number of closing codes used to indicate a return collected from the taxpayer.
2) anytime a tax return is received, an indicator of the ASED is set.
3) the assessment is adjusted to match the tax reported on the return, and
4) the filing status and personal exemptions are altered to match the return.

The 599 code with the 89 closing code and the ASED are indicators, *used by the IRS*, to indicate that a tax return has now been filed by the taxpayer. In this case, for the 2000 tax period, the notations indicating an ASED of 050508, the head of household filing status (which is 4), and the personal exemptions matching the return are found at ROA p. 34. The 599 code with a closing code of 89 is found at ROA p. 36. For the 2001 period the same notations (except the ASED is set at 083108) are found at ROA p.45 and the 599-89 code is found at ROA at p. 47.

To review, when taxpayers file returns during or after the SFR process, the modules the IRS uses to track the accounts now indicate:

1) the taxpayer has filed a return,
2) the IRS has three years to audit the taxpayer filed return,
3) the assessments match the tax reported on the taxpayer filed return, and

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[22]It is important to note in such a situation that the return is not processed because it does not meet the *Beard* test (discussed in section VI of this brief), not because it was filed late or after the SFR process was completed.

4) the filing status matches the status of the taxpayer filed return.[23]

In multiple ways, the IRS's internal records now reflect the taxpayer has filed a return. Yet, the IRS is asserting that a tax return has not been filed.

The IRS system for keeping track of assessments for tax, interest, penalties, payments and credits is decades old. It serves the IRS purpose well. However, there are a myriad of alternatives for proper ways to account for these items. As an example, the current fact pattern cannot occur with the State of Colorado Department of Revenue. The State has a process for filing a return for a taxpayer. If the taxpayer files a return after that process is complete, the State completely abates the State created assessment and makes a new assessment based upon the return filed by the taxpayer. Dischargeability of a debt should be determined by the nature of the debt or the actions of the debtor, not the accounting methods of the creditor.

V. THE STATUTE

Analysis of the law must start with an analysis of the relevant statutes. There are two paragraphs of § 523(a)(1) relevant to this issue. First, with italics indicating the language added by BAPCPA, § 523(a)(1)(B) now reads as follows:

> 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.

In addition, a hanging paragraph was added to the end of § 523(a). The hanging paragraph states:

> 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

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[23] A joint filed tax return has several possible steps depending upon who is listed as the primary taxpayer on the tax return and which parties had SFR assessments. If the primary taxpayer listed on the tax return is the SFR'd spouse, the process outlined above occurs. If the secondary taxpayer had an SFR assessment, that module would be completely abated. In the end, there is a module where the tax assessment now matches the tax reported on the return filed by the taxpayers. If the primary taxpayer on the taxpayer filed return is the non-SFR'd spouse, a joint module is created using the SSN of the primary taxpayer. This module will not have an SFR indication. The module will look no different than a joint module filed by a couple without an SFR issue. The SFR'd spouses module is then abated. Once again, the tax assessment now matches the tax reported on the return filed by the taxpayers.

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.

A. THE HANGING PARAGRAPH

The hanging paragraph has two sentences. The first sentence creates a definition for 'return' for this subsection. The definition clearly indicates that nonbankruptcy law, in this case tax law, is used to determine what is a tax return.

The second sentence expands the definition of what can constitute a "return." The second sentence has two parts. Clearly, the first part of the second sentence is designed to expand the definition of a tax return. The first portion of the sentence provides a list of items that are *included* in the set of items considered a return. These are items that tax law would not consider a tax return.[24] However, the second portion of the sentence makes clear a return created by 26 U.S.C. § 6020(b) is not part of this expansion of what constitutes a return.

Additionally, the word 'includes' is not a word used for an exhaustive list.[25],[26] There are other items that may be a tax return. 26 U.S.C. § 6014 allows certain taxpayers to complete most of a tax return but submit the document without computing the tax. Although a 6014 return is not in the list enumerated in the statute, such a return is closer to being a tax return than providing the information to have a 6020(a) return prepared. To the extent one tries to interpret the language in the hanging paragraph to exclude a 6014 return, one arrives at a nonsensical result.

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[24]A return created pursuant to 6020(a) would not meet the tax law definition of a tax return, nor would a stipulated decision in a nonbankruptcy tribunal. Multiple elements of the *Beard* test (discussed in section VI of this brief) would not be met.

[25]It is interesting to note that taxpayer protestors(individuals who believe the tax code does not apply to them) look at 26 U.S.C. § 3401(c) as "proof" that they do not have to pay taxes. This section states "for purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation." Most individuals in the country are not part of this list. However, the list uses the word includes. The section is written in a manner to make clear the listed individuals are also part of the group of individuals who are employees. To interpret the first part of the second sentence to omit items not on the list, would be to make the same statutory construction mistake that taxpayer protestors make.

[26]*Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, 105 S. Ct. 1421, 84 L. Ed.2d 406 (1985).

Moving one step further, recognizing other items that are less than a tax return as a tax return, but interpreting the statute to suggest a 1040 that meets the requirements of a tax return, but for the fact an SFR assessment was previously made, as not being a return defies common sense.

When a return is filed does not determine whether it is a tax return. The first sentence of the hanging paragraph contains a parenthetical (applicable filing requirements) at the end of the sentence. This parenthetical needs to be read in conjunction with the language added to § 523(a)(1)(B).[27] On the Federal level, 26 U.S.C. §§ 6011 and 6012[28] define the filing requirements. These sections do not contain any reference to due dates. The due dates for Federal income tax returns are set out in § 6072, which makes no reference to filing requirements. In the tax world, a filing requirement and a due date are separate concepts.[29] The language inserted into the Bankruptcy code makes clear that the tax (nonbankruptcy) context is to be used. One of the fundamental flaws in the *McCoy* case is the misunderstanding of this basic tax concept.

The underlying Court is the first court to thoroughly and rigorously analyze the language of the hanging paragraph in § 523(a). As Judge Campbell points out, "interpret[ing] "applicable filing requirements" . . . to encompass the time for filing a tax return" is a misreading of the statute, see ROA to 181. The Court goes on to state:

> "Under this reading . . . all taxes relating to late-filed returns are non-dischargeable under § 523(a)(1)(B)(i). . . . This interpretation says too much, however, essentially

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[27]This provision has more relevance in State law matters. Many states have a requirement to file an amended return, report or some other document (with the State taxing authority) after the completion of an IRS audit. The Colorado statute is C.R.S. § 39-22-601(6)(a). Pre-BAPCPA, there was a split of authority regarding whether requirements of this nature were filing requirements for the two year rule, since amended returns, reports and other documents would not normally be considered tax returns. This language, along with the addition of "equivalent report or notice" and the fact a document may be "given" instead of filed, is designed make some of these requirements applicable filing requirements. The difficulty with terminology being different at the State level was also the impetus for changing the word "assessment" to "incurred" in § 507(a)(8)(B). This case does not present any of these questions.

[28]These sections are found in Subtitle F, Chapter 61, Subchapter A, Part II, Subparts A and B of Title 26. § 6072 regarding filing requirements is in Part V.

[29]This concept is also seen in IRS Publication 17. Pages 5 - 7 discuss filing requirements. There are three tables (the first table is on page 4) that assist one in determining whether one has a filing requirement. There is a discussion of due dates is on pages 11 and 12. The filing requirement sections never discuss due dates, and the due date section makes no reference to filing requirements, just like the statute.

rendering § 523(a)(1)(B)(ii) superfluous. Section 523 (a)(1)(B)(ii) provides that taxes for which a return was filed "after such return was last due" and less than 2 years prior to the date of bankruptcy are not discharged. This section refers specifically to late-filed returns, and is the only place in § 523(a) where late filings is specifically referenced. To read "return" in § 523(a)(1)(B)(i) as meaning "timely-filed return" would make the discharge exception of § 523(a)(1)(B)(ii) entirely coincidental with that of § 523(a)(1)(B)(i), except in the case of tax returns prepared under 6020(a) of the Tax Code more than 2 years prior to bankruptcy.

> A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.

Hibbs v. Winn, 542 U.S. 88, 101 (2004)(quoting 2A N. Singer, Statutes and Statutory Construction §4606, pp. 181-186 (rev. 6th ed. 2000)).

Such an interpretation also requires the use of a different definition of the term "return" in § 523(a)(1)(B)(i) and in § 523(a)(1)(B)(ii), because § 523(a)(1)(B)(ii) speaks of "returns" filed "after the date on which such return...was last due." This contravenes

> the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.

Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995). There is nothing in the legislative history to the BAPCPA Amendment that indicates it was intended to have such an effect on § 523(a)(1)(B)(ii). The legislative history says only that the amendment was intended

> to provide that a return prepared pursuant to section 6020(a) of the Internal Revenue Code, or similar State or local law, constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer pursuant to section 6020(b) of the Internal Revenue Code, or similar State or local law, does not constitute filing a return (and the debt cannot be discharged).

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

"Applicable filing requirements" must refer to considerations other than timeliness, such as the form and contents of a return, the place and manner of filing, and the types of taxpayers that are required to file returns. These "applicable filing requirements" are found in statutes, *e.g.* 26 U.S.C. § 6011, regulations, and in case law," see ROA at 181-182.

B. 11 U.S.C. § 523(a)(1)(B)

The next issue is whether the statute recognizes the timing of an assessment as effecting whether a document is a return. Assessment is made relevant to what constitutes a priority tax in § 507. The statute does not make any reference to assessment in § 523(a)(1). Section 523(a)(1)(B) requires a "return" be "filed." No reference is made to assessment. What constitutes a tax return is defined by tax law, which will be reviewed in the next section of this brief. Filing is the act of legally delivering the return to the IRS. Assessment is the administrative act of creating a bill, assessing a tax. One cannot freely substitute the term assessment for the terms tax, return, or filing. The statute considers assessment and the filing of the tax return separate matters.

Appellant's brief, on page 20, suggests a straightforward reading of § 523(a) disallows a discharge for any "for a tax . . . with respect to which a return . . . was not filed or given." However, this is not actually what the IRS is asking the Court to rule. Actually, the IRS position is to disallow a discharge for any "assessment . . . with respect to which a return . . . was not filed or given."

The words "tax" and "assessment" are used throughout the Internal Revenue Code.[30] The words are also carefully placed in the Bankruptcy Code and the Internal Revenue Code. They are not interchangeable words. They have independent and separate meanings. Courts are not free to change words in a statute.[31] "Tax" is the amount of tax imposed, see 26 U.S.C. §§ 1 and 3. "Assessment" is the official recording of liability.[32] Throughout the tax code, Congress is careful in regard to the use of each word. Likewise in the Bankruptcy Code, § 507(a)(8)(A) uses the word "tax" twice and a variation of the word "assessment" three times. Section 523(a)(1) makes use of the word "tax" three times, but never uses the word "assessment." This is by design. Assessment is relevant to whether a tax is a priority tax. It has been conceded that this is not a priority tax. Assessment has no relevance to the "filing" of a "return" in § 523(a)(1)(B).

It should also be noted the IRS constantly raises the issue of the self-assessment purpose to filing a return and the dischargeability of taxes. As Judge Campbell noted, if Congress meant this to be part of the statutory scheme Congress could have said so in numerous ways. This argument is also inconsistent with the statutory scheme. The following example demonstrates the point. One timely files a tax return. The reported tax is paid. However, the return omits an item of income. The IRS issues a proposed assessment and Notice of Deficiency and the taxpayer does not respond. The tax is assessed and 240+ days pass. There is no fraud and it is now more than three years since the original due date of the return. The taxpayer files for Bankruptcy relief. The debt would be dischargeable despite the fact the tax liability in questions had not been self-assessed. There is no reference to self-assessment in the statute and it is not part of the statutory scheme.

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[30]Title 26 of the United State Code.

[31]*Badaracco* at 398.

[32]*Hibbs v. Winn,* 542 U.S. 88, 101 (2004). Also see 26 U.S.C. §§6201 - 6204.

To summarize, the first sentence of the hanging paragraph in § 523(a) indicates "return" is to be defined by nonbankruptcy law, which is tax law. The definition of return must be consistent with the usage of the word in the tax world. The definition must be consistent with the Supreme Court cases of *Zellerbach, Germantown* and *Badarraco*. The second sentence expands the definition of return, but not to include 6020(b) returns. Use of the word "includes" means there are other items beyond the two listed in the statute that qualify as tax returns. It is clear that *when* a tax return is filed is not part of the analysis to determine whether the document is a return. It is clear that the concept of assessment is not to be intermingled with "filing" a "return" in regard to § 523(a)(1)(B).

VI. WHAT IS THE TAX LAW DEFINITION OF A TAX RETURN?

The question here is whether Mr. Martin filed tax returns for 2000 and 2001. The plain language of the question would suggest the answer is yes. Implicitly, it has been conceded the returns are returns but for the timing of the filing. The internal records of the IRS indicate that a return has been filed.

The Internal Revenue Code does not provide a definition of "return." Rather, case law has defined what constitutes a return. The case most cited for the definition of a return is *Beard v Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986)(per curiam) which creates a four prong test to determine what is a tax return. The four prongs are:

1) there must be sufficient data to calculate tax liability;
2) the document must purport to be a return;
3) the taxpayer must execute the return under penalties of perjury; and
4) there must be an honest and reasonable attempt to satisfy the requirements of the tax law.[33]

These factors come from two Supreme Court cases, *Zellerbach* and *Germantown*. In addition, the Supreme Court has ruled that a fraudulently filed return is a tax return.[34] It is important to note that one cannot interpret or use the *Beard* test in a manner that is inconsistent with these cases. Further, the 10th Circuit has indicated that completion of the SFR process does not relieve a taxpayer of the duty to file a return.[35]

There were four Circuit Courts that dealt with the issue of whether a tax return filed after an

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[33] *Beard* at 777.

[34] *Badaracco v. Commissioner*, 464 U.S. 386, 104 S. Ct. 756, 78 L. Ed.2d 549 (1984).

[35] *In re Bergstrom*, 949 F.2d 341, 343 (10th Cir. 1991).

SFR was a tax return.[36] In addition, two Bankruptcy Appellate Panels have dealt with the issue.[37]

Each of the Circuit Courts adopted the *Beard* test for determining what constitutes a tax return.[38] Each case was decided based on the law as it stood prior to the statutory directive that nonbankrupcy law controls the definition of a return. Some Courts listed the elements in a different order, but all used the same elements. Despite the fact the elements are the same, Courts reached vastly different conclusions. The most recent case decided was *Colsen*. *Colsen* affirmed the decision of the 8th Circuit BAP.[39] That BAP opinion is the most thorough and rigorous analysis of this issue. As the *Colsen* Court indicated, the difference between the two approaches is whether a subjective or objective analysis of the fourth element is used.[40] The subjective approach was used by the *Hindenlang*, *Moroney* and *Payne* Courts. *Colsen* used the objective approach. The subjective approach uses factors outside the tax return document to determine whether the fourth element has been met. The objective approach looks merely at the tax return. As *Colsen* pointed out, the Supreme Court has ruled that even a fraudulently filed tax return is a tax return.[41] Therefore, *Colsen*, at 840, concluded that the objective approach was the approach used in tax law and found no reason to deviate from the tax law usage of the test.[42]

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[36]*In re Moroney*, 352 F.3d 902 (4th Cir. 2003), *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999), *In re Payne*, 431 F.3d 1055 (7th Cir. 2005), and *In re Colsen,* 446 F.3d 836 (8th Cir. 2006). At times, *In re Hatton*, 220 F.3d 1057 (9th Cir. 2000) is cited as having ruled on this issue. That is an error. *Hatton* adopted the *Beard* test, dealt with the fact a 6020(b) return was not a return, and rejected the argument that consenting to an Installment Agreement constituted filing a return. The IRS brief, on page 14, inaccurately states *Hatton* has ruled on the same issue as *Hindenlang*, *Moroney* and *Payne*. The error is then corrected in footnote 7 on page 15.

[37]*In re Nunez*, 232 B.R. 778 (9th Cir. B.A.P. 1999). The 10th Circuit BAP has addressed the issue twice in *In re Savage*, 218 B.R. 126 (10th Cir. B.A.P. 1998) and *Wogoman BAP*. At times, *In re Hatton*, 220 F.3d 1057 (9th Cir. 2000) is cited as overruling *Nunez*. *In re Colsen*, 322 B.R. 118, 124 (8th Cir. B.A.P. 2005) points out the case is distinguishable.

[38]*Hindenlang* at 1033, *Moroney* at 905, *Payne* at 1057, *Colsen* at 840.

[39]*In re Colsen*, 322 B.R. 118 (8th Cir. B.A.P. 2005).

[40]*Id* at 126.

[41]*Badaracco v. Commissioner*, 464 U.S. 386, 104 S. Ct. 756, 78 L. Ed.2d 549 (1984).

[42]The IRS still recognizes that *Colsen* is good law in the 8th Circuit and has instructed the various insolvency units not to pursue the theories set out in the Chief Counsel Notice in the 8th Circuit, see ROA at 98. The IRS recognizes there is nothing in the BAPCPA language to provide a basis for challenging *Colsen* in the 8th Circuit.

The *Hindenlang*, *Moroney*, and *Payne* Courts all used a subjective approach.[43] In this approach, the subjective intent of the filer was deemed relevant to whether the return was an honest and reasonable attempt to satisfy the requirements of the tax law. Each Court used the fact the return had been filed after the completion of the SFR process, and/or the possibility the return was filed solely for the potential purpose of eventually discharging the debt in Bankruptcy, to find there was no honest and reasonable attempt to satisfy the tax law. However, *Payne* clearly indicates it is not using the *Beard* test as it would be used in a tax context. Rather, the Court was using the test in a Bankruptcy specific context. BAPCPA makes clear this is not correct.

Colsen and *Nunez* used the objective approach. *Colsen* stated "to be a return, a form is required to 'evince' an honest and genuine attempt to satisfy the tax laws. . . . . We therefore hold that the honesty and genuineness of the filer's attempt to satisfy the tax laws should be determined from the face of the form itself, not from the filer's delinquency or the reasons for it. The filer's subjective intent is irrelevant." *Colsen* at 840.

If one applies the subjective approach to the *Badaracco* facts, or any fraudulent or frivolous return, one would come to the conclusion that a return was not filed. Fraudulent returns are not honest and reasonable attempts to satisfy the requirements of the tax law under a subjective analysis of the fourth prong. *Hindenlang, Moroney* and *Payne* were not constrained by the non-bankruptcy language inserted into §523(a)(1) by BAPCPA. The *Payne* Court, at 1059, effectively recognized that *Badaracco*[44] dictated a different result, but ruled that return under the Bankruptcy code did not necessarily have the same meaning as return for the tax code.[45] The bankruptcy code now says otherwise.[46]

To summarize, all Courts used the elements set out in *Beard*, non-Bankruptcy law. However, some Courts used the fourth element in a subjective manner that was not consistent with tax law,

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[43]This approach requires a detailed analysis of the facts and circumstances surrounding the filing of the returns. If this approach is used, a trial is necessary to determine these facts. A portion of these facts are found in the ROA at p.123 ¶ 3.

[44]Appellant's footnote 8 on page 17 suggests *Badaracco* can be distinguished on the basis that it addressed criminal statutes. That is not the case. The question before the Court was whether a fraudulent tax return was a tax return for purposes of 26 U.S.C. 6501(a), a civil statute. The Court found the return was a return.

[45]The Court also creates a hypothetical on page 1058 in an effort to prove there is more than one definition of return for the tax code. The hypothetical contains an error. The problem with the return sent to the cemetery is that it has not been filed, not that it fails to be a return.

[46]It should also be noted that this is same definition used for the millions of tax returns filed every year. The system cannot bear defining a return with a subjective analysis of the intent and circumstances of each filing.

while other Courts used the objective approach that was consistent with tax law.

VII. SUMMARY

Congress has put limits on the ability of debtors to discharge tax debts. Five meaningful events, discussed above, define the circumstances when a tax is not dischargeable. None of the five events exist in this case. The Courts are not at liberty to create a sixth event.

It is undisputed that four of the five events do not exist. The IRS asks the Court to find Mr. Martin has not filed tax returns for 2000 and 2001. The IRS asks the Court to make this determination despite the fact the records of the IRS indicate Mr. Martin did file tax returns. Common sense and a plain reading of the statute indicate Mr. Martin has filed tax returns for the 2000 and 2001 tax periods.

The statute clearly indicates tax law is to be used in determining what constitutes a tax return. Clear statutory interpretation of the hanging paragraph in § 523(a) leads to the conclusion that the second sentence is designed to expand the concept of what constitutes a tax return. Further, clear statutory interpretation of "applicable filing requirements" leads to the conclusion that the term defines *what* is to be filed, not *when*. Clearly, a Court cannot redefine "return" as "timely filed return."

The objective approach used in *Colsen* is consistent with the tax law usage of the *Beard* test. Therefore, *Colsen* is consistent with the BAPCPA directive to use nonbankruptcy law.

The 2000 and 2001 tax returns were filed. The Court has ruled properly and should be upheld.

CONCLUSION

The Bankruptcy Court's ruling should be upheld. The 2000 and 2001 tax periods are dischargeable.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this **Appellee's Reply Brief** was placed in the U.S. Mail, postage affixed and pre-paid, this 5th day of March, 2013, to the following:

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