ROBERT GOLDSTEIN (SBN 184226)
Law Offices of Robert L. Goldstein
100 Bush Street #501
San Francisco, CA 94104
Phone: (415) 391-8700
Fax: (415) 391-8701

Attorney for Plaintiff
Martin Smith

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re MARTIN SMITH Debtor, _____ – MARTIN SMITH Plaintiff, v. INTERNAL REVENUE SERVICE Defendants.	Case No.: 11-73272 RLE (Chapter 7) Adversary Proceeding No. 12-04086 Hearing: Date: November 1, 2012 Time: 11:00 A.M. Place: 1300 Clay Street, Suite 300 Oakland, CA 94612

SUPPLEMENTAL BRIEF AS REQUESTED BY THE COURT AFTER MOTION FOR SUMMARY JUDGMENT HEARING

On November 1, 2012, a hearing was held with respect to each party's Motion for Summary Judgment. At the conclusion of that hearing, the Court requested a Supplemental Brief to help determine whether the Form 1040 Martin Smith ("Mr. Smith) filed for tax years 2001 is a "return" for discharge purposes under Section 523(a)(1)(B). Mr. Smith, through his attorney, Robert L. Goldstein, files this Supplemental Brief to confirm that Ninth Circuit law, logic, and a plain reading of the Bankruptcy Code and Internal Revenue Code, holds such Form 1040 is discharged under Section 523(a)(1)(B).

TABLE OF CONTENTS

TABLE OF AUTHORITES

UNITED STATES SUPREME COURT CASES:

UNITED STATES COURT OF APPEALS CASES:

UNITED STATES BANKRUPTCY APPELLATE PANEL CASES:

UNITED STATES BANKRUPTCY COURT CASES:

STATUTES:

INTERNAL REVENUE MANUAL:

I. WHAT DOES IT MEAN TO BE A RETURN UNDER NON-BANRKUPTCY LAW?

At hearing, the Court requested further analysis about what it means for a return to "qualify as a return under non-bankruptcy law."

11 USC Section 523(a)(1)(B) requires that in order for a debt to be discharged, a "return, or equivalent report or notice" must be on file for two years before the date of the filing of the bankruptcy petition.

The "hanging paragraph" of Section 523(a)(19) states: "the term 'return' means a return that satisfies the requirements of applicable non-bankruptcy law (including applicable filing requirements)."

The problem with both Section 523(a)(1)(B) and 523(a)(19) is that neither actually defines what it means by "return." The best Section 523(a)(19) states is that the "return" must satisfy the applicable non-bankruptcy law (including applicable filing requirements).

"Applicable non-bankruptcy law" refers to the Internal Revenue Code – it is the only source Code that handles individual income taxes.

For the first "applicable non-bankruptcy law" filing requirement of the Internal Revenue Code, we look to 26 USC 6012, specifically Section 6012(a)(1)(A):

> "Returns with respect to income taxes… shall be made by… every individual having for the taxable year gross income which equals or exceeds the exemption amount…"

Section 6012 details the requirement that a taxpayer, if required, must file a "return." Again, however, we are back to the inquiry of what does "return" mean as Section 6012 also fails to provide a definition of "return."

Despite all the confusion about what Section 523(a)(1)(B) means in conjunction with the "hanging paragraph" of Section 523(a)(19), the Ninth Circuit case of In re Hatton, 220 F.3d 1057 (9th Cir. 2000) has already addressed this exact issue and is controlling. Although this case is pre-BAPCA, as will be shown, the "hanging

paragraph" merely codified the Hatton court's definition of "return."

The Hatton court correctly states the problem with respect to Section 523(a)(1)(B): "The Bankruptcy Code does not define the term 'return.'" Hatton, at 1060.

The Hatton court's analysis of what constitutes a "return" begins with California Franchise Tax Bd. v. Jackson (In re Jackson) 184, F.3d 1046 (9th Cir.1999). Citing Jackson, the Hatton court found that to define "return" they needed to "look no further than *Webster's* dictionary: 'A return is a formal statement on a required legal form showing taxable income, allowable deductions and exemptions and the computation of the tax due.'" Hatton, at 1060. .

Please note: Neither Hatton, Jackson, nor *Webster's* find that a return ceases to be a "return" if it is not filed timely. None of them finds that a substitute return bars a Debtor's efforts to file a "return."

The court then notes that "this definition closely mirrors the accepted meaning of "return" under the IRC, and every other Circuit that has considered the question… under section 523(a)(1)…" Id.

Hatton continues, **"Because the Bankruptcy Code uses the term "return" without providing a definition and there is no reason to presume that Congress intended to have a different meaning under Bankruptcy Code than under the IRC, we adopt the tax definition in determining whether Hatton's tax liabilities are dischargeable.**" Id. (emphasis added).

For all the concerns about the "hanging paragraph" of Section 523(a)(19) and what it means to have a return "satisfy the requirements of applicable non-bankruptcy law (including applicable filing requirements)," the court in Hatton tells us: The meaning of a "return" under the Bankruptcy Code shall have the same meaning as under the Internal Revenue Code. This is a very simple and straightforward finding that deserves repeating: what is a "return" under the Internal Revenue Code must mean the same as under the Bankruptcy Code and vice-versa.

But Hatton has still not stated what it means to be a "return" so we continue with

Hatton's analysis.

In the immediate paragraph after deciding that the Bankruptcy Code's definition of "return" and the Internal Revenue Code's definition of "return" must be the same, the Hatton court writes:

"Although the IRC [also] does not provide a statutory definition of 'return,' the Tax Court developed a widely-accepted interpretation of that term in Beard v. Commissioner, 793 F.2d 139 (6th Cir. 1986)." Id.

So we arrive at the Beard test to help determine what a "return" is under both the Bankruptcy Code and under the Internal Revenue Code. Per Hatton, the definition must mean the same under both Codes as the Hatton court specifically adopted the tax definition for bankruptcy purposes.

Therefore, if not clear enough already, the meaning of "return" under the Internal Revenue Code will be carried into the Bankruptcy Code.

The Beard test states that to qualify as a return: (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the law. Hatton, at 1060, 1061.

A. Hatton's only holding was that an installment agreement did not satisfy the Beard test, and thus was not a "return" for Section 523(a)(1)(B) discharge purposes

In Hatton, the court utilized the Beard test only to help it determine whether an installment agreement qualified as a "return" for Section 523(a)(1)(B) purposes. The IRS, however, is arguing that Hatton decided something bigger, that all documents, including Forms 1040, filed after a substitute return and assessment are not "returns" for Section 523(a)(1)(B) purposes. The IRS is wrong.

The Hatton court never considered or decided that a Form 1040 filed after an IRS substitute return and assessment did not qualify as a "return" under Section 523(a)(1)(B). Hatton held, and the only thing it held, was that an installment agreement

alone, or in combination with an unsigned substitute return, did not qualify as a "return."

We know the Ninth Circuit's decision was limited only to this issue and holding because the Ninth Circuit tells us so in plain language. The Hatton court writes:

"The only question on appeal is whether the substitute return prepared by the IRS, the installment agreement signed by Hatton, or a combination of both, constitute a tax 'return'…" Hatton, at 1058 (emphasis added).

Nowhere in the entire opinion of Hatton does the court find that the taxpayer filed an actual Form 1040 return. Nowhere in the entire opinion does the Hatton court hold that a late-filed Form 1040 tax return is not a "return" for discharge purposes under Section 523(a)(1)(B). The only ruling in Hatton was that an installment agreement did not qualify as a "return."

Further, from the framing of the issue, it is absolutely certain that Hatton did not hold that the IRS substitute return and assessment by the IRS acted as a complete bar to efforts by the Debtor to file a return. The only question Hatton considered was whether an installment agreement qualified as a Form 1040 return or equivalent return.

It is important to keep in mind that when the Hatton court references the word "return," it is doing so in consideration of whether an installment agreement qualifies as a "return." The court sometimes uses the term return as a factual matter (such as an actual and literal Form 1040 or equivalent document) and sometimes uses it as a term of art, a specific legal finding based upon a Beard analysis that a document does not actually qualify as a Form 1040 return or equivalent document. The Hatton court was not universally using the term "return" to equate to a "Form 1040 or equivalent document." In Hatton the court's factual finding was that no Form 1040 had ever been filed by the taxpayer. Its legal finding was that an installment agreement does not rise to the level of a Form 1040 return.

In Hatton, the taxpayer failed to file a Form 1040. He literally filed no tax return at all as a matter of fact. The taxpayer in Hatton needed the court to find that his installment agreement was the equivalent of a Form 1040.

And herein is the problem with the IRS's argument: the IRS seems to think that Hatton decided that a late-filed "Form 1040" is not a "return" and thus is not eligible for discharge under Section 523(a)(1)(B). The IRS, however, is wrong. Hatton only decided that an installment agreement did not rise to the level of a Form 1040 or equivalent document and thus the installment agreement did not qualify as a "return" for Section 523(a)(1)(B) discharge purposes. Simply reading Hatton will debunk the IRS's interpretation.

Remember the issue of Hatton: "The only question on appeal is whether the substitute return prepared by the IRS, the installment agreement signed by Hatton, or a combination of both, constitute a tax "return…"

In Hatton, the court analyzed the installment agreement Mr. Hatton signed using the four (4) factors of Beard.

Immediately the Hatton court ruled the installment agreement, the substitute return, or a combination of both, was not a return using the Beard analysis. Thus the installment agreement did not qualify as a "return" under Section 523(a)(1)(B). It was an easy conclusion for the court: the court found "neither document was signed under penalty of perjury. The substitute return was never signed by Hatton, and although the installment agreement contains Hatton's signature, his signature was not provided under penalty of perjury… Therefore, under Beard, Hatton failed to file a return." Id., at 1061.

How and why the IRS is arguing to this Court that Hatton held that a Form 1040 filed after a substitute for return is not a "return" based upon Hatton or that a Form 1040 is equivalent to the installment agreement in Hatton leaves us absolutely dumbfounded. Hatton only addressed whether an installment agreement qualified in the first place as a Form 1040 return or equivalent, thereby making it eligible as a "return" for Section 523(a)(1)(B) discharge.

The IRS is skipping the entire inquiry at the heart of Hatton. Hatton's only question and answer is that an installment agreement is NOT a return (Form 1040 or equivalent) and THAT is why it was not a "return" for Section 523(a)(1)(B) purposes.

Hatton never considered whether an actual and literal Form 1040 was a "return" for Section 523(a)(1)(B) discharge purposes. The IRS is either deliberately or unintentionally representing to this Court that when Hatton referred to "return," it meant Form 1040.

The IRS's argument seems to be that since an installment agreement is not a "return" and the installment agreement was entered into after an IRS substitute return and assessment, then ALL documents, including Forms 1040, do not qualify as "returns" if they are filed after an IRS substitute return and assessment. This is a fallacious argument that totally ignores the Beard test and how it applied specifically to the installment agreement. The IRS's argument requires this Court to completely ignore Hatton's limited finding that an installment agreement does not rise to the level of a Form 1040 or equivalent document under the Beard test and essentially declare that installment agreements are the equivalent of a Form 1040. That was not Hatton's purpose or finding.

Another problem with the IRS's argument is that it presumes that the Hatton court's Beard test analysis with respect to an installment agreement would reach the same conclusion based upon a Beard test analysis of an actual Form 1040 tax return. Yet the Hatton court only considered an installment agreement. Hatton reached no conclusion about whether a Form 1040 satisfied the Beard test.

We can only hope this Court sees this difference and how intellectually dishonest or lazy the IRS's argument regarding Hatton truly is.

A careful reading of Hatton reveals that the BAP's mistake in its decision was not its legal finding that a return filed after an SFR assessment could even qualify for discharge under Section 523(a)(1)(B); the BAP's only mistake was in finding that an installment agreement qualified as a return.

B. Hatton's Usefulness to the Present Case

Hatton is important to the present case for two reasons: (1) it determined that the definition of "return" must mean the same under the Internal Revenue Code and under

the Bankruptcy Code; and (2) it identified that the Beard test determines whether the document at issue qualifies as a "return" under the Internal Revenue Code, and thus qualifies as a return under the Bankruptcy Code. If a document is not a "return" under the Internal Revenue Code, it is not a "return" under the Bankruptcy Code and vice-versa.

The Hatton court's finding directly contradicts the IRS's statement at hearing that a "return" can have one meaning under the Internal Revenue Code and a different meaning under the Bankruptcy Code.

The IRS is also in the unfortunate position that the Hatton court's only holding was that an installment agreement did not qualify as a "return" under the Beard test and Hatton limited its ruling to only that question. Hatton never considered whether a Form 1040 satisfies the Beard test.

The only case that considered whether a Form 1040 satisfies the Beard test is In re Nunez, 232 BR 778 (1999). The Nunez court concluded that a Form 1040, even one filed after a substitute return and assessment, qualified as a "return" and thus was dischargeable under Section 523(a)(1)(B). Nunez specifically used the Beard test.

At hearing, the IRS made the bold claim that Hatton overrode or significantly weakened Nunez. But since we now know that Hatton only considered whether an installment agreement satisfied the Beard test and did not consider whether a Form 1040 satisfied the Beard test, the IRS has no basis for its argument.

Hatton never addressed the core issue in Nunez. Hatton utilized Beard to analyze the installment agreement "apple," while Nunez utilized Beard to analyze the Form 1040 "orange."

Simply contrast the Hatton court's issue-framing with that of the Nunez court:

Hatton: "The only question on appeal is whether the substitute return prepared by the IRS, the installment agreement signed by Hatton, or a combination of both, constitute a tax 'return.'

Nunez: “The issue was whether forms filed by the debtor after the IRS had independently calculated the debtor's tax liability were "returns" for purposes of Bankruptcy Code Section 523(a)(1)(B).” Nunez, at 779. (emphasis added).

The Nunez court clarifies what it means by using the word “forms,” finding, “[T]he Debtor submitted Forms 1040 (“Forms”).” Id,at 780 (emphasis added).

In fact, despite the IRS’s argument that Hatton overrules Nunez, the rulings of both cases actually bolster our argument in this case. A careful reading of both Hatton and Nunez reveals that neither court held that the preparation of a substitute return and assessment by the IRS acted as a complete bar by efforts of the debtor to file a return. The Hatton court merely found that an installment agreement did not qualify as a return or a “return” for Section 523(a)(1)(B) discharge purposes and Nunez found that a Form 1040 did qualify as a “return” under Section 523(a)(1)(B).

Had the Hatton court wished to declare a broad, *per se* rule that any document purporting to be a return, even Forms 1040, filed after an IRS substitute return and assessment were not “returns,” it could have done so. Instead, Hatton did the opposite; it issued a very limited ruling, holding only that an installment agreement did not qualify as a return.

Further, had the Hatton court wished to address the finding in Nunez, it could have done so. After all, Nunez was decided by the BAP on January 6, 1999. Hatton was argued before the Ninth Circuit on August 13, 1999 and decided August 10, 2000. The Hatton court had 19 months between the time Nunez was decided and its opinion was issued, yet the Hatton court never even mentions Nunez.

Because the IRS is purposely seeking to mislead this Court by confusing the installment agreement “apple” with the Form 1040 “orange,” we will spell out the differences:

Installment agreements are not signed under penalty of perjury; Forms 1040 are signed under penalty of perjury

Installment agreements report absolutely no income; Forms 1040 require the reporting of all sources of income earned in the specific taxable year

Installment agreements report absolutely no tax liability; Forms 1040 require the taxpayer to calculate and report the amount of tax due

Installment agreements, if a taxpayer does not wish to enter or enters and violates, carry no criminal or civil penalties; Forms 1040, if they are not filed and/or do not report all sources of income or miscalculates the tax liability due, carry the risk of numerous civil and criminal sanctions against the taxpayer, including civil negligence penalties for understatements, late filing penalties, civil fraud penalties for omission of income, misdemeanor charges for not filing, and criminal fraud or false return penalties.

And finally:

Installment agreements are voluntary; Forms 1040 or its equivalent are required to be filed under Internal Revenue Code Section 6012, specifically Section 6012(a)(1)(A).

Without question there are substantive and legal distinctions between an installment agreement and a Form 1040. The IRS, however, needs to obfuscate the differences between Hatton and Nunez because Ninth Circuit case law is directly against its position. Both Hatton and Nunez used the Beard test to reach their conclusions, but Hatton's analysis applied to the installment agreement "apple" while Nunez's analysis applied to the Form 1040 "orange."

As long as this Court does not mix up the "apple" with the "orange," this Court's ruling should find both Hatton and Nunez to still be good law and can take comfort in knowing that not only does Hatton not overrule Nunez, it complements it because neither case held that an IRS substitute return and assessment acted as a complete bar to a Debtor's efforts to file a return.

Looking at the Form 1040 Mr. Smith signed, we start with where Hatton started: *Webster's* dictionary. Mr. Smith filed his 2001 tax return on Form 1040, 2001. This document speaks for itself. The Form 1040 Mr. Smith filed was a formal statement on the required legal form. After all, the IRS prepared and made available this exact Form 1040 for tax year 2001 to all taxpayers in the United States. Further, Mr. Smith's return showed taxable income, allowable deductions and exemptions and computed the tax due.

Per *Webster's*, Mr. Smith's Form 1040 passes the test of qualifying as a "return" and, per Hatton, citing Jackson, the court needs "look no further." In Hatton, the

taxpayer's installment agreement did not show taxable income, allowable deductions and exemptions, and did not compute the tax due. Mr. Smith satisfies *Webster's* definition. Mr. Hatton, the taxpayer, did not.

Per Hatton, therefore, Mr. Smith's Form 1040 qualified as a "return" for discharge under Section 523(a)(1)(B).

Under a Beard test analysis for Mr. Smith's Form 1040 tax return for tax year 2001, the first three prongs of the test seem very straightforward:

1) It must purport to be a return

Mr. Smith filed Form 1040 2001. This form was available to all taxpayers in the United States for tax year 2001. On the top of the form it states: "U.S. Individual Income Tax Return 2001." The document Mr. Smith submitted purported to be a return. *Check*.

2) It must be signed under penalty of perjury

Mr. Smith signed his return on Page 2 of Form 1040 under the words:

> "Under penalty of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete."

The document Mr. Smith was signed under penalty of perjury. *Check*.

3) It must contain sufficient data to calculate tax

Mr. Smith's return reported all income, in fact over $100,000 more of income than the IRS was aware of. In addition, the return filed by Mr. Smith calculated the total tax for the IRS to be $111,057 which was $40,095 above the substitute return assessment. *Check*.

4. It must represent an honest and reasonable attempt to satisfy the law

It is with respect to this fourth prong that courts have diverged. And since it has been disproven that Hatton's holding overruled Nunez, the IRS can only be successful in this case by convincing this Court that Mr. Smith's return was an not "honest and

reasonable attempt to satisfy the law." For the reasons explained below, the IRS will not win.

Courts have diverged in understanding and approach as to what it means to file a return and make an "honest and reasonable attempt to satisfy the law." Certain courts have adopted a subjective standard that all Forms 1040 filed after an IRS substitute return and assessment are not "returns" under Bankruptcy Code Section 523(a)(1)(B).[1] Other courts have held that an objective standard must be used and that a return that "appears on its face" to be a return must be considered a "return" under Bankruptcy Code Section 523(a)(1)(B).[2] As this Court will see, an objective standard is required by Ninth Circuit law and on the basis of logic and fairness.

a. Remember Hatton and Section 523(a)(19)

The Ninth Circuit Court of Appeals in Hatton specifically held that "return" as used in Section 523(a)(1)(B) must have the same meaning under the Bankruptcy Code as under the Internal Revenue Code. Remember, there is "no reason to presume that Congress intended to have a different meaning [of "return"] under Bankruptcy Code than under the IRC, we adopt the tax definition…" Hatton, at 1060.

The "hanging paragraph" of Section 523(a)(19) that a return must satisfy the requirements of non-bankruptcy law simply codifies Hatton. A "return" must satisfy the requirements of non-bankruptcy law. Non-bankruptcy law means the Internal Revenue Code. And per Hatton, the definition of "return" must be the same under both Codes.

This means that when this Court is defining whether Mr. Smith's Form 1040 is a "return" for discharge purposes under Section 523(a)(1)(B), this Court is also defining

[1] In re Creekmore, 401 B.R. 748 (N.D. Miss. 2008), In re Wogoman, 475 B.R. 239 (B.A.P. 10th Cir. 2012), In re Payne, 431 F.3d 1055 (7th Cir. 2005), and recently In re Needham (no cite available) all have adopted a "per se" rule that a Form 1040 filed after substitute return and assessment is not a "return."

[2] Nunez and In re Colsen, 322 BR 118 (2005) have adopted an objective standard, relying upon the "face" of the return itself to qualify it as a "return."

whether Mr. Smith's return is a "return" under the Internal Revenue Code. This same meaning is required per the court in Hatton and is now codified in Section 523(a)(19).

b. The Legal Fallout under the Internal Revenue Code by Failing to Define Mr. Smith's Form 1040 as a "return" under the Bankruptcy Code

Immediately there will be legal complications under the Internal Revenue Code if Mr. Smith's return is not a "return" under the Bankruptcy Code. Since the definition of "return" is required to be one and the same under the Bankruptcy Code and Internal Revenue Code, we now offer but a few issues the IRS will have in enforcing its Code.[3]

First, the IRS would be forever barred from auditing a taxpayer's return filed, like Mr. Smith's, after a substitute return and assessment.

26 USC Section 6501(a) of the Internal Revenue Code specifically states:

> ***(a)* General rule**
> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the **return** was filed (whether or not such return was filed on or after the date prescribed)… (emphasis added)

The plain language of Section 6501(a) is clear: a tax may be assessed within 3 years after the "return" was filed, whether or not such a return filed on or after the date prescribed.

Section 6501(a) demonstrates two points. First, the tax code itself contemplates a late-filed return still being a "return" despite being filed after the due date prescribed. Second, and most important, since a tax audit requires a taxpayer "return," if this Court holds Mr. Smith's return to not be a "return" under the Bankruptcy Code that same definition must pass, per Hatton, onto the Internal Revenue Code, as well. Thus, the IRS could never audit a Form 1040 such as Mr. Smith's because Mr. Smith is deemed to have never filed a "return," a requirement under Section 6501(a) to audit and assess,

Second, such a holding now also prevents the IRS from ever prosecuting a taxpayer under 26 USC Section 7206 of the Internal Revenue Code for filing a

[3] There are literally hundreds more, but for now we focus on 26 USC Section 6501(a) and 26 USC 7206.

fraudulent or false return after a substitute return. Again this Court would be holding as a matter of law that the document the taxpayer filed is actually not a "return" under both the Bankruptcy Code and Internal Revenue Code and Section 7206 specifically requires that the fraudulent or false statement appear on a "return."

This Court must be extremely careful because the law of unintended consequences is far-reaching and will have their day in court.

Perhaps this why the courts in Nunez and In re Colsen, 322 B.R. 118 (8th Cir. BAP 2005) decided that a tax return filed after a substitute return and assessment were still "returns" on their face, without getting into subjective intent.

The dilemmas of Sections 6501(a) and 7206 are exactly what the court in Colsen foresaw in determining that courts must use an objective standard to determine what is an "honest and reasonable attempt to satisfy the tax law:"

> "The Supreme Court has made it clear this is an objective and not a subjective test. If a subjective test applied, then a fraudulent return could not be a return; yet the Supreme Court has told us otherwise in Badaracco. Furthermore, if the taxing authority is required to establish subjective intent under Section 523(a)(1)(B)(i) of the Bankruptcy Code, namely that the debtor did not intend the document to be an honest and genuine attempt to satisfy the tax law – how is this different than establishing that the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax under Section 523(a)(1)(C). We thus must look at the documents – in this case the 1040 forms – and determine if they appear on their faces to constitute endeavors to satisfy the law. Badaracco, 464 US at 397, 104 S.Ct. 756." Colsen, at 126.

This analysis is absolutely correct. Only an objective standard can avoid the dilemmas of Sections 6501(a) and 7206.

Certain courts and the IRS, however, seem to be in a panic because they think that to agree with Colsen means that a "fraudulent return" could then be discharged. But that is pure foolishness. The plain language of Bankruptcy Code Section 523(a)(1)(C) specifically denies discharge to a return that is fraudulent. Colsen's analysis does not seek to, nor does it, contradict or override Section 523(a)(1)(C).

Colsen is simply using logic to state that there is a slippery slope when courts seek to subjectively determine what is "honest and reasonable" because the law acknowledges that not even a fraudulent return ceases to be a "return" merely because of fraud. In fact, Section 7206 *requires* that it be a "return" under the Internal Revenue

Code in order to prosecute. If a fraudulent return does not cease to be a "return" under the Internal Revenue Code, then a Form 1040 merely filed late and after an IRS substitute return and assessment must also still qualify as a "return" under the Internal Revenue Code and, therefore, under the Bankruptcy Code as well. Sections 6501(a) and 7206 do not have any meaning unless a "return" exists. Yet to hold in the IRS' favor would require this Bankruptcy Court to hold as a matter of law that Mr. Smith's return is not a "return" at all under the Internal Revenue Code – thus it is immune from audit and criminal prosecution. Remember Hatton: "we adopt the tax definition."

Colsen is merely setting an objective standard that returns will be accepted as returns "on their faces" because to use a subjective standard would greatly diminish the ability of the IRS to enforce the Internal Revenue Code.

Even Judge Posner, however, falls into Badaracco panic. After noting the Badaracco finding, Posner writes "But there is no reason why the word "return" undefined in either the Bankruptcy Code or the Internal Revenue Code, should carry the same meaning regardless of context." In re Payne, 431 F.3d 1055, 1058 (7th Cir. 2005).

This statement by Judge Posner is unequivocally wrong. Both Hatton and the "hanging paragraph" in Section 523(a)(19) directly contradict Judge Posner's finding that the definition of "return" can mean one thing under the Internal Revenue Code and another under the Bankruptcy Code. Hatton specifically found "no reason to presume that Congress intended to have a different meaning [of "return"] under Bankruptcy Code than under the IRC, we adopt the tax definition…" Hatton, at 1060.

Ninth Circuit precedent gives Judge Posner his reason. He just failed to observe it. In the Ninth Circuit, "we adopt the tax definition" for Bankruptcy Code interpretation.

Judge Posner's failure in Payne to observe the reasoning of Hatton led to him concluding that a Form 1040 filed after an IRS substitute return and assessment was not an "honest and reasonable attempt to satisfy the law." See Payne, at 1059.

If one just thinks about Posner's logic, however, his finding creates an *Orwellian* result. But instead of "all animals are equal, but some animals are more equal than others," the saying would have to be: "All tax returns are equal under the Internal Revenue Code, but some tax returns are more equal than others when the tax return is considered under the Bankruptcy Code."

We acknowledge Judge Posner's name is famous, but he is human and thus he is fallible. His decision in Payne is proof of that.

And this is not the only area where Posner is wrong. Posner's opinion not only fails to follow Hatton's requirement that "return" must mean the same under both code, Judge Posner screws up Hatton's holding, as well.

Judge Posner writes: "Our conclusion that the return that Payne filed in 1992 was not a "return" for purposes of allowing him to discharge his tax liabilities in bankruptcy is consistent with **all** the appellate decisions (Moroney, **Hatton**, and Hindenlang) **that deal with untimely tax returns** brandished in the bankruptcy court in an effort to obtain a discharge." Payne, at 1058 (emphasis added).

It appears that Judge Posner did not actually read Hatton. Hatton's only issue was whether an installment agreement qualified as a tax return. Hatton did not deal with an "untimely tax return" such as Form 1040; it dealt with a taxpayer who filed literally nothing at all as required under Section 6012(a)(1)(A) and only agreed to an installment agreement and sought to have that installment agreement rise to the level of a Form 1040. Remember the differences between an installment agreement and Form 1040 as explained above.

If a court or the IRS wants a Ninth Circuit opinion on whether a Form 1040 filed after an IRS substitute return and assessment is a "return" under Section 523(a)(1)(B), it should look toward Nunez. Nunez, not Hatton, addresses that issue.

Judge Posner relies upon Hatton because he could not tell the difference between a taxpayer seeking to have an installment agreement discharged in bankruptcy as a "return" and a literal Form 1040 filed late. He, like the IRS, fails to understand that when the Hatton court says the taxpayer failed to file a return, it is a literal finding and not a legal conclusion based upon any Beard analysis. In Hatton, the taxpayer literally filed NOTHING: zero, zilch, nada.

Judge Posner is totally wrong in finding that the Bankruptcy Code and Internal Revenue Code can differ in what "return" means and totally wrong about Hatton.

We are certain all parties would agree that Judge Easterbrook, Judge Posner's colleague, is a wise and learned person. And yet he dissented from Posner's opinion in Payne. Perhaps Judge Easterbrook actually read Hatton and understood its meaning and what it stands for and what it does not. He certainly understood the slippery slope of subjectively defining a "return." We encourage this Court to read Judge Easterbrook's opinion. It is quite logical. Judge Posner's opinion is anything but.

The courts in In re Hindenlang, 164 F.3d 1029 (6th Cir. 1999), In re Wogoman, 475 B.R. 239 (B.A.P. 10th Cir. 2012), and Judge Posner in Payne have all adopted this one-size fits all *per se* legal standard that a Form 1040 return filed after an IRS substitute return and assessment are not "honest and reasonable" and thus can never be considered a "return" at all.

But in doing so, each court's decision means that "return" means one thing under the Internal Revenue Code and another under the Bankruptcy Code. The holdings in Hindenlang, Wogoman, and Payne all contradict the Ninth Circuit's finding in Hatton that the meaning of "return" must be the same under the Bankruptcy Code as under the Internal Revenue Code. They all contradict the "hanging paragraph."

We would like to point out further how the holdings of Hindenlang, Wogoman, and Payne twist logic into a pretzel:

Per Hindenlang, Wogoman and Judge Posner, by virtue of a taxpayer like Mr. Smith attempting to "honestly and reasonably" comply with Section 6012 (by claiming more income or claiming a child as a dependent), it is *per se* evidence that in fact the return the taxpayer is filing is in fact not "an honest and reasonable" attempt.

The maxim is stated thusly:

> Any effort by a taxpayer to file a return as an "honest and reasonable" attempt to comply with the tax law after an IRS substitute return and assessment is proof positive that the taxpayer's efforts are, in fact and law, not "honest or reasonable."

This reminds one of Yossarian's dlilemma in Joseph Heller's *Catch-22*. To avoid flying dangerous World War II missions, a pilot must be declared insane. But to be

declared insane one must request to be evaluated by a psychiatrist. The simple act of a person seeking this evaluation means the person must be sane because only sane people would make the request.

So per Judge Posner, et al, the taxpayer (Yossarian) in seeking to make an "honest and reasonable" effort to comply with the tax law is *per se* evidence that the taxpayer (Yossarian) is actually not making an "honest and reasonable" effort at all. All because the IRS prepared a substitute return and assessment the taxpayer is placed in a "Catch-1040."

And at the risk of taking a sledgehammer to a pin, we offer two real-life examples of the problems this Court will face if it adopts a *per se* rule like Hindenlang, Wogoman, and Judge Posner rather than a "face value" test like Nunez and Colsen.

The first hypothetical is as follows (note: it is not really a hypothetical at all because I just filed a bankruptcy case with essentially the following fact pattern):

A husband and wife each failed to file a 2005 Form 1040 tax return. In 2008, the IRS prepared a substitute return and assessment against the wife only, based upon the income the IRS had on record for her. The IRS never made a substitute return and assessment against the husband.

In 2009 the husband and wife file a joint tax return to claim 3 darling children, the husband's income, and for good measure a home mortgage interest deduction. The IRS accepts the Form 1040 and reduces the tax against the wife and assesses a tax against the husband. A joint bill is issued to the husband and wife. The bill to the husband and wife reflects the exact amount of tax due, plus penalties and interest, down to the penny. Two years later they file a joint bankruptcy.

Per the reasoning of Hindenlang Wogoman, and Judge Posner, the exact same return filed jointly, reporting the same income, the same deductions, the same tax due, and signed under penalty of perjury, would not be an "honest and reasonable" return for the wife because of the IRS substitute return and assessment but would be an "honest and reasonable" return for the husband because the IRS never filed a substitute return and assessment against him.

We ask this Court: Can an identical Form 1040 qualify as an "honest and reasonable attempt to comply" for one spouse but not the other? Does this make sense or seem fair? Can a tax liability with respect to the same "return" that otherwise meets all the rules be discharged with respect to only the husband and not the wife? Is it a "return" for the wife only under the Internal Revenue Code but not under the Bankruptcy Code, thereby directly contradicting the requirement that they be defined the same under both Codes? Or did the husband not file a "return" at all because his wife failed to respond to a Notice of Deficiency? Is it legally possible to punish the husband for the deeds of the wife?

This is the exact problem this and other courts will face by using a subjective standard.

And here is another example for the single taxpayer: a taxpayer files his or her 2007 tax return on time, on April 15, 2008. The taxpayer shows no tax due on the return (or even claims and receives a small refund). Twenty six months later, within the 3 year statutory period provided under 6501(a), the IRS audits the tax return. The IRS finds that while the taxpayer reported all wage income, the taxpayer omitted non-employee compensation based upon a 1099-Misc reported to the IRS but not reported on the tax return. The IRS contacts the taxpayer and the taxpayer does not respond. The IRS issues a Notice of Deficiency and the taxpayer does not respond. The IRS makes an additional assessment. No fraud penalty is assessed.

The taxpayer waits enough time and then files bankruptcy. The tax return was due 3 years before the bankruptcy filing. The return has been on file for more than 2 years and the taxes were assessed more than 8 months. The taxes are therefore discharged.

Per Judge Posner, we will declare this taxpayer's return, a return that was totally devoid of the income upon which the tax assessment was based, an "honest and reasonable attempt to comply with the tax law" because it was filed on time but not Mr. Smith's return – a return that reported more than $100,000 of income than the IRS was aware of. Yet looking at these two returns side by side, Mr. Smith's return that reported

100% of his income seems the "honest and reasonable" one, not the taxpayer's return that reported none of the income upon which the assessment was based. But using Judge Posner's logic, the opposite is true. And that is the problem with a *per se*, subjective standard and Judge Posner's conclusion – it is not just unfair, it is illogical.

These legal complications are created when, contrary to Ninth Circuit law and Section 523(a)(19), a "return" means one thing under the Internal Revenue Code and another under the Bankruptcy Code. Yet all these legal complications are totally avoided by following Nunez, by following Colsen, by following Judge Easterbrook, by following the requirement in Hatton that the definition of "return" be the same under the Bankruptcy Code as under the Internal Revenue Code.

To not follow the guiding cases of Nunez, Colsen and Hatton and to ignore simple logic creates a legal quagmire from which this Court and others would not be able to legally and logically extract themselves.

Mr. Smith filed a Form 1040 that "on its face" was a return. Mr. Smith's return as filed could be audited or prosecuted under the Internal Revenue Code. Therefore, in the name of precedent, logic, and common sense, this Court must find that Mr. Smith made an "honest and reasonable attempt to comply with the tax law" under the Bankruptcy Code.

c. Since 26 USC Section 6012 Requires All Taxpayers to File a "Return," Hindenlang, Wogoman, and Payne Prevent a Taxpayer like Mr. Smith From Ever Satisfying the Internal Revenue Code

Per Hindenlang, Wogoman, and Payne, a taxpayer filing Form 1040 after an IRS substitute return and assessment is not filing a "return" under the Bankruptcy Code. Since the Ninth Circuit requires that "return" mean the same under the Internal Revenue Code as under the Bankruptcy Code (Hatton adopted the tax definition for bankruptcy purposes, after all), then per Hindenlang, et al, a taxpayer can never file a "return" under the Internal Revenue Code.

Internal Revenue Code Section 6012(a)(1)(A) states:

> "Returns with respect to income taxes… shall be made by… every individual having for the taxable year gross income which equals or exceeds the exemption amount…" (emphasis added).

There is no exception to Section 6012's requirement. "Shall" is absolute. Filing a "return" is required by "every individual."

Section 6012 contains no provision that a taxpayer is relieved of his or her duty to file because too much time has passed. There is no statute of limitations to the requirement. Section 6012 also makes no mention that an IRS-prepared substitute return or assessment relieves a taxpayer of his or her duty to file a return. Despite an SFR, a taxpayer is still required to file a return or equivalent document.

If this Court accepts the IRS' position by adopting the ruling in Hildenlang, et al, that a return filed after a substitute return is no longer an "honest and reasonable" attempt to comply with Section 6012 and thus not a "return," a taxpayer is forever barred from satisfying his or her legal duty to file a tax return.

Such a finding would require this Court to judicially legislate 6012 to essentially include language that a substitute return nullifies a taxpayer's requirement to satisfy Section 6012. To accept the IRS' argument this Court would need to judicially create, because the language is not within Section 6012, a *per se* rule that a substitute return and assessment forever bars a taxpayer from being able to meet his or her requirement to file an actual return (form 1040) under Section 6012.

But by the rules of statutory interpretation, we must assume that by Congress not including any language about a statute of limitations or that a substitute return satisfies Section 6012, that Congress acted intentionally. Congress clearly did not wish to include such a rule that an IRS substitute return and assessment prevents a taxpayer from filing a "return" to satisfy the requirements of Section 6012.

In fact, Section 6012 is the heart of a taxpayer's requirement to file a return. Again, Hindenlang, Wogoman, and Payne's subjective standard of "an honest and reasonable return" only creates complications. Nunez's and Colsen's objective standard of a return qualifying as a "return" on "its face" is the only way for the Internal Revenue Code and Bankruptcy Code to have the same definition of "return."

d. Mr. Smith's return was an "honest and reasonable" attempt to satisfy the tax law

Decisions that are rendered are fact specific and all holdings must be considered in that light. While sometimes a more general holding will exist, the individual facts of each case must still be considered strongly. In Hindenlang the taxpayer's return "simply mirrored" the IRS substitute return and assessment. In Payne, the court does not reveal this detail but does mention he earned wages and had withholdings thereby making it likely that there was no deviation between the substitute return and the Form 1040 the taxpayer filed.

Mr. Smith, however, reported over $100,000 more of income and over $40,000 more of tax than the IRS was aware of. That seems to be the definition of honest. It seems to be the actions of a reasonable effort. We know, without question, that the IRS accepted Mr. Smith's Form 1040 because right after he filed it the IRS assessed an additional $40,095 of tax which matches the additional amount of tax Mr. Smith reported on his Form 1040 tax return.

The IRS's acceptance of Mr. Smith's return means it was not frivolous, because the IRS has the discretion to reject a frivolous return per the Internal Revenue Manual 5.1.15.3.4. To be non-frivolous, means to be "honest and reasonable."

While we believe the objective standard is best, this Court, if inclined, could create a "hybrid" standard. Essentially it would work as follows:

1) If a return filed by the taxpayer simply mirrors the substitute return, it is not a meaningful return and thus does not qualify.

2) If, however, the taxpayer provides any change to the return, then it is a meaningful attempt to comply with the law and thus is a "return."

3) If a return is rejected as "frivolous" by the IRS, it is not a "return" for Section 523(a)(1)(B) discharge purposes because a "return" was never accepted by the IRS and thus was never filed.

Fraudulent returns are already barred from discharge so there is no issue there. Further, such a rule would then allow the Hindenlang and Payne decisions to stand on their own without any contradiction but would recognize that a taxpayer such as Mr. Smith filed a "return" for Section 523(a)(1)(B) discharge purposes. It would allow

taxpayers to comply with Section 6012. It would also still give discretion to the IRS to reject a "frivolous" return (a return that by definition is not "honest and reasonable") such that a "frivolous" filing would never be considered a "return" and thus could never be discharged in bankruptcy.

We still believe, however, that the Nunez and Colsen standard of a "return" qualifying "on its face" is best, even if the return "simply mirrors" the substitute return. One *big* reason for this is that if a taxpayer files a Form 1040 to comply with Section 6012 that simply mirrors the substitute return but it turns out later that the taxpayer omitted cash income, say $50,000, the IRS could still audit or criminally prosecute as long as that document still counts as a "return." Badarocco is absolutely right in logic, even a fraudulent return must be a "return" in order for 11 USC Section 6702 to kick in. Remember, a fraudulent return is already exempted from discharge under Section 523(a)(1)(C) but to follow Payne, et al, this omitted cash would not be prosecutable if a Form 1040 that "simply mirrors" the substitute return is not a "return" under Section 523(a)(1)(B) since that finding must mean the same under the Internal Revenue Code, as well.

However, we still offer this alternative as it would allow this Court to rule for Mr. Smith while not directly contradicting another circuit.

e. Certain Courts and the IRS are Cherry-Picking Language out of Hatton to Reach Conclusions with No Foundation in the Law

The Hatton court, under the first prong of the Beard test, concluded on that basis alone that the installment agreement at issue was not a "return" because it was not signed under penalty of perjury. This was an easy conclusion – laying the foundation of the analysis and the law was the hard part.

Mr. Smith's return was signed under penalty of perjury and thus his return satisfies the first prong of Beard. The court in Hatton, however, did not continue with the second and third prongs of Beard, and without detailed analysis of what it means for a taxpayer to make an "honest and reasonable attempt to comply with the tax law," merely concluded that the installment agreement was not it – the installment agreement,

a document that was not a Form 1040 or equivalent, was not an "honest and reasonable attempt."

The following is what the Hatton court wrote, after finding the installment agreement was not a return under the Beard test because it was not signed under penalty of perjury:

> "[N]either the installment agreement nor the substitute return represent an honest and reasonable attempt to satisfy the requirements of the tax law. It is undisputed that Hatton failed to file a federal tax return on his own initiation… as required by section 6012 of the IRS See 26 USC Section 6012(a)(1)(A)." Hatton, at 1061.

It is clear from this language that the court concluded that it was the installment agreement that was not an "honest and reasonable attempt to satisfy the requirements of the tax law." There is no mention of a late-filed Form 1040 in this sentence or even within the entire fact pattern or analysis of Hatton. The court is merely concluding that Section 6012(a)(1)(A) requires the taxpayer to file a return and he failed to do so.

It is vital to understand that when the Hatton court writes that "[the taxpayer] failed to file a return" that it is NOT a legal conclusion based upon a Beard analysis. This is the court stating that the taxpayer literally failed to file a Form 1040 or equivalent document in the first place. This is an actual finding of fact, not law, that the taxpayer never filed Form 1040. Again, the taxpayer in Hatton literally filed nothing – zero, zilch, nada. He only agreed to an installment agreement and that is not a return (see above again if needed for differences between Form 1040 and an installment agreement).

Yet, certain courts and the IRS, apparently, do not understand the nuance between Hatton's factual finding that no literal Form 1040 return was filed and a Beard analysis conclusion that the document at issue is not a "return."

The IRS is confusing the finding of fact with the finding of law. When Hatton states the taxpayer failed to file a return, they mean that literally.

Thus courts, including Payne and Wogoman, and now the IRS erroneously believe that the Hatton court's holding was that a late-filed Form 1040 is not a "return." However, it is clear from actually reading the case that it was an installment agreement that is not a return and that the taxpayer literally filed no Form 1040 return or equivalent

document. The taxpayer instead sought to have an installment agreement rise to the level of a Form 1040 or equivalent return. And that is what Hatton said "no" to.

Remember Hatton's statement of issue: "The only question on appeal is whether… an installment agreement… constitute a tax return." Hatton, at 1058.

Perhaps another reason courts have been confused by Hatton is the following statement within the opinion. Hatton writes:

> The BAP excused Hatton's failure to file a return because 'he cooperated with the IRS, accepted his tax assessed liability without objection, signed the Installment Agreement to pay his tax liability, and performed his obligations under the Installment Agreement over a 23-month period.' Hatton 216, B.R. at 283. Hatton's belated acceptance of responsibility, however, does not constitute an honest and reasonable attempt to comply with the requirements of the tax law… Because Hatton never filed a return and only cooperated with the IRS once collection became inevitable, the bankruptcy court erred in concluding that section 523 did not except Hatton's tax liability from discharge." Id., at 1061 (emphasis added).

Again, rather than understanding that the Hatton court literally meant that the taxpayer never filed a Form 1040 or equivalent document, it appears that certain courts and the IRS are broadly interpreting this paragraph to mean all documents, including Forms 1040, cease to be "returns" when "belated acceptance of responsibility" exists. Out of this entire paragraph, the IRS is focusing on "belated acceptance of responsibility" as if it is a legal standard in and of itself.

The IRS is wrongfully taking language meant for an installment agreement (the only issue the Hatton court addressed) and transferring it to a late-filed Form 1040 without any basis whatsoever. A late-filed Form 1040 is not even in the fact pattern of Hatton. The Hatton court never even considered a late-filed Form 1040, only an installment agreement.

The intellectual laziness or confusion by certain courts and the IRS is astounding. Cherry-picking language out of a Court's opinion that only addresses whether an installment agreement is a tax return and applying it to all documents, including a late-filed actual Form 1040 that the court never even considered, is extremely reckless and dangerous.

This runaway, jumping-the-tracks false legal standard must be stopped and we can only hope this Court decides to run it into a brick wall.

The IRS's argument requires that this Court take a finding meant for an installment agreement and substitute in a Form 1040 taxpayer-filed return. That is not what the Hatton court said. That is not what the Hatton court meant.

Again, when the court wrote: "The BAP excused Hatton's failure to file a return" they meant just that - he literally failed to file Form 1040. He only agreed to an installment agreement. This is NOT a legal conclusion or the court using the term of art "return" based upon a Beard analysis and conclusion. This is an actual statement of fact that the taxpayer never filed Form 1040 – he filed nothing, zero, zilch, nada.

Let's further break down the first part of the paragraph and what it truly means:

> The BAP excused Hatton's failure to file a return because 'he cooperated with the IRS, accepted his tax assessed liability without objection, signed the Installment Agreement to pay his tax liability, and performed his obligations under the Installment Agreement over a 23-month period.' Hatton 216, B.R. at 283. Hatton's belated acceptance of responsibility, however, does not constitute an honest and reasonable attempt to comply with the requirements of the tax law…

When read in proper context, it is clear that the Ninth Circuit is writing these words and providing this analysis because it was not happy with BAP excusing the taxpayer from filing a literal Form 1040 (or equivalent document) by substituting "touchy-feely" concepts such as the taxpayer "cooperated" and "accepted… without objection" for an actual Form 1040 or equivalent return. Come here, give us a hug and we will call that a return, too.

The Ninth Circuit in this paragraph needed to reject the BAP allowing a "hug" to qualify as a return (Form 1040 or equivalent) in order to ensure that the "hug" did not qualify as a "return" for Section 523(a)(1)(B) discharge purposes.

The Ninth Circuit was stating that "touchy feely" concepts like the fact that the taxpayer "belatedly accepted responsibility" are not a substitute for an actual, honest-to-goodness Form 1040 or equivalent document.

The Ninth Circuit was telling the BAP that a return has certain characteristics – it must be signed under penalty of perjury, it must provide data. There is no excuse available that will satisfy the court for the taxpayer not actually filing a document like Form 1040 that purports to be a return, one that is signed under penalty of perjury and provides the data necessary to calculate tax. An installment agreement alone ("belated acceptance of responsibility" alone) is not an "honest and reasonable" attempt to satisfy

Section 6012. Remember the differences between an installment agreement and a Form 1040. The "apple" was a "belated acceptance of responsibility." It had nothing to do with the "orange." The IRS wishing it to be does not make it so.

Mr. Smith, on the other hand, needs absolutely no excuse from this Court for not filing a literal, taxpayer-filed return. He filed Form 1040. The taxpayer in Hatton filed NOTHING and that is why he needed the BAP to "excuse" him from filing a return and that is what the Ninth Circuit smacked down. "Touchy-feely" actions do not count as a return. An installment agreement certainly does not count as a return.

This Court must not allow the IRS to take the words "belated acceptance of responsibility" out of context. The words were meant for a taxpayer who only agrees to an installment agreement, not for a taxpayer who actually files Form 1040. The words were used to tell the BAP that a "hug" does not qualify in lieu of a Form 1040 or equivalent document. "Belated acceptance of responsibility" does not turn nothing (the installment agreement) into something (a Form 1040 return).

Remember, the preceding paragraph in Hatton:

"[N]either the installment agreement nor the substitute return represent an honest and reasonable attempt to satisfy the requirements of the tax law. It is undisputed that Hatton failed to file a federal tax return on his own initiation… as required by section 6012 of the IRS See 26 USC Section 6012(a)(1)(A)." Hatton, at 1061.

The "honest and reasonable" language directly applied, and only applied, to the installment agreement. The "belated acceptance of responsibility" language that followed was offered only in support of the finding that an installment agreement was not "honest and reasonable."

The "touchy-feely" definition as allowed by the BAP is not going to work. A taxpayer's "belated acceptance of responsibility" through an installment agreement – this "touchy-feely" definition - is not enough to make it a return.

If 'belated acceptance of responsibility' is what bars a Form 1040 from being a "return," then Section 523(a)(1)(B)(ii) would be rendered totally superfluous. After all, Section 523(a)(1)(B)(ii) specifically contemplates that the return is late in the first place, that the taxpayer is 'belatedly accepting responsibility' through filing the return late. Section 523(a)(1)(B)(ii)'s mere existence directly contradicts any argument that a late-

filed return/belated acceptance of responsibility disqualifies a Form 1040 from being a "return." If "belated acceptance of responsibility" bars a Form 1040 from being a "return," Section 6501(a) would only need to read that the IRS can audit within 3 years of the due date of the return. But Section 6501(a) specifically allows for audit of a "return" within 3 years of the due date OR 3 years from the filing date, whichever is later.

Hatton's use of "belated acceptance" was merely re-stating in different language that the "touchy feely" definition as allowed by the BAP was incorrect. It was not meant as a one-size fits all legal standard that "belated acceptance of responsibility" will cause an actual, late-filed Form 1040 to not qualify as a "return." Hatton did not even address a late-filed Form 1040.

Further, why would the Hatton court even mention that the taxpayer should have filed a literal return (Form 1040 or equivalent) as required by Section 6012(a)(1)(A). If the IRS prepared substitute return and assessment acted as a bar to all efforts by the taxpayer to file a Form 1040 as the IRS is arguing, then the Hatton court would have had to have held that the filing requirement of Section 6012(a)(1)(A) is no longer applicable once the IRS prepares a substitute return and assessment. The court would have had to have found that once the IRS prepares a substitute return, a taxpayer can no longer satisfy Section 6012 period. But Hatton made no such finding. In fact, Hatton still wanted a return to satisfy Section 6012(a)(1)(A) despite the substitute return's presence in the facts .

We return to the example of the taxpayer who timely files, receives a refund, but then the IRS discovers unreported income and issues a Notice of Deficiency that is not contested, and then files bankruptcy. The income earned that was related to the tax liability was never reported on the original return and the assessment is solely the result of a later-issued and uncontested Notice of Deficiency. We clearly have a case where the taxpayer 'belatedly accepted responsibility' for a tax liability and yet the tax is discharged.

We implore this Court to remember: The Ninth Circuit **never** held that the substitute return barred Mr. Hatton from ever filing a return or that had he actually filed a Form 1040 the un-timeliness would have prevented it from being considered a "return." The Hatton court only held that an installment agreement was not a return.

It may seem a simple task for this Court, but many other courts have confused the installment agreement "apple" with the Form 1040 "orange."

f. The train-wreck that is In re Needham

If one were to hold a clinic on how to get everything wrong with Hatton, Nunez, and the issue at the heart of this case, we would simply need one case to dissect: In re Needham. No cite is available to us but it is Case Number 12-2059, Motion for Summary Judgment, decided October 31, 2012 by Judge Bardwil, Eastern District of California Bankruptcy Court. No cite is yet available to us.

Just last month the Needham court issued a summary judgment opinion that bought into every misconception about Hatton, Nunez, Section 523(a)(19), Badaracco, etc. hook, line and sinker.

The IRS provided this case to this Court on the day of the hearing, presumably in the hope that it could pull the wool over another court's eyes, and that is why we need to methodically eviscerate the Needham case.

The glaring errors of Needham start at the beginning. The Needham court starts its analysis with the following finding:

" On facts **surprisingly similar** to the facts in this case, the Ninth Circuit held in… Hatton… that the tax was not dischargeable." No cite available (emphasis added).

Based upon this statement by the court, the facts should be set -- the taxpayer in Needham obviously never filed a tax return and only agreed to an installment agreement. After all, that is the exact fact pattern of Hatton and Hatton specifically limited its ruling only to such a fact pattern. Even the court is "surprised" by the similarity to Hatton and from our experience, courts are rarely so surprised.

But not so fast!

In Needham the court goes on to find: "On November 14, 2005, the debtor filed a return for 2002…" The Needham court even found that the filing of the Form 1040 by the taxpayer substantially reduced the amount of tax owing as calculated by the SFR.

But if we remember the facts of Hatton correctly, nowhere does the court find that the taxpayer filed a Form 1040 return. In fact, the court found he only agreed to an installment agreement. And, surprisingly, nowhere in Needham is it found that the taxpayer ever entered into an installment agreement, he only filed Form 1040.

If the facts in Hatton are so "surprisingly similar" to Needham then it must be, as sure as the sun rises in the east and sets in the west, that the taxpayer in Needham never filed a Form 1040 and only agreed to an installment agreement. But we now know this not to be the case.

If the facts are so "surprisingly similar," then the Needham court would have limited its ruling to only deciding that an installment agreement does not qualify as a return or equivalent document. But the Needham court does not.

It is clear that Needham simply could not tell the difference between an apple and an orange.

The Needham court's comparison to and reliance on Hatton is wrong as a matter of fact and law. At best, the Needham court is confused – erroneously believing that Hatton's usage of the word "return," a term of art, is the same as Form 1040. Needham does not understand that when the Hatton court stated that Mr. Hatton "failed to file a return," this was a statement of fact and not a conclusion based upon any Beard analysis. Needham fails to understand that the Hatton court never decided that Form 1040, late-filed or otherwise, did not qualify as a return or a "return."

Remember, a taxpayer who files Form 1040 is vastly different from a taxpayer who only agrees to an installment agreement. Hatton deals with the installment agreement, Nunez deals with Form 1040. Yet unbelievably Needham finds that Hatton applies and Nunez does not. In fact, Needham makes the bold finding that Nunez is no longer good law. The court writes, Hatton "significantly weakened the Nunez decision, and in fact, that if Nunez had been appealed, the Court of Appeals would have reversed it."

This is quite an astonishing statement. The Needham court, which does not

even understand the facts and holding of Hatton, is now going to tell us what the learned justices of the Ninth Circuit would decide. With absolute certainty nonetheless! Perhaps it is because the court does not understand Hatton that it feels the need to make such a conclusory statement. As should be clear by now, Hatton has zero effect on Nunez. Hatton dealt with an installment agreement, Nunez a Form 1040. Needham failed to recognize that Nunez is the "surprisingly similar" case, *not* Hatton.

Remember, if anything, Hatton complements and confirms Nunez. Neither case held that a substitute return or assessment by the IRS acts as a complete bar to a debtor's effort to file a return, only that an installment agreement does not qualify as a return and thus is not a "return" under Section 523(a)(1)(B) (See Hatton) and a late-filed Form 1040 does qualify as a return on its face and thus is a "return" under Section 523(a)(1)(B) so it is dischargeable (See Nunez).

Needham was either confused or intellectually lazy in its analysis of Hatton, and while it is surprising, it is unfortunately not uncommon (See Judge Posner above).

Another lowlight of Needham is the court's fallacious reliance on Hatton by cherry-picking the "belated acceptance of responsibility" wording in Hatton and using it to argue that the taxpayer's late-filed Form 1040 does not qualify as a "return." In Hatton what was not "honest and reasonable" was the installment agreement. Needham does not understand that the Hatton court's use of the "belated acceptance of responsibility" language was only part of its reasoning to explain why a "touchy-feely" definition does not replace the need to actually file a Form 1040 or equivalent document.

Needham further argues that the lateness of a return affects its ability to qualify as a "return," writing "We agree with the weight of authority that a debtor's delinquency is relevant to determining whether the debtor has filed a return."

It seems that the Needham court does not understand the plain language of Section 523(a)(1)(B)(ii) correctly. Section 523(a)(1)(B)(ii) specifically contemplates that the return is already late filed, yet it is *still* dischargeable as long as it is filed 2 years before the bankruptcy filing. Timeliness has absolutely nothing with disqualifying a

Form 1040 from being a "return" under the Bankruptcy Code. Unless Congress wished to render Section 523(a)(1)(B)(ii) entirely superfluous, the language of that Section can only be given meaning if the return is, in fact, late-filed. This Section's sole purpose is in contemplation of a late-filed return. It is amazing Needham cannot recognize that.

Needham is also guilty of Badaracco panic, concluding that Badaracco no longer applies by writing: "Thus, under the hanging paragraph added by BAPCA, a false or fraudulent return is not a "return" for purposes of Section 523(a)(1)(B)."

Needham is oblivious to the fact that both *pre*- and *post*-BAPCA a fraudulent return was and is barred from discharge under Section 523(a)(1)(**C**). The court clearly did not read just one sentence below Section 523(a)(1)(B). BAPCA had *zero* affect with respect to barring a fraudulent return from discharge; a fraudulent return has always been specifically barred from discharge under Section 523(a)(1)(C).

And the Needham court goes on, concluding: "[A]fter BAPCA, the rationale for the Colsen decision no longer stands." Needham thus adopts the subjective standard, writing: "the 'honest and reasonable attempt to satisfy the requirements of tax law' test requires that the court go beyond the 'face' of the debtor's purported return."

Needham does not understand that it is because of BAPCA that Colsen's rationale must now be adopted by bankruptcy courts. BAPCA's "hanging paragraph" did not eliminate the objective standard, it codified it – the meaning of "return" must satisfy the requirements of non-bankruptcy law (Internal Revenue Code and thus Beard) in order to be a "return" under the Bankruptcy Code. Needham fails to understand that a "fraudulent" return must nonetheless qualify as a "return" under the Internal Revenue Code in order for a taxpayer to be prosecuted under 11 USC 6702. A Form 1040 does not cease to be a "return" because it is fraudulent, late, or because the IRS prepared a substitute return. As the Supreme Court stated, it is required to be a "return" under the Internal Revenue Code in order for the Internal Revenue Code's provisions to even have effect.

In conclusion, Needham is an excellent illustration of a court falling for every fallacy in deciding this issue – Needham thinks Hatton was about a late-filed Form

1040. It was not. Needham thinks that Nunez was or would have been overruled by Hatton and/or the Ninth Circuit. It was not and would not be. In fact, the cases complement each other. Needham thinks that BAPCA actually changed Ninth Circuit law. It did not, BAPCA actually codified Ninth Circuit law as determined in Hatton. Needham thinks that a late-filed Form 1040 is not an "honest and reasonable attempt to comply with the tax law" by adopting the subjective standard of defining "return," thereby directly contradicting Nunez, BAPCA , Hatton, general logic, and fairness. Needham thinks BAPCA overrides the logic of Badaracco, not understanding that Section 523(a)(1)(C) existed pre- and post-BAPCA. Needham thinks that the definition of "return" can mean one thing under the Internal Revenue Code and another under the Bankruptcy Code. Needham does not understand that the meaning of "return" must be the same under both Codes, so it is totally blind to the fact that its holding greatly weakens the Internal Revenue Code itself.[4]

Every step of the way Needham misinterprets facts, case law, and Code. If this Court simply does the opposite of Needham, it will correctly find the tax return at issue dischargeable.

III. A RECENT CASE THAT IS THE EXACT OPPOSITE OF IN RE NEEDHAM

On November 14, 2012, as we were writing the final words of this Brief, an opinion was issued in the case of In re Peter George Martin. No formal cite is available to us yet but it is Case Number 10-37360, Adversary Number 11-1536, decided by Judge Campbell for the United States Bankruptcy Court for the District of Colorado. Martin ruled for the taxpayer and against the IRS on the exact issue before this Court presently. See Exhibit 1 for the complete Martin opinion.

The Martin decision stands for, and agrees with, almost everything we have been arguing in this Brief. The court specifically finds that Wogoman, Mccoy v.Miss. State

---

[4] Even the IRS seems to be arguing a position that severely weakens the Internal Revenue Code and does not even realize it. It is ironic that this Brief is attempting to save the IRS from itself.

Tax. Comm (In re MccCoy), 666 F.3d 924 (5th Cir 2012), Hindendlang, and Judge Posner in Payne all incorrectly and illogically use the subjective standard when considering Beard.

The court in Martin points out that Section 523(a)(1)(B) would be rendered superfluous if a Form 1040 is disqualified from discharge simply for being late.

Martin finds that the objective standard of what qualifies as a "return" is required, writing: "This Court agrees with the analysis of Judge Easterbrook and the Eighth Circuit"

This is specific reference to Judge Easterbrook's dissent from Judge Posner in Payne and the Eighth Circuit's opinion in Colsen.

The Martin opinion fully addresses the problems of Wogoman, Hindenlang, and Payne and directly states why the Form 1040 filed after a substitute return must be discharged under Section 523(a)(1)(B) if the Internal Revenue Code is to have meaning. Martin is a well-reasoned and logical opinion on the exact issue facing Mr. Smith.

Finally, the Martin court also finds that Congress has not included within the Bankruptcy Code any condition that a return be filed prior to assessment or that the tax be self-assessed in order to be discharged under Section 523(a)(1)(B)(i). This finding directly contradicts the ruling in In re Smythe, which brings us to…

IV. THE PROBLEMS WITH IN RE SMYTHE

At hearing, this court expressed concern over the issue of the IRS substitute return and assessment creating a valid debt without a return and therefore it being exempted from discharge. The court specifically referenced In Re Smythe, 2012 WL 843435, U.S. Bankruptcy Court, W.D. Washington. We believe Smythe's essential holding could be summarized thusly:

A "debt" is created by virtue of the IRS' substitute for return. This "debt" is the result of the substitute return and not a tax return. Section 523(a)(1)(B)(i) exempts a

"debt" from discharge "for which no return was filed." Thus, since the "debt" resulted not from a return but from the substitute return, there is a "debt for which no return was filed" and the "debt" is therefore not dischargeable.

Smythe, however, is incorrect as a matter of statutory interpretation and law.

The Smythe court's statutory interpretation of Section 523(a)(1)(B) disregards the plain language of the bankruptcy code and essentially creates language and requirements that are simply not in the code at all.

Under a plain reading of section 523(a)(1)(B)(ii), it is only required that a return is "filed or given" with respect to the "debt." There is simply no requirement in Section 523(a)(1)(B) or anywhere else in the Bankruptcy Code that the tax return itself give rise to, cause, or create the debt being discharged. This is where the logic and finding of Smythe is flawed. The Bankruptcy Code does not tie the timing or the creation of the assessment/debt to the timing or filing of the tax return.

In Nunez, the court addressed and rejected Smythe's exact holding:

> "Congress could have conditioned discharge of tax debt on whether a return was filed prior to an assessment… Congress used an assessment as a trigger for other time periods on the Code, for example, the priority qualification found in Section 507(a)(8)(A)(ii). When Congress includes particular language in one section of the Code, but mits it in another, it is presumed to have acted intentionally and purposely. BFP v. Resolution Trust Corp., 511 US 531, 537, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994). We will not read into Section 523(a)(1)(B) the requirement that a debtor must have filed a return prior to an assessment by the IRS." Nunez, at 782.

The Nunez analysis is correct. Yet Smythe offers no argument against it. In fact, Smythe does not mention Nunez at all.

We also look to one of our prior examples to demonstrate the flaws of Smythe, the example of the taxpayer who files a timely return with a refund due but then the IRS discovers unreported income and issues a Notice of Deficiency that goes uncontested.

If the logic of Smythe is correct, the taxpayer would not receive a discharge because the "debt" was created or resulted not from the tax return itself but from the uncontested Notice of Deficiency. Remember, the original return reported none of the income upon which the assessment was based. The "debt" did not result from a return

on file and thus, under Smythe's reasoning, it is not dischargeable. Such a finding, however, turns the Bankruptcy Code on its head.

This Court must not buy into Smythe. The Smythe court creates a requirement that does not exist within the Bankruptcy Code and does so by directly contradicting established precedent of statutory interpretation as explained in Nunez and now Martin.

A plain reading of Section 523(a)(1)(B) reflects that the issue is not whether the "debt" was caused, created or resulted from the return, only that a return with respect to the debt be on file for 2 years prior to the bankruptcy. Such plain reading avoids the dilemma created by the example above. A plain reading means that this Court will not be placed in the untenable position of finding that all returns are equal, but some returns are more equal than others.

The tax debt at issue for Mr. Smith is tax year 2001. A tax return with respect to that tax year was on file for more than 2 years prior to his bankruptcy filing. Mr. Smith satisfied Section 523(a)(1)(B)(ii).

If that is not enough, the total tax being discharged by Mr. Smith matches the total tax, plus penalties and interest, as reported on Mr. Smith's tax return, not the substitute return. The total tax being discharged is far greater than the substitute return calculation. There is simply nothing in the Bankruptcy Code that distinguishes between assessments or their foundation for discharge purposes.

CONCLUSION

With full understanding of how arrogant the following may sound:

We are correct in what Hatton stands for and what it does not. The IRS and certain courts are wrong. We are correct that Nunez has never been overruled by the Ninth Circuit, directly or indirectly, by Hatton or any other case. The IRS is wrong. We are correct in stating that Hatton actually complements Nunez. The IRS is wrong. We are correct that the meaning of "return" is required to be the same under both the Bankruptcy Code and the Internal Revenue Code. The IRS and Judge Posner, et al, are wrong in concluding that the term "return" can have one meaning under the Internal Revenue Code yet have a different meaning under the Bankruptcy Code. We are correct that in the name of logic and fair enforcement of the Internal Revenue Code, this

Bankruptcy Court must adopt an objective standard as to what is an "honest and reasonable attempt to comply with the tax laws" – a standard that finds a return to be a return "on its face." The IRS is wrong because if their argument is accepted, under certain circumstances, 26 USC Section 6501(a) and 26 USC Section 7206 would be rendered totally empty and impotent. We are correct because Section 523(a)(1)(B) does not require that the tax assessment be timed to the tax return filing or be based upon the tax return itself, only that the return be on file for the tax year at issue for at least 2 years prior to the bankruptcy. The logic of Nunez is correct, the court's interpretation in Smythe is wrong. We are correct because if the IRS's argument is accepted, a court of law would need to rule that an identical Form 1040 is a "return" for one spouse but not the other. Finally, we are correct because to hold for the IRS, a court of law would literally be adopting the rule of law as it exists on Orwell's dystopian farm.

We hope this Court understands this is really not arrogance speaking, it is Ninth Circuit precedent, it is logic, and it is fairness. It is, most recently, the United States Bankruptcy Court for the District of Colorado speaking.

In conclusion, we offer to the Court our availability at another oral hearing if the Court so wishes.

Respectfully submitted on this 20th day of November, 2012

Robert L. Goldstein
Attorney for Plaintiff, Martin D. Smith
100 Bush Street, Suite 501
San Francisco, CA 94104
Telephone: (415) 391-8700