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DISCHARGE OF TAXES IN THE AFTERMATH OF *McCOY*

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INTRODUCTION

In litigation to determine the dischargeability of taxes, courts must decide whether a taxpayer's late-filed tax return meets the definition of "return" under 11 U.S.C. § 523(a) such that the related tax debt is NOT excepted from discharge under 11 U.S.C. § 523(a)(1)(B). In 2012, the Fifth Circuit held that a late-filed Form 1040 would never qualify as a "return" for purposes of 11 U.S.C. § 523(a) because it would not comply with the applicable filing requirements set forth in the Internal Revenue Code, unless the debtor consented to and signed a return prepared by the IRS pursuant to 26 U.S.C. § 6020(a). *McCoy v. Mississippi State Tax Commission*, 666 F.3d 924 (5th Cir. 2012), *cert. denied*, 2012 WL 2028690 (2012). Controversy has followed the *McCoy* decision and many lower courts have split on the issue. Appeals are pending in the United States Court of Appeals for the First, Ninth and Tenth Circuits. Absent amendment to the Bankruptcy Code by Congress, the final resolution of this question will likely rest with the United States Supreme Court.

In this paper, we review those provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") that determine whether taxes are discharged in bankruptcy, the relevant Internal Revenue Code statutes, the Fifth Circuit's decision in *McCoy*, and the jurisprudence and IRS position that followed.

A. Discharging Taxes: What is a "Return" Under 11 U.S.C. § 523(a)(1)(B)

Before the enactment in 2005 of BAPCPA, the Bankruptcy Code did not contain a definition of what constituted a "return" for purposes of 11 U.S.C. § 523(a). The definition of "return" is important because that term is incorporated into 11 U.S.C. § 523(a)(1)(B). In the absence of a statutory definition, courts wrestled with the question: what is a "return" under 11 U.S.C. § 523(a)?

As to federal tax debts, these courts looked to tax law to determine what constitutes a valid tax "return." Courts largely utilized a four prong test to decide whether a document submitted to the Internal Revenue Service constituted a "return" for purposes of 11 U.S.C. § 523(a). This test appeared in *Beard v. Commissioner*, 82 T.C. 766, 777-78, *aff'd*, 793 F.2d 139 (6th Cir.1986) and had four requirements:

> First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury.

Beard, 82 T.C. at 777-78. The *Beard* test stems from two Supreme Court decisions concerning whether a taxpayer's filings were "returns" for the purpose of deciding the date on which the statute of limitations for deficiency assessments began to run. In *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), the Court explained that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and

evinces an honest and genuine endeavor to satisfy the law." *Id.* at 180. In *Germantown Trust Co. v. Commissioner*, 309 U.S. 304 (1940), the Court stated that "where a [taxpayer], in good faith, makes what it deems the appropriate return, which discloses all of the data from which the tax ... can be computed," a return has been filed. *Id*. at 309.

Courts applying the *Beard* test generally focused on whether the tax return was an honest and reasonable attempt to comply with tax laws. In addition to an examination of the return and the taxpayer's subjective intent and circumstances surrounding the filing of a return, the courts considered the timeliness of the filing. In particular, the courts examined whether the taxpayer filed the tax return after the date required by tax laws and after the date that the IRS prepared a return for the taxpayer and made its assessments of tax. Courts considered that where a taxpayer waits until the IRS has completed the involuntary assessment process to file a Form 1040, the form does not accomplish the critical purpose of self-assessment that returns are intended to accomplish under the tax laws. Therefore, the Sixth Circuit held "as a matter of law that a Form 1040 is not a return if it no longer serves any tax purpose or has any effect under the Internal Revenue Code." *In re Hindenlang*, 164 F.3d 1029, 1034 (6th Cir. 1999). The court reasoned:

> [a] purported return filed too late to have any effect at all under the Internal Revenue Code cannot constitute an "honest and reasonable attempt to satisfy the requirements of the tax law." Once the government shows that a Form 1040 submitted after an assessment can serve no purpose under the tax law, the government has met its burden.

Id. at 1033. Accordingly, the late-filed Forms 1040 in *Hindenlang*, as a matter of law, did not qualify as an honest and reasonable effort to satisfy the tax laws and, thus, were not "returns" for purposes of 11 U.S.C. § 523(a)(1)(B)(i).

Pre-BAPCPA, a majority of courts, including all the federal courts of appeals (except one) to consider the issue, held that where a debtor comes forward with belated submissions after the IRS already has determined and assessed their tax liabilities on its own, the debtor's return is not a "return" and the debtor's previously assessed tax liabilities are not dischargeable under 11 U.S.C. § 523(a)(1)(B)(i). See *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999); *In re Payne*, 431 F.3d 1055 (7th Cir. 2005); *In re Moroney*, 352 F.3d 902 (4th Cir. 2003); *In re Hatton*, 220 F.3d 1057 (9th Cir. 2000). These courts of appeals held, as did many lower courts, that the late-filed tax form "was not a 'return' for purposes of allowing [a debtor] to discharge his tax liabilities in bankruptcy." *Payne*, 431 F.3d at 1058. Therefore, the purported returns, submitted only after the IRS assessed tax on its own, did not satisfy the *Beard* test's requirement that a return reflect an honest and reasonable attempt to satisfy the tax laws.

The Eighth Circuit took an opposite tack to determine whether a late return was an honest and resonable attempt to comply with tax laws. *In re Colsen*, 446 F.3d 836 (8th Cir. 2006). According to *Colsen*, a bankruptcy court should only examine whether sufficient information appeared on an appropriate tax form irrespective of the timeliness of the return. The Eighth Circuit's preference for an "objective" test that considers only the information on the return,