| Department of the Treasury | Internal Revenue Service | Office of Chief Counsel | **Notice** |
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**CC-2010-016**

**September 2, 2010**

| **Subject:** | Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities Reported on Late-Filed Returns and Returns Filed After Assessment | **Cancel Date**: | Effective until further notice |
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**Purpose**

This Notice provides guidance on the application of the discharge exception under section 523(a)(1)(B)(i) of the Bankruptcy Code for a debt with respect to which a return was not filed in cases in which the taxpayer filed a Form 1040 after the due date.

**Background**

Pursuant to section 523(a)(1)(B)(i), an individual's bankruptcy discharge does not discharge a tax debt for which a required return was not filed. The Government successfully argued in a number of circuits that a Form 1040 filed after assessment does not qualify as a return for discharge purposes under section 523(a)(1)(B)(i). For example, In re Hindenlang, 164 F.3d 1029 (6th Cir.), cert. denied, 528 U.S. 810 (1999), the Sixth Circuit held that a document must qualify as a federal tax return under tax law to be a return for bankruptcy purposes. The court applied the test in Beard v. Commissioner, 82 T.C. 766 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986), which held that if a document "contains sufficient information to permit a tax to be calculated" and "purports to be a return" and "is sworn to as such, and "evinces an honest and reasonable attempt to satisfy the law," it is a return. The Hindenlang court concluded that a Form 1040 filed after assessment serves no tax purpose and therefore was not an honest and reasonable attempt to satisfy the tax laws. Other circuits largely followed Hindenlang. See 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). The Eighth Circuit disagreed in In re Colsen, 446 F.3d 836 (8th Cir. 2006), holding that a document that on its face evinces an honest and reasonable attempt to satisfy the tax laws qualifies as a return, whether or not it was filed after assessment.

Section 523(a) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The following unnumbered paragraph was added to the end of section 523(a), effective for cases filed on or after October 17, 2005:

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> For the purpose 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 of local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

(Emphasis added.) Neither Colsen nor any of the prior decisions of the courts of appeal involved a bankruptcy case filed on or after October 17, 2005. In the dissent in Payne, Judge Easterbrook remarked that, after the 2005 legislation, an untimely return cannot lead to a discharge because of the reference to "applicable filing requirements" in the unnumbered paragraph in section 523(a). 431 F.3d at 1060. In In re Creekmore, 401 B.R. 748, 751 (Bankr. N.D. Miss. 2008), a post-October 17, 2005 case, the bankruptcy court agreed with Judge Easterbrook's dissent and concluded that any late-filed return can never qualify as a return for dischargeability purposes, unless it was prepared pursuant to I.R.C. § 6020(a). The bankruptcy court in Creekmore acknowledged that its reading of the unnumbered paragraph was harsh, but stated that debtors could avoid the problem by taking advantage of the "safe-harbor" of section 6020(a) by having the Service prepare their returns. Creekmore, 401 B.R. at 752.

**Discussion**

**1. For bankruptcy cases filed on or after October 17, 2005, can a tax debt related to a late-filed Form 1040 be discharged?**

Yes. Read as a whole, section 523(a) does not provide that every tax for which a return was filed late is nondischargeable. If the parenthetical "(including applicable filing requirements)" in the unnumbered paragraph created the rule that no late-filed return could qualify as a return, the provision in the same paragraph that returns made pursuant to section 6020(b) are not returns for discharge purposes would be entirely superfluous because a section 6020(b) return is always prepared after the due date. It is a cardinal principle of statutory construction that a statute should be construed so that no clause, sentence or word is rendered superfluous. Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998) (refusing to read one provision of the Bankruptcy Code to render another superfluous).

Section 523(a)(1)(B)(ii) provides that an individual's bankruptcy discharge does not discharge a debt for which a return was filed after the last date, including any extension, the return was due, and after two years before the date of the filing of the petition in bankruptcy. The Creekmore reading would limit the application of section 523(a)(1)(B)(ii) to cases in which the Service prepares a return for the taxpayer's signature under section 6020(a) of the Internal Revenue Code. By presuming that Congress intended to limit section 523(a)(1)(B)(ii)'s long-standing discharge exception for debts with respect to which a late return was filed more than two years before bankruptcy to the minute number of cases in which the Service prepares a return for the taxpayer's signature under section 6020(a), the Creekmore reading also contradicts a special rule for interpreting the Bankruptcy Code. As the Supreme Court stated in Dewsnup v. Timm, 502 U.S. 410, 419 (1992), "This Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." Finally, the supposed "safe harbor" of section 6020(a) is illusory. Taxpayers have no right to demand that the Service prepare a return for them under that provision. We, therefore,

conclude that section 523(a) in its totality does not create the rule that every late-filed return is not a return for dischargeability purposes.

**2. Whether or not a Form 1040 filed after assessment is a return under nonbankruptcy law, is the related tax debt dischargeable?**

No. A debt for the portion of a tax that was assessed prior to the filing of a Form 1040 is nondischargeable under 523(a)(1)(B)(i). The debt is not dischargeable because a debt assessed prior to the filing of a Form 1040 is a debt for which is return was not "filed" within the meaning of section 523(a)(1)(B)(i).[1]

For bankruptcy discharge purposes, an income tax for any given year can be partially dischargeable and partially nondischargeable. Section 523(a)(1)(A), together with section 507(a)(8)(A), excepts debts for priority taxes from discharge. Section 507(a)(8)(A) includes three alternative rules that confer priority (and nondischargeability) on income taxes. Two of those rules clearly allow priority to apply to only a portion of the tax for a given year. Section 507(a)(8)(A)(ii) generally confers priority (and nondischargeability) to income taxes that were assessed within 240 days of the bankruptcy petition. If only a portion of a year's income tax was assessed within the 240-day period, only that portion would be excepted from discharge. Section 507(a)(8)(A)(iii) generally confers priority (and nondischargeability) to income taxes that were unassessed but assessable after the bankruptcy case was filed. If only a portion of the income tax for a given year was unassessed but assessable, only that portion would be excepted from discharge. For discharge purposes, therefore, a given income tax is divided into dischargeable and nondischargeable debts if a criterion for discharge applies only to a portion of the tax.

As with section 523(a)(1)(A), a tax liability for any given year can be divided into dischargeable and nondischargeable debts under section 523(a)(1)(B)(i). Section 523(a)(1)(B)(i) excepts from discharge any "debt" for a tax with respect to which a return was not "filed." For bankruptcy discharge purposes, a debt for an income tax recorded by an assessment should be considered independently of any part of the tax for the same tax year that may be assessed later. If at the time of assessment no return has been filed, then the debt recorded by that assessment is a debt with respect to which a return was not filed and section 523(a)(1)(B)(i) applies to except it from discharge. If the taxpayer later files a Form 1040 that reports an additional amount of tax, only the portion of the tax that was not previously assessed would be a dischargeable debt based upon that subsection. The portion of a tax that was assessed before a Form 1040 was filed would be a debt for which no return was "filed" within the meaning of section 523(a)(1)(B)(i), because at the time of assessment the debtor had not met the filing requirements for that portion of the tax and the assessed portion was not calculated based upon the tax reported on the Form 1040. The assessed portion of the tax was a debt for a tax that was legally enforceable by lien or levy before any return was filed. In the case of a debtor who files a Form 1040 after assessment reporting no more tax than was previously assessed, no portion of the tax would be a dischargeable debt.

**Conclusion**

A Form 1040 is not disqualified as a "return" under section 523(a) solely because it was filed late. Regardless of whether a Form 1040 filed after assessment is a "return" for tax purposes, the portion of a tax that was assessed before the Form 1040 was filed is nondischargeable under

[1] Accordingly, whether a late-filed Form 1040 is a "return" – the issue addressed in Hindenlang and other cases on section 523(a)(1)(B)(i) – is irrelevant.

section 523(a)(1)(B)(i). All bankruptcy cases involving application of the discharge exception under section 523(a)(1)(B)(i) to cases involving a Form 1040 filed after assessment should be coordinated with Branch 5, Office of the Associate Chief Counsel (Procedure and Administration). Questions about this Notice should be directed to Branch 5 at (202) 622-3620.

**/s/**
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