POST-PETITION TAX COMPLIANCE UNDER THE BANKRUPTCY CODE: CAN THE IRS ENFORCE TAX COLLECTION AFTER BANKRUPTCY IS FILED?

CRAIG A. GARGOTTA*

INTRODUCTION

Chapter 13[1] of the Bankruptcy Code provides the broadest discharge available to consumer debtors.[2] Despite chapter 13's broad discharge, it has its limitations as to the discharge of taxes. Chapter 13 does not discharge any "business" taxes[3] or individual income taxes[4] for which the tax return was due within three years of the petition date, inclusive of extensions.[5] Tax claims for individual income taxes that are due more than three years from the date of petition are dischargeable.[6] Penalties on priority tax claims are also dischargeable,[7] but the interest on priority claims is not.[8]

I. TREATMENT OF PRE-PETITION TAX CLAIMS IN CHAPTER 13

---

* Assistant United States Attorney, Western District of Texas, 1990-present; Adjunct Professor of Legal Writing, St. Mary's School of Law, San Antonio, Texas. The views expressed in this Article are those of Mr. Gargotta's and not the views of the Department of Justice and Internal Revenue Service.

[1] *See* 11 U.S.C. §§ 1301–1330 (2000).

[2] *See Id*. § 1328(a) (providing chapter 13 discharge discharges all debts except debts under § 1322(b)(5) (mortgage debts)); § 523(a)(5) (alimony or support obligations); § 523(a)(8) (student loan obligations); § 523(a)(9) (personal injuries caused by operation of vehicle while driving under the influence); and any restitution or criminal fine included in sentence on debtor's conviction of crime). A chapter 13 discharge also discharges debts based on fraud. *Cf*. 11 U.S.C. §§ 727, 1141(d)(3)(C) (providing discharge of fraud claim under chapters 7, 11 and 12 may be contested).

[3] Business taxes include payroll of "FICA" taxes as defined under I.R.C. §§ 3402-3405, 6051 (2000); unemployment or "FUTA" taxes under I.R.C. §§ 85(b) and 6050B (2000). Corporate income taxes are not implicated in chapter 13 because corporations cannot file for chapter 13. *See* 11 U.S.C. § 109(e) (2000) (describing who may be a debtor). Other "business" taxes might include partnership taxes or highway use taxes for trucking businesses. *See generally* 11 U.S.C. § 507(a)(8) (2000) (providing business taxes are exempt from discharge).

[4] *See* I.R.C. §§ 6051–6052 (2000) (describing duty of employers to provide information to individuals regarding amount of wages, deductions, and withholdings for taxes).

[5] *See* 11 U.S.C. § 507(a)(8)(A)(i) (2000) (providing tax on or measured by income or gross receipts is non–dischargeable "for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition"); *see also In re* Smith, 144 B.R. 473, 475 (Bankr. W.D. Ky. 1989) (holding debtor's income tax liability due less than three years prior to bankruptcy filling was not dischargeable).

[6] *See In re* Healis, 49 B.R. 939, 941–42 (Bankr. M.D. Pa. 1985) (finding tax liability dischargeable when due more than three years prior to debtor's petition). *See generally In re* Luke, 142 B.R. 160 (Bankr. W.D. Mich. 1992) (stating proper period to analyze in determining whether tax claim is non–dischargeable is three years before filing of petition).

[7] *See In re* Holway, 237 B.R. 217, 219 (Bankr. M.D. Fla. 1999) (stating debtor does not pay post-petition penalties on unsecured priority claim); *see also In re* Paulson, 152 B.R. 46, 49 (Bankr. W.D. Pa. 1992) (stating tax penalties that meet requirements of § 523(a)(7) are not dischargeable); *In re* Divine, 127 B.R. 625, 630 (Bankr. D. Minn. 1991) (holding assessed penalty was dischargeable).

[8] *See* Garcia v. United States, 955 F.2d 16, 17 (5th Cir. 1992) (holding interest is subject to same priority as underlying tax); *In re* Stowe, 121 B.R. 549, 552 (Bankr. N.D. Ind. 1990) (stating pre-petition interest is given same priority as underlying tax claim); *In re* Palmer, 88 B.R. 101, 102 (Bankr. N.D. Tex. 1986) (holding pre-petition interest on priority tax claim receives priority treatment).

The IRS asserts three types of claims in chapter 13 cases: secured tax claims,[9] priority tax claims,[10] and unsecured non-priority or general unsecured claims. Section 1325(a)(5)[11] of the Bankruptcy Code provides that secured claims are to be paid the value[12] of the claim over the life of the plan at a rate of interest that

---

[9] A federal tax lien arises upon three conditions: (1) there must be an assessment of the tax; (2) there must be a demand pursuant to I.R.C. § 6321, and (3) the tax payer must refuse or neglect to pay the tax due. The lien is recorded in accordance with state law pursuant to I.R.C. § 6323(f). For example, in Texas, liens against real property are recorded in the county deed records where the property is located. Liens against personal property are recorded with the Texas Secretary of State. The tax liens attach to all property interests of the taxpayer except for purchasers, holders of security interests, mechanics lien holders, and judgment lien creditors who recorded their liens prior to the notice of federal tax liens. There are further exceptions to the IRS's lien taking priority as defined under I.R.C. § 6326 (b–d) and for ad valorem taxes on real property.

[10] *See* 11 U.S.C. § 507(a)(8) (2000).

[11] *Id*. § 1325 (a)(5). A secured claim in chapter 13 can receive one of three types of treatment: the secured creditor can accept the proposed treatment under the plan; the debtor can surrender the collateral securing the debt to the creditor; or the debtor can "cram down" the plan on the secured creditor. *See* Assoc. Comm. Corp. v. Rash, 520 U.S. 953, 957 (1997) (stating three treatments for secured claims and specifically explaining "cram down" power). Further, a chapter 13 plan under § 1325(a)(5) will be confirmed if it meets these conditions: (1) the holder of the secured claim accepts the plan; (2) the plan provides that the holder of the secured claim retains its lien and is paid the value of its claim as of the effective date; or (3) the debtor surrenders the collateral securing the claim. *See* Laguna v. Shearson Lehman Mortgage Corp. (*In re* Laguna) 944 F.2d 542, 545 n.7 (9th Cir. 1987) (explaining conditions necessary to have court confirm chapter 13 plan).

[12] The valuation of the IRS's secured claim is different than consensual liens in that the tax liens are blanket liens that attach to all of the taxpayer's property under I.R.C. § 6323. *See* Redondo Constr. Corp. v. United States, 157 F.3d 1060, 1062 (6th Cir. 1998) (stating Internal Revenue Service lien attaches all after acquired property and is valid only after IRS files notice); United States v. Polk, 822 F.2d 871, 874 (9th Cir. 1987) (noting § 6323(f) provides that after notice of tax lien is filed lien exists against all property owned by taxpayer). Also, tax liens attach to exempt property. *See* 11 U.S.C. § 522(c)(2) (2000); *In re* Voelcker, 42 F.3d 1050, 1051 (7th Cir. 1994) (holding "federal tax lien attaches to all of a debtor's property, without exception."); United States v. Barbier, 896 F.2d 377, 379 (9th Cir. 1990) (explaining how tax lien may be applied even to property exempt from IRS levy); Medaris v. United States, 884 F.2d 832, 835 (5th Cir. 1989) (finding IRS may impose lien on all property and rights to property of person that failed to pay taxes).

Nonetheless, debtors may argue that the tax liens should be released after payment of the value of the lien plus interest. Cases holding that a debtor can force a creditor to release its lien on personal property once the secured claim is paid (which is almost always before discharge) employ a literal reading of § 1325(a)(5)(B)(i) and whether § 349 and § 506 limit its application. *See In re* Shorter, 237 B.R. 443, 445–46 (Bankr. N.D. Ill. 1999) (holding bankruptcy plan could provide for release of lien even if full payment is made before discharge); *In re* Johnson, 213 B.R. 552, 558 (Bankr. N.D. Ill. 1997) (stating provision could allow debtor to obtain release of lien upon full payment even if prior to discharge).

Cases holding that a lien on personal property should not be released until the debtor receives a discharge focus on the realities and equities of the early release of liens. These courts cite the high number of failed chapter 13 cases or cases that convert to chapter 7. They further point out that chapter 13 is a process that contemplates receiving a discharge after completion of a plan. These courts question the release of a lien prior to receipt of a discharge. *See In re* Pruitt, 203 B.R. 134, 136–37 (Bankr. S.D. Ind. 1996). In *Pruitt*, the court found that a chapter 13 plan is a collective proceeding, in which debtors must propose and effect a comprehensive solution to their financial difficulties. Accordingly, a chapter 13 plan is in truth a new contract between a debtor and all of his/her creditors. *Id*. As with any contract, there are covenants and considerations. As such, before a debtor can receive adjustment of its pre-petition obligations, the debtor should be required to make all plan payments. *Id*.; *see also In re* Thompson, 224 B.R. 360, 365 (Bankr. N.D. Tex. 1998) (holding debtor may not obtain release of secured creditors lien until completing confirmed plan and receiving discharge); *In re* Zakowski, 213 B.R. 1003, 1006 (Bankr. E.D. Wis. 1997) (finding bank need not release its lien until payment of secured claim). These courts hold that chapter 13 is a new contract, and before the contract is binding, all conditions and covenants must be fulfilled. Therefore, the lien remains until all payments are made and a discharge is granted. *See In re Zakowski*, 213 B.R. at 1006–07 (showing multiple courts have accepted "new contract" theory); *In re Thompson*, 224 B.R. at 365 (holding "creditor's lien can be extinguished pursuant to the debtor's plan upon payment of the creditor's secured claim.").

Finally, other courts focus on § 1307, which allows the debtor the unfettered right to dismiss a chapter 13 case at any point during the pendency of the case. These courts find that the only way that a creditor's rights (retention of the lien) could be maintained is to apply § 349(b) to dismissed or converted chapter 13 cases, which would result in the lien being retained. *In re* Feher, 202 B.R. 966, 972 (Bankr. S.D. Ill. 1996) (finding if debtor's case is dismissed

is equal to a market rate plus a risk factor.[13] Priority tax claims under section 507(a)(8) are to be paid in full over the term of the chapter 13 plan without interest,[14] unless the creditor agrees to alternative treatment.[15] Tax claims to which there is no security to secure the claim, or are not priority claims, are treated as unsecured non-priority or general claims.[16] These claims share pro-rata in distribution with all other unsecured claims, paid on the basis of the debtor's disposable income.[17]

---

prior to completion, all liens voided would be reinstated); *In re* Murray-Hudson, 147 B.R. 960, 962–63 (Bankr. N.D. Cal. 1992) (stating if debtor opts to dismiss lien rights would fully restore). *Contra In re* Jones, 152 B.R. 155, 179–83 (Bankr. E.D. Mich. 1993) (arguing lien retains its validity until collateral ceases to be property of estate).

[13] *See In re* McNichols, 249 B.R. 160, 177 n.12 (Bankr. N.D. Ill. 2000); *In re* St. Cloud, 209 B.R. 801, 806 (Bankr. D. Mass. 1997) (discussing "market rate plus" as approach to calculate rate of interest by adjusting objective interest rate for risk associated with case). There are no specific Code requirements on the payment of secured tax claims. In fact, the treatment is the same for all secured claims, consensual or not. Also, as to a rate of interest, the Supreme Court in *Assocs. Comm. Corp. v. Rash*, 520 U.S. 953 (1997), held that vehicles are valued at the replacement value. *Id*. at 963. Other courts have held that the rate of interest to be paid on IRS secured claims is a function of the treasury bill rate. *See* Gen. Motors Acceptance Corp. v. Valenti (*In re* Valenti), 105 F.3d 55, 64 (2d Cir. 1997) (involving treasury bill rate plus risk factor); *In re* Mitchell, 39 B.R. 696, 702 (Bankr. D. Or. 1984) (involving treasury bill rate); *In re* Crotty, 11 B.R. 507, 510 (Bankr. N.D. Tex. 1981) (concerning treasury bill rate). *Contra In re* Milspec, Inc., 82 B.R. 811, 820 (Bankr. E.D. Va. 1988) (adopting "market rate/case by case" approach as best way to determine interest on IRS's claims). In chapter 11 cases, courts have consistently held that a market rate of interest (allowing for a risk factor) is the best way of determining a rate of interest on the payment of IRS claims. *See* Craig A. Gargotta, *Fifth Circuit Joins Chorus on Interest Rates Owed for Tax Claims*, AM. BANKR. INST. JOURNAL, March 2000, at 8.

[14] *See In re* Smith, 196 B.R. 565, 570 (Bankr. M.D. Fla. 1996) (holding chapter 13 plan only required to pay priority tax claim in full in deferred cash payments equal to present value of claim); *In re* Rogers, 57 B.R. 170, 173 n.3 (Bankr. E.D. Tenn. 1986) ("[A] priority claim in a chapter 13 plan need not be paid with interest in order to pay the 'present value.'"); *see also In re* Kingsley, 86 B.R. 17, 20 (Bankr. D. Conn. 1988) (finding priority claim in chapter 13 paid in full without interest).

[15] This is contingent on the debtor providing for the full amount of the IRS's priority claim. *See In re* Escobedo, 28 F.3d 34, 35 (7th Cir. 1994) (stating chapter 13 plan cannot be confirmed if plan does not provide for full payment of priority tax claim); *see also In re Rogers,* 57 B.R. at 172 (stating chapter 13 plans provide for full payment of secured debt). Additionally, § 502(b)(9) provides that a governmental entity must file a proof of claim within 180 days of filing. In many jurisdictions confirmation of a chapter 13 plan occurs prior to the bar date. If no objection to the plan is filed, the plan will be confirmed. Section 1327(a) provides that the provisions of a confirmed chapter 13 plan bind the creditor, whether or not the creditor has filed a claim or objected, accepted or rejected the plan. Section 1327 operates to give confirmed chapter 13 plans *res judicata* effect. As such, should a chapter 13 plan provide for less than the full amount of a priority tax claim, and the creditor not object, the debtor can receive a discharge of that portion of the tax debt not provided for in the plan. *See* Great Lakes Higher Educ. Corp. v. Pardee (*In re* Pardee), 218 B.R. 916, 926 (B.A.P. 9th Cir. 1998); (stating creditor's failure to object at plan confirmation hearing constitutes implied acceptance of plan) *aff'd*, 193 F.3d 1083 (9th Cir. 1999).

The IRS can attempt to circumvent the *res judicata* effect of the plan by moving to modify the plan under § 1329(a), which requires a showing of a change in circumstances. *See In re* Fitak, 92 B.R. 243, 249–50 (Bankr. S.D. Ohio 1988), *aff'd*, 121 B.R. 224 (S.D. Ohio 1990). *But see In re* Witowski, 16 F.3d 739, 744 (7th Cir. 1994) (showing of changed circumstances unnecessary). If the IRS is unsuccessful in modifying the plan to have its priority claim paid in full, a debtor will then argue that the claim is discharged under § 1328(a) because the claim was "provided for" by the plan and thus entitled to discharge.

[16] *See In re* Hernando Appliances, Inc. 41 B.R. 24, 25 (Bankr. N.D. Miss. 1983) ("To the extent that the claims exceed the valuation of the properties, the tax and the interest shall be treated in the same manner as § 507(a)(6) unsecured priority claims, but the applicable penalty shall be treated as general unsecured, non-priority claims."). Claims secured by notices of federal tax liens are only "secured" for the periods that are listed on the notices and if there is collateral to secure the liens. *See generally* Timothy R. Zinnecker, *When Worlds Collide: Resolving Priority Disputes Between the IRS and the Article Nine Secured Creditor*, 63 TENN. L. REV. 585, 588–89 (1996) (describing tax liens and notice requirement).

[17] *See* 11 U.S.C. § 1325(a)(4) (2000) providing court shall confirm plan if :

> the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

There is little discussion in the Bankruptcy Code regarding the payment of post-petition tax claims[18] under chapter 13, but for section 1305(a).[19] There is no precise provision for the payment of post-petition taxes.[20] Further, there is no provision under chapter 13 that requires the filing of post-petition tax returns. It is this "gap" in the payment of taxes and filing of tax returns post-petition that poses challenges for the IRS and other governmental taxing entities. This article will examine what remedies the IRS has in the enforcement and collection of post-petition taxes.

II. SECTION 1305

Section 1305(a) provides that "[a] proof of claim may be filed by any entity that holds a claim against the debtor—for taxes that become payable to a governmental unit while the case is pending."[21] As such, only the entity holding the claim has the right and ability to file a claim for post-petition taxes.[22] Courts have uniformly upheld this rationale.

Courts holding that a debtor may not file a proof of claim for post-petition taxes note that section 1305(a) claims are totally within the control of the creditor.[23] There is no provision in section 1305(a) for the debtor to force a post-petition creditor to file a proof of claim, or for the debtor to file a proof of claim

---

Id. *See generally In re* Nottingham, 228 B.R. 316, 321 (Bankr. M.D. Fla. 1998) (discussing debtor's obligation to demonstrate commitment of projected disposable income to plan).

[18] Post-petition taxes are defined as taxes for which the return is due after the date of petition. *See* United States v. Ripley *(In re* Ripley*)*, 926 F.2d 440, 449 (5th Cir. 1991) (holding taxes become payable when final tax return for year was required to be filled); *In re* Jagours, 236 B.R. 616, 618 (Bankr. E.D. Tex. 1999) (holding taxes become payable to governmental unit while case is pending). *Cf. In re* Lee, 184 B.R. 257, 262 (Bankr. W.D. Va. 1995) (arguing person is responsible for paying withholding taxes from moment when taxes are withheld); *In re* Friesenhahn, 169 B.R. 615, 626 (Bankr. W.D. Tex. 1994) (discussing responsible officer liability under I.R.C. § 6672 was not post-petition claim where investigation and assessment of tax arose post-petition but tax relating to trust fund recovery did not).

[19] 11 U.S.C. § 1305(a) (2000) (providing in relevant part "a proof of claim may be filed by any entity that holds a claim against the debtor for taxes that became payable to a governmental unit while the case is pending").

[20] Some courts have found that the § 1305(a) claim should be paid as a priority claim. *See In re* King, 217 B.R. 623, 625–26 (Bankr. S.D. Cal. 1998) (allowing IRS priority claim against debtor to be paid in full despite debtor's attempt to use taxes owed to IRS to pay trustee); *In re* Wright, 66 B.R. 125, 127 (Bankr. D. Kan. 1984) (treating § 1305(a) claim as priority claim to be paid in deferred cash payments under § 1305(b)).

[21] 11 U.S.C. § 1305 (a)(1) (2000); *see also In re Jagours*, 236 B.R. at 618 (deeming IRS amended claim for deficient taxes post-petition since personal income taxes "become payable" on April 15 of following calendar year); *In re* Owens, 67 B.R. 418, 425 (Bankr. E.D. Pa. 1986) (holding I.R.S. deficiency claim against debtor post–petition and claim entitled to § 1305(a)(1) treatment since debtors filed tax return after petition in bankruptcy).

[22] The debtor does not have standing to file a proof of claim under § 1305(a) for the IRS. *See In re* Martin, 130 B.R. 349, 350–51 (Bankr. M.D. Fla. 1991) (sustaining IRS objection to debtor's $9,573 income tax deficiency filing on behalf of IRS); *In re* Roseboro, 77 B.R. 38, 39–40 (Bankr. W.D.N.C. 1987) (holding post–petition claim may only be filed under chapter 13 if filed by holder of claim); *In re* Dickey, 64 B.R. 3, 4 (Bankr. E.D. Va. 1985) (holding debtor could not file claim on behalf of IRS since IRS filed no proof of claim with regard to debtor's tax liabilities).

[23] *See In re* Sorge, 149 B.R. 197, 203 (Bankr. W.D. Okla. 1993) (denying debtor's contention that IRS post–petition claims had been discharged even though no proofs of claim were filed); *In re* Benson, 116 B.R. 606, 607–09 (Bankr. S.D. Ohio 1990) (denying debtor's motion to file claim on behalf of post–petition creditor in accordance with chapter 13 philosophy not to grant debtor special protections beyond what is necessary debt); *In re* Pritchett, 55 B.R. 557, 559 (Bankr. W.D. Va. 1985) (denying discharge to four post–petition medical claims since medical institutions had not filed proof of claim against debtor).

for a post-petition debt.[24] Moreover, courts analyzing section 1305 have found that section 501(c)[25] makes express allowances for those post-petition claims that a debtor may file proof of claims, for example, those claims found in section 502.[26] For example, claims falling under section 502(a)[27] can be filed by the debtor if a creditor fails to do so in a timely fashion.[28] Section 502 is inapplicable to section 1305 claims; however, because the holder of a post-petition claim is not a creditor for purposes of section 101(10),[29] nor can the claim fall within the provisions of section 503.[30]

Additionally, section 1329[31] permits the post-confirmation modification of a chapter 13 plan within the limits imposed by the statute.[32] "The statute does not contemplate, nor does the unambiguous language permit, post-confirmation modifications forcing the addition of post-petition creditors."[33] Further, the government can choose to collect from the debtor after his discharge.[34] As such,

---

[24] *See In re* Epstein, 200 B.R. 611, 614 (Bankr. S.D. Ohio 1996) (holding IRS had "exclusive control" in deciding to file proof of claim for post–petition debt); *In re* Trentham, 145 B.R. 564, 567 (Bankr. E.D. Tenn. 1992) (holding chapter 13 debtor has no standing to file proof of claim on behalf of post–petitionconsumer creditor); *In re* Goodman, 136 B.R. 167, 169 (Bankr. W.D. Tenn. 1992) (denying debtor's motion to add claim on behalf of collection agency citing "no provision in §1305(a) for the debtor to force a post–petition creditor to file a proof of claim . . . .").

[25] 11 U.S.C. § 501(c) (2000) ("If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim").

[26] *Id*. § 502.

[27] *Id*. § 502(a) ("A claim or interest, proof of which is filed under § 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.").

[28] *See In re* Glover 107 B.R. 579, 581, 583 (Bankr. S.D. Ohio 1989) (denying debtor's motion to modify chapter 13 plan since holder of claim was not "creditor" and thus § 501(c) was inapplicable).

[29] 11 U.S.C. § 101(10)(A) (2000) (defining creditor as "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor").

[30] *Id*.; *accord In re* Hudson, 158 B.R. 670, 674 (Bankr. N.D. Ohio 1993) (differentiating claim treatment under § 502 from pre-petition tax claims); *In re* Benson, 116 B.R. 606, 607–08 (Bankr. S.D. Ohio 1990) (finding holder of claim not creditor for purposes of 501(c)); *In re* Pritchett, 55 B.R. 557 (Bankr. W.D. Va. 1985) (stating allowance of § 1305(a) claim is regulated by § 502).

[31] 11 U.S.C. § 1329(a) (2000) provides:

> (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to–
>
> > (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
> > (2) extend or reduce the time for such payments; or
> > (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

See In re Roberts 279 B.R. 396, 400 (B.A.P. 1st Cir. 2000), *aff'd*, 279 F.3d 91 (1st Cir. 2002) (citing debtor's failure to modify plan and to include § 1305(a) claim in denying debtors request for "hardship discharge").

[32] *Id*.; *see In re* Cruz, 253 B.R. 638, 641 (Bankr. D. N.J. 2000) (stating any modification of confirmation plan is explicitly based upon statute); *In re* Trentham, 145 B.R. 564, 567 (Bankr. E.D. Tenn. 1992) (noting post–confirmation modification permitted within imposed limitations of the statute); *In re* Goodman, 136 B.R. 167, 169 (Bankr. W.D. Tenn. 1992) (concluding statute restricts post-confirmation modification to limited purposes); *In re* Glover, 107 B.R. 579, 581 (Bankr. S.D. Ohio 1989) (finding statute only authorizes modification as provided within text).

[33] *In re Trentham*, 145 B.R. at 567 (noting commentator suggests post-petition debts may be added prior to confirmation under § 1329 (citing *In re Goodman*, 136 B.R. at 169)); *see also In re* Haith, 193 B.R. 341, 343 (Bankr. N.D. Ala. 1995) (concluding § 1329 cannot be used to bring post-petition creditors within plan); *In re* Benson, 116 B.R. 606, 608 (Bankr. S.D. Ohio 1990) (noting possible inequitable result of allowing debtor to use statute to sweep in additional post-petition creditors).

[34] *See In re* Ryan, 78 B.R. 175, 180 (Bankr. E.D. Tenn. 1987) (holding government can collect from debtor after discharge); *see also In re* DeBerry, 183 B.R. 716, 718 (Bankr. M.D.N.C. 1995) (finding where debtor incurs post-

there is nothing in the language of sections 1305 or 1329 that requires the IRS to file a post-petition claim for taxes. Therefore, if a section 1305(a) claim is not filed, the failure to file a claim does not discharge the claim under section 1328(a).[35]

III. WHAT FORM SHOULD THE IRS'S POST-PETITION CLAIM TAKE?

Assuming that the IRS will participate in a chapter 13 case by filing a post-petition claim, the IRS must determine the basis for filing the claim.

Generally, before the IRS initiates collection activity against a taxpayer, it must first determine the amount of the tax assessment through demand and assessment.[36] An assessment is made by recording the liability of the taxpayer in the office of the Secretary of the IRS.[37] The IRS makes assessments by having an assessment officer fill out and sign a "summary record of assessment" also referred to as a Form 23C.[38] Further, the "Certificates of Assessments and Payments" list the first notice dates of each assessment and are presumptive proof that the IRS gave notice of the assessments and made demands for payment of the tax.[39] Therefore, "[a]n assessment has the same legal effect as a judgment against the debtor."[40] As such, the IRS can prepare a proof of claim premised upon an assessment.[41]

Under bankruptcy law, however, "assertion of a claim in bankruptcy is the

---

petition tax debt, stay should be lifted for cause so IRS can pursue collection for unpaid post-petition taxes); *In re* Hester, 63 B.R. 607, 612 (Bankr. E.D. Tenn. 1986) (discussing discharge and payment of post-petition taxes).

[35] *See In re* Epstein, 200 B.R. 611, 614 (Bankr. S.D. Ohio 1996) (discussing relationship of § 1305(a) claim to § 1328(a) discharge); *In re* Smith, 192 B.R. 712, 713 (Bankr. E.D. Tenn. 1996) ("Thus, the discharge of a post-petition debt depends on two factors: first, whether the claim for the post-petition debt is one that is allowed under § 1305, and second, if the claim is allowed, whether the chapter 13 plan 'provide[s] for' the claim."); *In re* Dunn, 83 B.R. 694, 695–96 (Bankr. D. Neb. 1988) (stating claim must be allowed to be provided by plan and thus discharged under § 1328(a)); *In re* Roseboro, 77 B.R. 38, 40–41 (Bankr. W.D.N.C. 1987) (describing consequences of not filing § 1305 proof of claim).

[36] *See* United States v. Galletti (*In re* Galletti), 298 F.3d 1107, 1110 (9th Cir. 2002) (stating collection efforts may begin once timely assessment has been made as mandated by statute); Hilley v. United States, 807 F.2d 623, 626 (7th Cir. 1986) (describing creation and reasoning behind statutorily imposed assessments); *see also* I.R.C. § 6502 (2000) (outlining timing and subsequent collection efforts regarding IRS assessments).

[37] *See* I.R.C. § 6203 (2000).

[38] *See* 26 C.F.R. § 301.6203-1 (2002) (discussing method of assessment in accordance with § 6203); *see also* Huff v. United States, 10 F.3d 1440, 1446 (9th Cir. 1993) (detailing valid assessment and importance of 23C date); Hefti v. I.R.S., 8 F.3d 1169, 1172 (7th Cir. 1993) (stating how IRS can satisfy assessment obligations as mandated by statute); Geiselman v. United States, 961 F.2d 1, 5–6 (1st Cir. 1992) (detailing how IRS satisfies assessments).

[39] *See Geiselman*, 961 F.2d at 6 (citing United States v. Chila, 871 F.2d 1015, 1019 (11th Cir. 1989)); *see also Huff* 10 F.3d at 1445–46 (9th Cir. 1993) (stating Certificates of Assessments and Payments are routinely used for proof of valid assessment); United States v. Lorson Elec. Co., 480 F.2d 554, 555 (2d Cir. 1973) (noting presumptive correctness of Certificate of Assessment); United States v. Miller, 318 F.2d 637, 638–39 (7th Cir. 1963) (holding Certificate of Assessments and Payments properly considered).

[40] *In re* Vines, 200 B.R. 940, 947 (Bankr. M.D. Fla. 1996); *see* Rambo v. United States, 492 F.2d 1060, 1061 n.1 (6th Cir. 1974) (stating legal effect of assessment is like judgment); *see also* Bull v. United States, 295 U.S. 247, 259–60 (1935) (noting assessments carry force of judgment).

[41] *See* Davis v. Columbia Constr. Co., Inc. (*In re* Davis), 936 F.2d 771, 774 (4th Cir. 1991) ("An assessment of a tax is not a prerequisite to the imposition of tax liability."); *In re Vines*, 200 B.R. at 947 (discussing IRS proof of claim procedures); *see also* Fed. Deposit Ins. Co. v. United States, 654 F. Supp. 794, 806 (N.D. Ga. 1986) (concluding taxes are due and owing regardless of when actually assessed).

assertion to a right to payment. The IRS does not need an assessment to assert such a right to payment, just as a creditor does not need a judgment."[42] Moreover, I.R.C. section 6151(a)[43] places the obligation on the taxpayer to pay taxes due without assessment and without notice and demand.[44] Further, the taxes are considered due and owing, and constitute a liability, as of the date the return is due.[45]

"The unassessed taxes, due and owing, fall within the concept of a claim in bankruptcy."[46] Further, "an assessment of a tax is not a prerequisite to an imposition of tax liability."[47] In fact section 507(a)(8)(A)(iii) gives priority to allowed claims for certain unassessed taxes, and section 1322(a)(2) requires that these claims be paid in full.[48] Therefore, assuming the debtor has filed tax returns post-petition, the IRS can file a post-petition claim for the debtor based upon the return data.[49]

Moreover, the IRS does not need a tax return, summary record of assessment, or other documentary evidence to file a proof of claim.[50] Rather, courts have consistently held that there is no need to provide supporting documentation for claims that are based on statutory, rather than written, obligations.[51] As long as the

---

[42] *In re Vines*, 200 B.R. at 947; *see also* 11 U.S.C. § 101(5) (2000) (defining claim as right to payment).

[43] I.R.C. § 6151(a) (2000) ("When a return of tax is required under this title or regulations, the person required to make such a return shall, without assessment or notice and demand from the Secretary, pay such tax . . . at the time and place fixed for filing the return . . . .").

[44] *See id*.; *see also In re Vines*, 200 B.R. at 947 (finding § 6151(a) requires payment of tax absent assessment, notice, or demand).

[45] *See In re Vines*, 200 B.R. at 947 (finding taxpayer owes duty to pay and IRS is entitled to payment at tax return filing deadline) (citing FDIC v. United States, 654 F.Supp. 794, 806 (N.D. Ga. 1986)); *see also* Baasch v. United States, 742 F. Supp. 65, 68 (E.D.N.Y. 1990), *aff'd*, 930 F.2d 911 (2d Cir. 1991) (stating same).

[46] *In re* Davison, 156 B.R. 600, 603 (Bankr. E.D. Ark. 1993) (citing *In re* Kilen, 129 B.R. 538, 548 (Bankr. N.D. Ill. 1991)).

[47] Davis v. Columbia Constr. Co., Inc. (*In re* Davis), 936 F.2d 771, 774 (4th Cir. 1991) (citing *In re* Hatchett, 31 B.R. 833, 836 (Bankr. E.D. Va. 1983)).

[48] *See In re* White, 168 B.R. 825, 832 (Bankr. D. Conn. 1994); *see also* 11 U.S.C. § 507(a)(8)(A)(iii) (2000) (granting priority to taxes assessable after case commences except taxes described in §§ 523(a)(1)(B) or 523(a)(1)(C) of Code); 11 U.S.C. § 1322(a)(2) (2000) (requiring full deferred cash payments of § 507 claims). *But cf*. Missouri Dep't of Revenue v. L.J. O'Neill Shoe Co. (*In re* L.J. O'Neill Shoe Co.), 64 F.3d 1146, 1151 (8th Cir. 1995) (interpreting § 507(a)(8)(A)(iii) to address taxes from pre-petition events not assessed before but which may be assessed after case commencement). *See generally* Jacob L. Todres, *Mini–Symposium: Tax Filing Year in Bankruptcy: Corporate Bankruptcy: Treatment of Filing Year Income Tax–A Suggested Approach*, 9 AM. BANKR. INST. L. REV. 523 (2001) (discussing various courts' treatment of § 507).

[49] *See* 11 U.S.C. § 362(b)(9) (2000) (providing IRS may audit tax return, issue notice of deficiency, demand returns, or make assessment); *see also* FED. R. BANKR. P. 3001(c) (allowing proof of claim based on writings which must be filed with original or duplicate of such writing). *But cf. In re* Wilkoff, No. 98-34354, 2001 Bankr. LEXIS 124, at *24 (Bankr. E.D. Pa. 2001) (finding failure of IRS to file proof of claim for post petition tax return neither allows nor disallows claim).

[50] *See* FED. R. BANKR. P. 3001(f) (stating evidentiary effect of properly filed proof of claim is prima facie confirmation of validity and amount of claim); Mulvania v. I.R.S. (*In re* Mulvania), 214 B.R. 1, 7 n.8 (B.A.P. 9th Cir. 1997) (distinguishing presumptively valid proof of claim from valid assessments requiring proper documentation); State Bd. of Equalization v. Los Angeles Int'l Airport Hotel Assocs., (*In re* Los Angeles Int'l Airport Hotel Assocs.), 196 B.R. 134, 139 (B.A.P. 9th Cir. 1996) (finding failure to attach required writing does not invalidate claim but deprives claim of prima facie validity under Rule 3001(f)) (citing Ashford v. Consolidated Pioneer Mortgage (*In re* Consolidated Pioneer Mortgage) 178 B.R. 222, 226–27 (B.A.P. 9th Cir. 1995) *aff'd*, 106 F.3d 1479 (9th Cir. 1997)).

[51] *See In re* Pan, 209 B.R. 152, 156 (Bankr. D. Mass. 1997) (finding proof of claim based on statutory tax penalty thus government is not required to supply additional documentation supporting proof of claim); *see also* Spiers v. Ohio

IRS's proof of claim identifies the tax periods in question and the amount of the liability, the claim is valid. All that is required for purposes of asserting a proof of claim is listing the tax periods, and stating the amount of the liability.[52]

As such, should the debtors file their tax returns, the IRS can file a section 1305(a) claim should it desire, without need of assessment to assert a right of payment.[53] The ability to file a section 1305(a) claim is more problematic where the debtors either fail or refuse to file tax returns post-petition.

IV. THE DEBTOR'S AND THE IRS'S REQUIREMENTS REGARDING THE FILING OF POST-PETITION TAX RETURNS

28 U.S.C. § 960 imposes a duty on debtors to prepare and file tax returns and to pay taxes as required by law, "[a]ny officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."[54]

Nonetheless, there are some instances where the United States must prove that debtors are taxpayers within the confines of the Internal Revenue Code. Further, some debtors allege that the IRS cannot establish that they are required to file returns or pay taxes. These debtors argue that the IRS has a duty to show that there is an obligation under the Bankruptcy Code to file returns post-petition.[55]

The IRS has consistently argued that an individual is a "person" under the I.R.C.[56] and subject to criminal prosecution for the failure to file the return.[57] Moreover, the I.R.C. defines a "taxpayer" as a person subject to tax under applicable law.[58] Further, "the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax . . . at the time

---

Dep't of Natural Resources (*In re* Jenny Lynn Mining Co.), 780 F.2d 585, 587 (6th Cir. 1986) (scrutinizing former analogous bankruptcy rule and finding documentation unnecessary for claim based upon statutory obligation); *In re* Los Angeles Int'l Airport Hotel Assocs., 196 B.R. at 139 (determining tax based on state statute did not need further documentation of debtor's liability).

[52] *See In re Pan*, 209 B.R. at 156; *accord In re* Boehm, 255 B.R. 686, 688 (Bankr. E.D. Ky. 2000) (asserting in chapter 13 cases IRS claim is not founded on a writing but rather U.S. Constitution and does not fall within gambit of FRBP Rule 3001(c)).

[53] *See generally* 11 U.S.C. § 1305 (2000) (stating claim may be filed by anyone with claim against debtor for taxes payable to government).

[54] 28 U.S.C. § 960 (2000); *see also* 26 U.S.C. §§ 6011, 6012 (2000) (describing who must pay taxes).

[55] *See* Crain v. Commissioner, 737 F.2d 1417, 1417–18 (5th Cir. 1984) stating:

> We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit. The constitutionality of our income tax system–including the role played within that system by the Internal Revenue Service and the Tax Court–has long been established.

Id.; Hallowell v. Comm'r., 744 F.2d 406, 408 (5th Cir. 1984) (holding debtor's argument that Congress is not authorized to impose tax upon income is without merit).

[56] I.R.C. denotes "Internal Revenue Code", 26 U.S.C.

[57] *See* United States v. Studley, 783 F.2d 934, 937 n.3 (9th Cir. 1986) ("We note that this argument has been consistently and thoroughly rejected by every branch of the government for decades. Indeed advancement of such utterly meritless arguments is now the basis for serious sanctions imposed on civil litigants who raise them."); United States v. Bell, 734 F.2d 1315, 1316 (8th Cir. 1984) (asserting willful failure to file tax return subjects taxpayer to criminal penalties). *See generally* I.R.C. § 7203 (2000).

[58] I.R.C. § 1313(b) (2000); *see* Templeton v. IRS, 650 F. Supp. 202, 204 (N.D. Ind. 1985), *aff'd*, 808 F.2d 838 (7th Cir. 1986) (defining taxpayer).

and place fixed for the filing of the return . . . ."[59] Finally, the I.R.C.[60] requires every individual whose gross income[61] is greater than or equal to the exemption amount to file returns. These three statutes are written in absolutes ("shall") and in no way excuse a person's ignorance or non-compliance from filing tax returns and paying taxes.[62] Moreover, the duty to file returns, and the individual's responsibility to pay taxes, rests with the individual, not the IRS.[63] As such, "[a]ll individuals, natural or unnatural, must pay federal income tax on their wages . . . ."[64] Moreover, a person's assertion that money received in compensation for labor is not taxable has been rejected by many courts.[65] In the alternative, debtors may argue that the IRS must file tax returns for them.

V. SECTION 6020(B) - CAN THE IRS BE COMPELLED TO FILE A RETURN FOR THE DEBTOR?

Internal Revenue Code section 6020(b) provides that the Secretary of the IRS "shall" make a return if any person fails to file a return.[66] Some taxpayers have argued that section 6020(b)(1) is mandatory, and not permissive.[67] That assertion is incorrect. Rather, the section is permissive and not mandatory.[68] "Section 6020(b) authorizes the Secretary to prepare a return in the absence of a return filed by the taxpayer, and requires that such a return be made from his own knowledge

---

[59] I.R.C. § 6151 (2000); *see also* Fed. Deposit Ins. Corp. v. United States, 654 F.Supp. 794, 806 (N.D. Ga. 1986) (stating taxes due and owing as of date tax return is required to be filed).

[60] I.R.C. § 6012 (2000).

[61] *See* Coleman v. Comm'r, 791 F.2d 68, 70 (7th Cir. 1986) (opining it does not matter what kind of income is at issue and that IRC imposes tax on all income and "[w]ages are income, and the tax on wages is constitutional.").

[62] *See* Ripperger v. United States, 248 F.2d 944, 945 (4th Cir. 1957) (asserting defendant's ignorance of law requiring filing of return is not valid); *In re* White, 168 B.R. 825, 830 n.4 (Bankr. D. Conn. 1994) (citing I.R.C. § 6151(a): taxpayer shall pay tax when due).

[63] *See* United States v. Norton, 250 F.2d 902, 905 (5th Cir. 1958) ("[D]uty to return and pay the correct tax rests on the taxpayer").

[64] Lovell v. United States, 755 F.2d 517, 519 (7th Cir. 1984) (per curiam); *see* United States v. Rice, 659 F.2d 524, 528 (5th Cir. 1981) (explaining IRC is not written to limit or exclude individuals or "natural persons" from filing tax returns). Further, the failure to file tax returns has been construed to mean that the taxpayer filed a return with zero amount paid. *See* Schiff v. United States, 919 F.2d 830, 832 (2d Cir. 1990).

[65] *See Lovell*, 755 F.2d at 518–19 (noting gross income includes compensation for labor and is taxable); *see also* Perkins v. Comm'r, 746 F.2d 1187, 1188 (6th Cir. 1984) (quoting I.R.C. § 61(a)(1) (2000)); Funk v. Commissioner, 687 F.2d 264, 265 (8th Cir. 1982) ("Gross income means all income from whatever source derived including compensation for services.").

[66] *See* I.R.C. § 6020(b)(1) (2000) (stating in relevant part: "If any person fails to make any return required by any internal revenue law . . . the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise."); *see also In re Rosemiller*, 188 B.R. at 135 (explaining how executions of returns operate). *See generally* Garner v. United States 424 U.S. 648, 651 (1976) (applying § 6020(b)(1) to returns).

[67] *See In re Rosemiller*, 188 B.R. at 135 (describing taxpayer's argument that § 6020 relieves tax payer of obligation to file return); *see also* United States v. Powell 955 F.2d 1206, 1209 (9th Cir. 1991) (explaining taxpayer's belief § 6020 is voluntary). The creation of a substitute for return is purely administrative, thereby permitting the IRS's assessment and collection processes to commence. *See In re* Rank, 161 B.R. 406, 409 (Bankr. N.D. Ohio 1993) (citing *In re* Pruitt, 107 B.R. 764, 766 (Bankr. D. Wyo. 1989)).

[68] *See* United States v. Stafford, 983 F.2d 25, 27 (5th Cir. 1993) ("Although the section authorizes the Secretary to file for a taxpayer, the statute does not require such a filing, nor does it relieve the taxpayer of the duty to file."); *see also* Geiselman v. United States, 961 F. 2d 1, 5 (1st Cir. 1992) (reasoning that failure of Secretary to file returns does not relieve tax payer of liability).

and from such information as he can obtain through testimony or otherwise."[69] "The Secretary has statutory authority to prepare the delinquent returns, but is not statutorily mandated to do so."[70] Moreover, the Secretary's preparation of a section 6020(b) return cannot be used to make "lawful the failure to file a return despite the command of section 7203."[71]

The Substitute for Return (SFR) program was developed to deal with taxpayers who do not file voluntarily, and for whom the IRS has income information available to substantiate a significant income tax liability.[72] SFR's are adjusted to reflect income reported on information returns (Forms W-2 and 1099) and other sources of income, and a tax liability is proposed to the taxpayer in the form of a statutory notice.[73] The taxpayer is then given the opportunity to either file a valid return, correct the assessment, or agree to the proposed assessment.[74] The tax is then assessed with the appropriate penalties and interest, and then a demand and notice for payment of the tax is mailed to the taxpayer.[75]

The debtor, through the failure to file a tax return or allowing the IRS to file a SFR, can further require the IRS to show the correctness of the liability stated on the SFR.[76] The burden of proof is on the IRS to show that the taxpayer received income.[77] That said, the deficiency determination is presumed correct.[78] The burden is then on the taxpayer to prove that the incorrectness of the deficiency determination by producing competent and relevant evidence that he did not receive the alleged income.[79]

The IRS can use the "Substitute for Return" approach where it has reliable income and/or wage data, and has the resources to prepare returns.[80] This approach

---

[69] *In re Rosemiller*, 188 B.R. at 135.

[70] *Id.* at 135–36; *see also In re* Martin, 180 B.R. 90, 95 (Bankr. E.D.N.C. 1994) (reasoning courts have consistently found that although IRS has authority to file return for taxpayer, it is not required to do so); *In re Rank*, 161 B.R. at 409 (indicating § 6020(b) does not supplant taxpayer's obligation to file nor does it relieve taxpayer from criminal liability for failure to file).

[71] *Powell*, 955 F.2d at 1213 (9th Cir. 1991) (reasoning tax payer is liable despite § 6020(b)).

[72] *See In re Rosemiller,* 188 B.R. at 134 (discussing purposes of substitute for return program); *see also Geiselman*, 961 F.2d at 5 (explaining IRS method of preparing returns); *In re* Olson, 261 B.R. 752, 752–53 (Bankr. M.D. Fla. 2001) (explaining how IRS prepares substitutes for returns from information independently obtained).

[73] *See* I.R.C. § 6212(a) (2000) (providing if Secretary of IRS, or subordinates, determines there is tax deficiency, Secretary is authorized to send such notice to taxpayer).

[74] *See In re Rosemiller*, 188 B.R. at 134 (explaining taxpayer's options after SFR is proposed); *see also* United States v. Hindenlang (*In re* Hindenlang), 164 F.3d 1029, 1031 (6th Cir. 1999) (explaining taxpayer's failure to opt to file tax return until 2 years after receipt of SFR). *See generally In re* Izzo, 287 B.R. 158 (Bankr. E.D. Mich. 2002) (discussing taxpayer's choice to file return after IRS prepared SFR).

[75] *See In re Rosemiller*, 188 B.R. at 134 (describing process of Substitute for Return program); *see also In re* Sgarlat, 271 B.R. 688, 692 (Bankr. M.D. Fla. 2001) (explaining after IRS determines tax liability in SFR, penalties and interest are added); *In re* Gless, 179 B.R. 646, 650 (Bankr. D. Neb. 1995) (evaluating penalties and interest assessed against debtor).

[76] *See In re* Martin, 180 B.R. 90, 94 (Bankr. E.D.N.C. 1994) (explaining Commissioner may have burden of proving existence and amount of deficiency); *see also* Higginbotham v. United States, 556 F.2d 1173, 1175 (4th Cir. 1977) (holding taxpayer must prove by preponderance of evidence assessment is erroneous and if burden is met, government must prove how much taxpayer owes); Foster v. Comm'r, 391 F.2d 727, 735 (4th Cir. 1968) (noting if taxpayer produces relevant evidence he did not receive income alleged in deficiency notice, Commissioner has burden of proof).

[77] *See Foster*, 391 F.2d at 735 (explaining burden of proof shifts back to Commissioner).

[78] *See id*. (stating initially government's burden is satisfied because deficiency determination is presumed correct).

[79] *See id*. (explaining burden shifts to taxpayer to prove he did not receive alleged income).

[80] *See* Moore v. Comm'r, 722 F.2d 193, 194 (5th Cir. 1984) (explaining Commissioner assessed taxes by using taxpayer's reported income in previous year, Consumer Price Index, and third party information); *In re Rosemiller*,

becomes more problematic when a debtor refuses to file a return, and the IRS does not have reliable income/wage data to prepare a substitute for return.[81] The IRS's ability to prepare and file a section 1305(a) claim is compromised when there is no return or income information.[82] Consequently, the IRS's remedies to enforce tax collection and compliance should include dismissal of a case under 11 U.S.C.§ 1307(c) for failure to file tax returns.

VI. IS "CAUSE" LIMITED TO THE BASES LISTED IN SECTION 1307(C)?

Section 1307(c) reads in relevant part "on request of a party in interest or the United States trustee and after notice and a hearing, the court . . . may dismiss a case under this chapter . . . for cause."

Section 1307(c) does not specifically mention the failure to file tax returns as a basis for dismissal.[83] Therefore, the United States would have to argue that the failure to file tax returns is "cause" for dismissal.[84]

"Several potential grounds for relief are listed in [s]ection 1307(c), but they are not exclusive."[85] "It is an established rule of construction for bankruptcy statutes that 'includes' and 'including' are not limiting."[86] "It is therefore beyond dispute that a court may consider matters other than those enumerated in section 1307(c) as grounds for dismissal of a chapter 13 petition."[87] The United States would have to

---

188 B.R. at 134 (stating SFR should reflect income reported on information returns and other sources). Consider if all debtors in bankruptcy in a particular district did not voluntarily file returns. The IRS would not have the resources to prepare returns for them. As such, the IRS generally prepares returns for large dollar amount cases or where the taxpayer has failed to file tax returns or pay taxes for substantial period of time.

[81] *See Moore*, 722 F.2d at 194–96 (detailing difficulty in obtaining adequate return information from recalcitrant taxpayer); *see also In re* Sgarlat, 271 B.R. 688, 691–92 (Bankr. M.D. Fla. 2001) (examining multiple years taxpayer failed to file tax return). *See generally In re* Washburn, No. 01-15534-9P7, 2002 Bankr. LEXIS 903, at *2–*6 (Bankr. M.D. Fla. 2002) (explaining process after taxpayer fails to file tax return). The absence of tax data would most generally occur where the taxpayer is self-employed because there is no income date or wage data to access because the information must be furnished by the self-employed taxpayer.

[82] *See* 11 U.S.C. § 1305(a) (2000) (allowing entity to file proof of claim against debtor for taxes owed to governmental unit while case is pending). *See generally* United States v. Ripley (*In re* Ripley) 926 F.2d 440, 443 (5th Cir. 1991) (determining proper application of § 1305).

[83] *See* 11 U.S.C. 1307(c) (2000) (stating chapter 13 does not explicitly contain good faith requirement for the filing of petition. Nevertheless, § 1307(c) of the Bankruptcy Code does state that chapter 13 petitions may be dismissed "for cause."); *In re* Love, 957 F.2d 1350, 1354 (7th Cir. 1992) (noting chapter 13 does not contain good faith requirement). As such, the good faith determination is fact based and subject to the bankruptcy court's discretion. *In re Love*, 957 F.2d at 1355. *Contra In re* Lilley, 91 F.3d 491, 496 (3d Cir. 1996) (stating chapter 13 does not contain good faith requirement). The burden of proof of good faith is on the debtor. Harden v. Caldwell (*In re* Caldwell), 895 F.2d 1123, 1126 (6th Cir. 1990) (explaining party seeking discharge has burden of proving good faith).

[84] *See* Howard v. Lexington Invs., Inc., 284 F.3d 320, 323–24 (1st Cir. 2002) (affirming dismissal of chapter 13 filing for failure to file tax returns within set time); Ladika v. I.R.S., 215 B.R. 720, 725 (B.A.P. 8th Cir. 1998) (affirming bankruptcy court's decision to convert chapter 13 case to chapter 7 for debtor's failure to file tax returns); *In re* Crayton, 169 B.R. 243, 245 (Bankr. S.D. Ga. 1994) (dismissing for failure to file federal tax returns within six months after filing petition).

[85] *In re* Puckett, 193 B.R. 842, 845 (Bankr. N.D. Ill. 1996) (citing *In re Love*, 957 F.2d at 1354); *see also* Alt v. United States (*In re* Alt), 305 F.3d 413, 419 n.2 (6th Cir. 2002) (citing *In re Lilley*, 91 F.3d at 494).

[86] *In re Lilley*, 91 F.3d at 494 (citing 11 U.S.C. § 102(3)); *see also* P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 77 (1979) (stating 'including' indicates enumerated items are part of larger group).

[87] *In re Lilley*, 91 F.3d at 494; *see also* Ho v. Dowell (*In re* Ho), 274 B.R. 867, 876 (B.A.P. 9th Cir. 2002) (indicating bad faith is basis for dismissal under chapter 13 even though not listed in § 1307(c)); *In re* Wallace, 259 B.R. 646, 648 (Bankr. E.D. Tenn. 2001) (stating § 1307(c) provides ten non-exclusive examples of cause for dismissal). Moreover, through § 1307(c), "Congress intended to provide bankruptcy courts with a discretionary means to

argue that allowing a person to remain in bankruptcy without filing tax returns, and not paying taxes, is exactly the grounds upon which Congress would ask the court to consider whether the bankruptcy process is being preserved.[88]

For example, in *In re Cobb,*[89] the debtors were required to file tax returns in accordance with local rules that required them to file all state and federal tax returns as a condition of confirmation. The debtors responded to the court's order requiring them to file their delinquent returns by arguing that the IRS had not proven the debtors were required to file the returns.[90] The debtors maintained that ". . . the United States Congress and the Internal Revenue Service, by deceptive and misleading words and statements . . . have committed constructive fraud by misleading and deceiving us, . . . into believing that we were required to file [IRS] forms . . . ."[91]

The bankruptcy court in *Cobb* noted that there were a number of bases that would support dismissal of the case. To begin with, the debtors did not obey orders of the court.[92] Second, the court found that the IRS's proof of claim was *prima facie* correct because the only evidence that would rebut the IRS's proof of claim was the filing of the debtors' tax returns.[93] Third, the *Cobb* court found that, "[t]he failure to file a chapter 13 case in good faith or propose a feasible plan because of failure or refusal to file tax returns appears to offer a basis for dismissal . . . ."[94]

The court held that debtors should not be permitted to take advantage of the discharge without first providing a complete and accurate account of the debtors' affairs.[95] In sum, the *Cobb* court found that the debtors' failure to file tax returns and, as such, evade their legal duty, was "bad faith" in the filing of their chapter 13 petition.[96]

Other courts have followed the *Cobb* court's rationale in finding that the failure to file returns is a precursor to bad faith and constitutes "cause" for dismissal under chapter 13. For example, in *In re Bertelt*,[97] the bankruptcy court held the debtor's serial filings, coupled with a refusal to file valid returns (the debtor filed returns with

---

preserve the bankruptcy process for its intended purpose." *In re* Rodriguez, 248 B.R. 16, 18–19 (Bankr. D. Conn. 1999) (reiterating "including" is non–exclusive).

[88] Notably, a court could not dismiss a case for bad faith because bad faith is not a basis for dismissal under § 1307(c). Many courts have rejected that conclusion. *See In re* Greene, 1999 WL 1271763, at *3 (Bankr. E.D. Pa. 1999) (noting Third, Seventh, Ninth and Tenth Circuits have found lack of good faith cause for dismissal under § 1307(c)); *see also* Eisen v. Curry (*In re* Eisen), 14 F.3d 469, 470 (9th Cir. 1994) (explaining determination of bad faith reviewed by looking at "totality of circumstances" and finding bad faith thus affirmed dismissal); Grier v. Farmers State Bank of Lucas, Kansas (*In re* Grier), 986 F.2d 1326, 1329–30 (10th Cir. 1993) (stating same).

[89] 216 B.R. 676, 678 (Bankr. M.D. Fla. 1998).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 679 (dismissing tax protestor's case proper under § 1307(c) for failure to provide information required by court) (citing *In re* Vomhof, 207 B.R. 191, 193 (D. Minn. 1997); s*ee also In re* Nygaard, 213 B.R. 877, 879 (Bankr. M.D. Fla. 1997) (stating court has power to require debtors to file tax returns as condition of confirmation).

[93] *In re Cobb*, 216 B.R. at 679 (finding only method to rebut proof of claim stems from filed tax returns) (citing *In re* Busch, 213 B.R. 390 (Bankr. M.D. Fla. 1997).

[94] *Id.* at 680; *see also* Roberts v. Boyajian (*In re Roberts*), 279 B.R. 396, 400 (B.A.P. 1st 2000) (stating debtor's failure to timely pay taxes should constitute material default under confirmed chapter 13 Plan).

[95] *In re Cobb*, 216 B.R. at 680.

[96] *Id.*

[97] 250 B.R. 739 (Bankr. M.D. Fla. 2000).

no income), was cause for dismissal.[98] Moreover, the *Bertelt* court noted that where the sole purpose of the debtors' chapter 13 filings was to frustrate tax collection and contest the validity of the tax system, the debtor's bankruptcy case was not properly filed.[99]

Conversely, in *In re Parffrey*,[100] the bankruptcy court did not grant the IRS's motion to dismiss because the debtor had already completed the plan by making all his plan payments.[101] The *Parffrey* court noted that under section 1328(a),[102] the court had no discretion but to grant the discharge of the debtor even if the debtor had incurred post-petition taxes.[103] That said, the court noted that the failure to file tax returns was "cause" for dismissal under section 1307(c).[104] Also, the court declined the IRS's argument that the incurring of post-petition tax liability was a basis for dismissal because, under section 1305(a), the creditor has the option of filing a claim for post-petition debt.[105] The court did suggest, however, that if the court had the discretion, it would have dismissed the debtor's case for his willful violation of title 26, and because the "[d]ebtor was not performing his obligations as a chapter 13 debtor in good faith."[106]

VII. IS FAILURE TO PAY POST-PETITION TAXES "CAUSE" UNDER SECTION 1307(C)?

In the alternative, can the IRS move to dismiss a case for failure to pay a post-petition tax liability, or must it first file a section 1305(a) claim? As has been already demonstrated, "cause" is broader than the ten bases for dismissal under section 1307(c). Moreover, there has been case law treatment that the accrual of post-petition taxes is "cause" under section 1307(c) and grounds for dismissal.

For example, in *In re Koval*,[107] the court found that it had the power to dismiss a chapter 13 case for the accrual of post-petition taxes under its local rules.[108] In *Koval*, the local rules providing for the dismissal of cases for accruing post-petition taxes were issued after the debtor's case and, therefore, were inapplicable.[109] Nonetheless, the *Koval* court found that a bankruptcy court could dismiss a case for

---

[98] *Id.* at 747; *see also In re* Hopkins, 201 B.R. 993, 996 (Bankr. D. Nev. 1996) (finding debtors' filing of frivolous tax returns with no intention to pay taxes warranted dismissal of chapter 13 case as bad faith).

[99] *In re Bertelt*, 250 B.R. at 749–50 (explaining debtor misused procedure of bankruptcy to defer and delay payment of taxes); *see also In re* Spurgeon, 166 B.R. 150, 152–53 (Bankr. D. Neb. 1993) (holding failure to obey court orders in filing returns and frivolous challenges warranted dismissal).

[100] 264 B.R. 409 (Bankr. S.D. Tex. 2001).

[101] *Id*. at 414.

[102] 11 U.S.C. § 1328(a) (2000) ("As soon as practicable after completion by the debtor of all payments under the plan, . . . the court shall grant the debtor a discharge of all debts provided for by the plan . . . . ").

[103] *In re Parffrey*, 264 B.R. at 414 (explaining when payments are complete court must grant discharge).

[104] *Id*. at 413.

[105] *Id*.

[106] *Id*. at 414. The court also noted that had the IRS filed a § 1305(a) claim prior to all plan payments being made, that should the debtor be unable to pay the claim that the failure to provide for the claim could have constituted grounds for dismissal.

[107] 205 B.R. 72 (Bankr. N.D. Tex. 1996).

[108] *Id*. at 76.

[109] *Id*.

cause under section 1307(c).[110] The court then held that the failure to file post-petition tax returns was cause under section 1307(c).[111] The court reasoned that, "[d]ebtors were attempting to take advantage of the protection of the Bankruptcy Court while totally ignoring the requirements of the Internal Revenue Code . . . ."[112] The court also held that:

> [d]ebtors should not be able to afford themselves of the special and equitable benefits afforded by the Bankruptcy Code while ignoring the duties and responsibilities imposed by the Tax Code. It is not good faith for [d]ebtors to file [c]hapter 13 bankruptcy and then continue to earn income but not pay the post-petition taxes on that income.[113]

Additionally, in a case where there was no local rule regarding post-petition taxes, the bankruptcy court in *In re Robertson*,[114] stated that, "the general purpose of chapter 13 is to allow the honest debtor the opportunity to pay her debts . . . as opposed to the liquidation of future assets . . ."[115] "Willful avoidance by a debtor of legal obligations as they become due post-petition is inconsistent with Congress' purpose in establishing chapter 13."[116]

The *Robertson* court also observed the practical and detrimental effect the failure to pay post-petition taxes has on a chapter 13 case.[117] The court noted that a holder of a post-petition obligation is not stayed from enforcing the obligation.[118] As such, tax collection of post-petition taxes will adversely limit the debtor's ability to make chapter 13 plan payments.[119] The court concluded that the payment of post-petition taxes as they become due is required by law, and nothing in the Bankruptcy Code relieves the debtor of that duty.[120]

Similarly, the bankruptcy court in *In re King*[121] found that the IRS's filing of a section 1305(a) proof of claim necessitated its allowance as a pre-petition claim payable as a priority claim under section 507(a)(8).[122] The court then noted that the allowance of the IRS's post-petition claim as a priority claim benefits the debtors, in that the claim could be paid over the life of the plan, instead of a lump sum.[123] The debtors objected to the proposed payment of the claim through the

---

[110] *Id*.; *see also In re* Bennett, 200 B.R. 252, 254 (Bankr. M.D. Fla. 1996) (noting case may be dismissed for cause under § 1307(c) of title 11).

[111] *In re Koval*, 205 B.R. at 76 (asserting debtor's nonpayment of post–petition taxes constituted cause for dismissal under chapter 11) (citing *In re* Berryhill, 189 B.R. 463, 466 (Bankr. N.D. Ind. 1995)).

[112] *In re Koval*, 205 B.R. at 76.

[113] *Id*.

[114] No. 697-61956-fra13, 2000 Bankr. LEXIS 1929 (Bankr. D. Or. 2000).

[115] *Id.* at *6.

[116] *Id*.

[117] *Id*. (noting particular prejudice to creditors).

[118] *Id*.

[119] *In re* Robertson, No. 697-61956-fra13, 2000 Bankr. LEXIS 1929, at *6 (Bankr. D. Or. 2000).

[120] *Id.* at *8. The court did not dismiss the case, finding that it was not required to under § 1307(c) and because the debtor owed a relatively small amount of post-petition taxes. The court did order that the taxes be paid within six months.

[121] 217 B.R. 623 (Bankr. S.D. Cal. 1998).

[122] *Id*. at 626.

[123] *Id*.

plan, arguing that the post-petition claim would render their plan infeasible.[124] The court found that the plan's infeasibility was a consequence of the debtors' actions, not the IRS's.[125] The court then concluded by finding that a material default under section 1307(c) had occurred with regard to the plan because the debtors could no longer pay their priority claims in full.[126] As such, the court dismissed the case.[127]

CONCLUSION

"The privilege of discharge is dependent upon a true presentation of the debtor's financial affairs."[128] "Such disclosure ensures that, . . . creditors are supplied with dependable information on which they can rely to analyze the debtor's financial history."[129] Moreover, income tax returns are the best source upon, "which the debtor's financial condition or business transactions might be ascertained."[130] Therefore, the bankruptcy process should not be used to circumvent the requirements of filing tax returns. Further, in instances where the returns are not filed, or liability not provided for, courts should consider dismissal of the debtor's case where either tax compliance is at issue, the plan was filed in bad faith, or where the debtor cannot make the plan feasible upon the filing of section 1305(a) claim.

---

[124] *Id*. (stating debtors argued they would not be able to finish their plan within time allotted). Moreover, providing for a post-petition claim would have an adverse effect on the debtor's unsecured general claims. Allowance of a post-petition tax claim as a priority claim would require the debtor to do one of two things: (1) reduce expenses to have more disposable income; or (2) reduce the distribution to unsecured creditors to have more income to pay the post-petition claim. Assuming a reduction to unsecured creditors, the IRS is left with a Hobson's choice of seeking allowance of its post-petition claim and causing a corresponding reduction of payment on the IRS's unsecured (dischargeable) claim.

[125] *Id*.

[126] *In re* King, 217 B.R. 623, 626 (Bankr. S.D. Cal. 1998).

[127] *Id*.

[128] *In re* Vines, 200 B.R. 940, 950 (M.D. Fla. 1996) (citing *In re* Baxter, 96 B.R. 58, 60 (Bankr. E.D. Va. 1989)).

[129] *Id*. at 950.

[130] *In re* Wolfson, 152 B.R. 830, 833 (Bankr. S.D.N.Y. 1993) (quoting § 727(a)(3)).