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"WILLFULNESS" AND ATTEMPTS TO EVADE OR DEFEAT TAXES UNDER THE BANKRUPTCY CODE'S SECTION 523(a)(1)(C) EXCEPTION TO DISCHARGE

Fundamental to bankruptcy policy is the goal of providing the honest debtor with a "fresh start." [1] An important part of this fresh start is the opportunity for an individual debtor to obtain a discharge from debts as a result of compliance with the bankruptcy laws. [2] All debts, however, are not dischargeable in bankruptcy. Section 523 of the Bankruptcy Code lists certain exceptions to discharge, generally intended to separate the honest debtor from the not−so−honest debtor. [3] Section 523(a)(1)(C), in particular, excepts from discharge any tax liability "with respect to which the debtor made a fraudulent return or *willfully attempted in any manner* to evade or defeat." [4]

For the various reasons discussed in this Note, the ambiguity of section 523(a)(1)(C) has caused considerable litigation and disagreement among courts. [5] The disagreement relates to the proper standard of "willfulness" to apply to section 523(a)(1)(C). [6] Because the language of section 523(a)(1)(C) is almost identical to certain provisions of the Internal Revenue Code (the "IRC"), many courts have applied interpretations of willfulness under the IRC. [7] The problem stems from the fact that there are both civil and criminal provisions of the IRC containing language identical to section 523(a)(1)(C). [8] A majority of courts have held that the civil standard [9] should apply. [10] Courts applying this standard generally equate "willful" with "voluntary, conscious and intentional evasions of tax liabilities." [11] Under the civil standard, the government is not required to prove [12] an affirmative act on the part of the debtor in order to find that he "willfully attempted to evade or defeat" the tax. In other words, acts *or* omissions are considered willful under the civil standard. [13]

A minority of courts have adopted the standard of willfulness applied under criminal tax provisions. [14] This standard requires the government to prove that "the law imposed a duty on the defendant, that the defendant knew of this duty, and voluntarily and intentionally violated that duty." [15] The debtor must have committed an affirmative act in attempt to evade a tax liability; [16] mere omissions are not enough to affect dischargeability. [17]

Courts approach the determination of the meaning of section 523(a)(1)(C) as an issue of statutory construction. Although the Supreme Court is committed to a plain meaning interpretation of the Bankruptcy Code, [18] this approach is limited to instances in which the language of the statute is unambiguous. [19] Section 523(a)(1)(C) reads: "willfully attempted in any manner to evade or defeat." [20] Many courts have relied on the plain meaning of those words in determining the willfulness issue. [21] Some courts, however, recognize that where "`the literal application of a statute will produce results demonstrably at odds with the intention of its drafters,'" resort to sources outside of the Bankruptcy Code is necessary. [22] These outside sources include congressional intent gleaned from the legislative history, [23] and interpretations of analogous provisions of the IRC. [24]

Underlying the discrete statutory construction issues are the conflicting policy considerations of the Bankruptcy Code and the IRC. [25] On the one hand, since one of the purposes of the Bankruptcy Code is to give the honest debtor a fresh start, [26] exceptions to discharge should be narrowly construed in favor of the debtor. [27] On the other hand, the government's need for tax revenues always has been a primary concern. [28] Balancing these two policy considerations has played a role in the determination of the amount of evidence the IRS should be required to produce in order to deprive the debtor of a discharge.

Part I of this Note examines the statutory construction of section 523(a)(1)(C). In particular, plain meaning interpretation and legislative history are discussed along with the interpretation of section 523(a)(1)(C) in light of

parallel provisions of the IRC. Part II examines the interplay of bankruptcy and tax policies, and questions the validity of allowing tax policy to override bankruptcy policy in the determination of the section 523(a)(1)(C) "willfulness" issue. Part III discusses cases analyzing the section 523(a)(1)(C) "willfulness" issue, in particular, cases involving the nonpayment of taxes, late−filed returns, and fraudulent transfers. This Note concludes that in the absence of a clear directive from Congress, the IRC's criminal standard of willfulness should apply to section 523(a)(1)(C).

I. Statutory Interpretation

A. Plain Meaning

The Supreme Court has made it clear that where the words of the statute are unambiguous, provisions of the Bankruptcy Code should be interpreted according to their plain meaning. [29] Only when the words of a statute are ambiguous, or where their plain meaning leads to a result which is at odds with the intent of the drafters, should courts look to congressional intent and legislative history to complete their judicial analysis. [30] Several courts have heeded the Supreme Court's textualist warning and have begun their analysis of section 523(a)(1)(C) with the plain meaning of its words. [31]

Section 523(a)(1)(C) excepts from discharge a tax "with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat." [32] The terms of this section which have caused the most difficulty are "willfully" and "in any manner." [33] Neither of these terms is defined by the Bankruptcy Code. [34] As a result, the language should be given its common meaning. [35] The common meaning of "willfully" is that which is done deliberately or intentionally. [36] The problem is that the common understanding of that term does not address the situation where something is deliberately *not done*, for example, when a taxpayer does not pay his taxes. Can this failure to act be considered willful, or must there be some other culpable conduct present to ensure that the debtor's failure to act was a willful attempt to evade or defeat the tax? A majority of courts hold that "willfully" includes both acts of commission and omission. [37] When applied in cases where the debtor has failed to pay his taxes, without more, however, it is difficult to say that the tax liability should be nondischargeable. [38]

Plain meaning interpretation of the phrase "in any manner" has led many courts to conclude that section 523(a)(1)(C) should be read broadly enough to include the nonpayment of taxes. [39] Applying the plain meaning rubric to both "willfully" and "in any manner," however, has led some courts to the result that any act or omission by the debtor to evade or defeat the assessment, payment or collection of a tax is grounds for nondischargeability under section 523(a)(1)(C). [40] This interpretation would mean that a debtor's mere nonpayment of his tax liability would lead to nondischargeability under section 523(a)(1)(C). [41] The Supreme Court has held that: "The strict language of the Bankruptcy Code does not control, even if the statutory language has `plain meaning,' if the application of that language `will produce a result demonstrably at odds with the intention of its drafters.'" [42] It is argued that the outcome under the plain meaning approach would cause all unpaid tax liabilities to be nondischargeable. Since this result would seem to be "at odds with the intention of Congress," outside sources should be examined. [43]

B. Standards of "Willfulness" Under the Internal Revenue Code

Since, Congress is presumed to know of existing legislation and judicial interpretations thereunder when enacting new legislation, [44] it is valid to incorporate analyses of analogous provisions of the IRC into an analysis of related provisions of the Bankruptcy Code. [45] The IRC contains several provisions relating to willful attempts to evade assessment, payment, and collection of taxes. [46] The IRC provisions most often discussed in the context of section 523(a)(1)(C) willfulness are sections 6653, [47] 6672, [48] and 7201. [49] Sections 6672 and 7201 use language nearly identical to that found in section 523(a)(1)(C) of the Bankruptcy Code. Sections 6653 and 6672 provide civil penalties, and section 7201, criminal. Since the Supreme Court has given the criminal standard of willfulness the most attention, [50] it will be discussed first.

1. Criminal Standard of Willfulness

In *United States v. Murdock*, [51] the Supreme Court acknowledged the difficulty of interpreting the term "willful." Discerning its meaning in the context of a penal statute, the Court recognized that "[a]id in arriving at the meaning of

the word "willfully" may be afforded by the context in which it is used." [52] While the common meaning of the word usually indicates "an act which is intentional, or knowing, or voluntary, as distinguished from accidental," [53] the Court found that "when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely; a thing done without ground for believing it is lawful; or conduct marked by careless disregard for whether or not one has the right so to act." [54] The Court also noted that an "evil motive" usually is required. [55]

In *Spies v. United States*, [56] the Court was asked to distinguish between conduct necessary to constitute a willful failure to pay a tax (a misdemeanor), and a willful attempt to evade or defeat a tax (a felony). [57] The Court held that a criminal conviction for willfully evading a tax or for willfully failing to pay a tax both required some affirmative act. [58] Among the affirmative acts that the Supreme Court had in mind were; "keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records . . . and any conduct, the likely effect of which would be to mislead or conceal." [59] So, even though willfully failing to pay a tax carried a lesser criminal penalty, "willfulness" still required the taxpayer to engage in an affirmative act. [60]

Since *Spies* and *Murdock*, the Supreme Court has refined the meaning of "willfully" as applied to criminal tax provisions. In *United States v. Bishop*, [61] the Court had to decide whether to impose the same meaning of "willfully" in two different criminal tax provisions. [62] The Court had difficulty attaching the same definition to the term when other provisions of the sections in which the word was used are substantially different. [63] The Court resolved this problem, however, by looking to the "additional misconduct" essential to violation of the statute, rather than by formulating different standards of willfulness. [64] The context in which the words were used, therefore, served as the distinction between the standards of willfulness. Ultimately, the *Bishop* Court found "willfulness" to be satisfied by the "voluntary, intentional violation of a known legal duty." [65] The Court also seemed to reiterate the requirement of bad intent or evil motive imposed under *Murdock*. [66]

In *United States v. Pomponio*, [67] the Court clarified its language in *Bishop* which referred to a "bad purpose and evil motive." [68] The Court stated: "We did not . . . hold that the term [willfully] requires proof of any motive other than intentional violation of a known legal duty." [69] In *Pomponio*, the Court held that an intent to violate a known legal duty was enough to satisfy any requirement of evil motive which may have been imposed by the Court in prior decisions. [70]

Cheek v. United States [71]

is the Supreme Court's most recent decision interpreting "willfulness" in criminal tax statutes. In *Cheek*, the Court evaluated prior decisions and found that to prove willfulness under section 7201, the government must show that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." [72] The Court also reaffirmed the holding in *Pomponio* that there is no requirement of a bad intent or evil motive beyond the voluntary, intentional violation of a known legal duty. [73]

2. Civil Standard of Willfulness

On the civil side of the IRC, a majority of courts have incorporated section 6672, by analogy, into their section 523(a)(1)(C) analysis. [74] Section 6672 imposes penalties for failure to pay taxes held in trust for the government. [75] Like section 7201, section 6672 contains language identical to section 523(a)(1)(C). Under the majority view, the standard of willfulness under section 6672 requires a "voluntary, conscious, and intentional act, not a bad motive or evil intent." [76] The "act" contemplated under section 6672 usually involves payment of other creditors with the knowledge that withholding taxes are due. [77] Furthermore, under section 6672 courts have found that "willfulness" is satisfied by both acts of commission and omission. [78] Willfulness, however, is *not* satisfied by "mere negligence." [79] Rather, a higher standard of gross negligence is imposed. [80]

After establishing that the civil standard of willfulness should apply, some courts look to the civil fraud penalties in section 6653 to prove an *intent* to evade or defeat taxes. [81] Since intent is rarely provable by direct evidence, "badges of fraud" are used as circumstantial evidence of fraudulent intent. [82] Generally, these badges of fraud include "significant understatements of income made repeatedly; failure to file tax returns; repeatedly filing late returns;

implausible or inconsistent behavior by the taxpayer; and failure to cooperate with federal tax authorities." [83]

3. Summary of Competing Standards

So, to juxtapose the two standards, the criminal standard of "willfulness" today requires an affirmative act by which the taxpayer voluntarily and intentionally violates a known legal duty. Under the civil standard, "willfulness" requires a voluntary, conscious, and intentional act or omission. Both standards require a voluntary and intentional act. Neither standard is satisfied by negligent acts, and neither standard requires a bad intent or evil motive except to the extent that under the criminal standard, the taxpayer must have the intent to violate a known legal duty. The two standards become even more similar when the examples of affirmative acts contemplated under *Spies* [84] (the criminal standard) are compared to the "badges of fraud" relied upon by some courts adopting the civil standard. [85] Thus, the primary difference between the two standards is the inclusion or exclusion of omissions as conduct constituting willfulness. [86]

Defining the standards of willfulness under the IRC, however essential to a discussion of this issue, does not answer the question as to *which* standard should apply. For that we look to congressional intent.

C. Congressional Intent

Two issues of congressional intent arise upon examination of the legislative history of section 523(a)(1)(C). First: Did Congress intend "willfully" to be evaluated in terms of civil or criminal *fraud* standards? Second: Did Congress intend to include the nonpayment of taxes within section 523(a)(1)(C)'s exception to discharge?

Congress is presumed to know of existing law when it enacts new legislation, [87] especially legislation which closely parallels that which Congress is enacting. Therefore, Congress is presumed to have known of both the civil *and* criminal penalties imposed under the IRC for *willful attempts* to evade or defeat taxes. On the civil side, courts have interpreted section 523(a)(1)(C) either in terms of the fraud penalties under section 6653 or the penalties for nonpayment of trust fund taxes under section 6672. The error of applying either of these standards will be addressed in turn.

Basic rules of statutory construction lead to the conclusion that if Congress intended courts to interpret section 523(a)(1)(C) under standards for fraud, they would have worded the statute accordingly, *i.e.*, the statute would have excepted from discharge those taxes with respect to which the debtor "*fraudulently* attempted to evade." [88] Two circumstances should be discussed here: First, Congress, within the same section speaks in terms of fraud. In section 523(a)(1)(C), Congress excepts from discharge taxes "with respect to which the debtor made a *fraudulent return*." [89] Congress's failure to use the term "fraud" when referring to attempts to evade or defeat a tax suggests that they did not intend the determination to be made under legal standards for fraud. [90]

The second circumstance indicating that Congress did not intend to incorporate principles of fraud into "attempts to evade or defeat a tax," is found in the original Senate version of section 523(a)(1)(C). This version was worded such that taxes which the debtor "*fraudulently* attempted to evade or defeat" would be nondischargeable. [91] Ultimately, the House version, which contained the current wording of the section was adopted. The differing House and Senate versions of section 523(a)(1)(C) indicate that Congress knew of its options in terms of the standard to apply to attempts to evade or defeat taxes and chose not to apply fraud. [92] Although this observation does not help *define* "willful," it is used as evidence that Congress did not intend a fraud standard to be incorporated into section 523(a)(1)(C).

The civil standard alternative to the fraud standard, and the standard most often applied in interpreting section 523(a)(1)(C), is the standard adopted under section 6672 of the IRC. [93] Analogy to civil liability for failure to pay trust fund taxes under section 6672 loses strength, however, when we recognize that Congress expressly makes trust fund taxes nondischargeable in section 523(a)(1)(A) of the Bankruptcy Code. [94] It seems that adoption of the section 6672 standard of liability into section 523(a)(1)(C) would render superfluous section 523(a)(1)(A)'s exception to discharge for trust fund taxes. It is also argued that the special nature of the trust fund tax [95] precludes the incorporation of section 6672's standard of liability into the very general section 523(a)(1)(C) exception to discharge. The fact that trust fund taxes are, at all times, the property of the taxing authority [96] justifies stricter standards of liability for their

payment that are not justified with other tax liabilities which may underlie a section 523(a)(1)(C) determination. [97]

By process of elimination, the criminal standard of willfulness remains. Although there is no positive evidence in the legislative history supporting the imposition of this standard, it has been observed that, at the time of section 523(a)(1)(C)'s enactment, section 7201 (the criminal tax provision) was the primary enforcement tool of the IRS. [98] Therefore, it is likely that in drafting section 523(a)(1)(C) in terms identical to section 7201, Congress probably intended the criminal standard to apply. [99] Furthermore, the Supreme Court has held that exceptions to discharge should be interpreted strictly in the debtor's favor. [100] The criminal standard gives effect to this policy of narrow construction by requiring the IRS to prove an affirmative act on the part of the debtor. A survey of cases dealing with this issue reveals that showing that a debtor has affirmatively attempted to evade a tax should not be a daunting task, as most debtors engage in some overt act aimed at tax evasion. [101]

The next provision of section 523(a)(1)(C) which is ripe for an analysis of congressional intent is the "in any manner" clause. Many courts are inclined to include the nonpayment of taxes within section 523(a)(1)(C) by reading the "in any manner" phrase broadly. [102] Similarly worded provisions of the IRC penalize willful attempts to evade or defeat taxes "or the payment thereof." [103] This language is excluded from section 523(a)(1)(C). Many courts believe that the omission of the "or payment thereof" language from section 523(a)(1)(C) should have no practical effect. [104] However, because Congress included nonpayment of taxes within certain analogous provisions of the IRC, [105] and because Congress is presumed to have known of those provisions, the omission of this language from the Bankruptcy Code *is* an issue. The minority recognizes that because Congress omitted the "or payment thereof" language from section 523(a)(1)(C), they intended to leave it out and intended that willful attempts at the nonpayment of taxes would *not* satisfy section 523(a)(1)(C). [106]

Because no clear answer emerges from the legislative history, policy may influence the outcome.

II. Policy

What is it that justifies the special treatment of tax claims in bankruptcy? In general, "Congress has determined that the problems of financing the government override granting debtors a wholly fresh start." [107] The result is that the debtor's fresh start has been subordinated to the government's need for revenue. [108] This subordination, however, is not absolute. [109] Under the IRC, the government must assess and collect tax liabilities within three years after the return is required to be filed. [110] The Bankruptcy Code parallels this three year limit in section 507(a)(8) which provides that taxes for which a return is due within three years prior to filing in bankruptcy are given priority status. [111] This three year time frame is echoed in section 523(a)(1)(A) which provides that the tax liabilities which are given priority under section 507(a)(8) are also nondischargeable. [112]

Since Congress has already provided the taxing authority with a substantial leg up in the bankruptcy process, it seems that the practice of overextending favorable treatment to tax claims is questionable. [113] By applying an expansive reading of section 523(a)(1)(C), courts run the risk of allowing that section to become a catchall nondischargeability provision for the IRS. [114] The IRS has had fair opportunity to enjoy the favorable status conferred upon it by the Bankruptcy Code, therefore taxes should not retain their nondischargeable status unless the government can prove some culpable conduct on the debtor's part. [115]

It has been argued that a restrictive reading of section 523(a)(1)(C) opens the door for that section to become a lucrative tax evasion device. [116] As one court noted, however, the provision that Congress drafted to prevent this form of tax evasion was not section 523(a)(1)(C), but sections 523(a)(1)(A) and 507(a)(8). [117] Moreover, it seems that the probability that the debtor is using bankruptcy as a tax evasion device decreases after three years has passed.

Discussion of the issue at hand in theoretical terms does not present an accurate picture of the practical problems which need to be addressed in applying a standard of willfulness under section 523(a)(1)(C) to varying factual circumstances. A careful examination of the cases is necessary.

III. The Cases

One reason why the section 523(a)(1)(C) willfulness standard is so difficult to interpret is that courts have had to address this issue under a wide variety of factual situations. The most common situations are where a taxpayer fails to pay his tax liability, [118] files a late return, [119] or fraudulently transfers property. [120] To a large extent, determining willfulness is fact−driven and cannot be simplified by finding that either the criminal or the civil standard applies, that section 523(a)(1)(C) requires an affirmative act, or that omissions also satisfy the standard.

Analysis of the sterile recounting of facts found in written opinions still does not convey to the reader the credibility and demeanor of the debtor which may have swayed the court's decision. This handicap only makes our efforts to distill the themes resulting from these cases doubly difficult.

A. Failure to Pay

Even if the taxpayer files his tax returns on time, honestly reports all taxable income, and fully acknowledges the tax liability, if that taxpayer does not *pay* the liability, the IRS has taken the position that the failure to pay is a willful attempt to evade or defeat the tax. This was the situation presented in *Haas v. IRS (In re Haas)*. [121]

In that case, although the debtor, Thomas Haas ("Haas") honestly and accurately filed tax returns for the years 1977 through 1985, he failed to pay his income and employment taxes for those years. [122] Instead, he used his income to pay other debts; both personal and business. [123] In 1987, Haas pleaded guilty to willfully failing to pay income taxes for 1980 through 1982, and employment taxes for a portion of 1984, [124] and received a suspended prison term with probation. [125] As a condition to probation, Haas was required to remain current in his estimated tax payments and to make monthly installments on his tax liabilities. [126] Although Haas substantially complied with his restitution payments, he filed a Chapter 11 bankruptcy petition in 1991. [127] The government then filed a proof of claim for unpaid taxes dating from 1977. [128] Haas contended that his tax liabilities for 1977 through 1987 were dischargeable. [129] The government argued nondischargeability based on section 523(a)(1)(C). The bankruptcy court agreed with Haas. [130] The court reasoned:

> Instead of satisfying the tax liability, Mr. Haas used his income to pay personal and business expenses rather than pay taxes due. Mr. Haas was under financial pressure and his nonpayment of the taxes was not the result of willful conduct designed to defeat or evade the taxes; but, instead was the result of mistaking the priority and importance of certain financial obligations. [131]

Although it is not expressly stated which standard the bankruptcy court used, finding that Haas' tax liabilities were dischargeable based upon the above reasoning supports a rejection of the section 6672 standard of willfulness.

On appeal, the district court reversed, [132] holding that willfulness under section 523(a)(1)(C) should be interpreted according to the civil standard under section 6672. [133] The court stated:

> [T]he most persuasive interpretation of the statutory language at issue is to construe the phrase "willfully attempted in any manner to evade or defeat" to mean: (1) the debtor has a duty under the law, (2) the debtor knew he or she had a duty, and (3) the debtor voluntarily and intentionally violated that duty . . . .
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> . . . .
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> There is no requirement that the debtor commit a fraudulent act in order to make an attempt to evade a tax . . . Instead, where the debtor *is financially able* to pay the taxes due, but chooses not to do so, the government has met its burden of proof. [134]

Although the district court purported to adopt the civil standard, the standard that it used was formulated under a *criminal* statute. [135] Despite the court's confusion of the standards, the result that "where the debtor is financially able to pay taxes due, but chooses not to do so, the government has met its burden of proof," *is* the correct result under section 6672. [136] The district court stressed that a willful attempt to evade or defeat a tax is not the same as fraud, [137] noting that the fraudulent return and willful attempt provisions of section 523(a)(1)(C) must be read in the disjunctive. [138]

The Eleventh Circuit disagreed with the district court and held Haas' tax liabilities to be dischargeable. [139] First, the court observed that if the plain meaning had been applied in the case of nonpayment, all tax debts would be nondischargeable in bankruptcy. [140] Haas, like every debtor, did not have enough money to pay every debt he owed. [141] The inability to satisfy obligations to creditors, including the IRS, is the impetus for *all* debtors to file in bankruptcy. [142] Thus, if the nonpayment of a tax liability absent an affirmative attempt to evade the tax, were found to be "willful" under section 523(a)(1)(C), all tax debts would be nondischargeable. [143] The *Haas* court correctly observed that where "the literal application of a statute will produce results demonstrably at odds with the intentions of its drafters," courts should look beyond the plain meaning. [144]

The Eleventh Circuit concluded that Congress did not intend the nonpayment of taxes to be included within section 523(a)(1)(C). The court noted that "Congress has shown itself capable of distinguishing between the evasion of a tax and the evasion of payment thereof; its decision to omit the words `or payment thereof' in section 523(a)(1)(C), despite the inclusion of these words in four previously enacted and nearly identical provisions of the IRC, must be given effect." [145] Next, the court found the criminal standard under section 7201 to be more persuasive in interpreting section 523(a)(1)(C), in part because section 7201 is "the capstone of a system of sanctions" within the IRC. [146] "As such, section 7201 was certainly pertinent to any bankruptcy provision intended to delineate which unpaid taxes would be dischargeable in bankruptcy and which would remain with the debtor." [147]

Several cases support a conclusion similar to that in *Haas*. In *Howard v. United States (In re Howard)*, [148] the bankruptcy court analogized to section 7201 in concluding that section 523(a)(1)(C) requires an affirmative act. [149] The debtor, David C. Howard ("Howard"), was involved in "creative financing" through real estate. [150] Apparently, this creativity paid off because in 1987, Howard's taxable income was approximately $300,000. While he did not pay estimated taxes during that year, he did file a tax return. [151] Howard's creativity did not go unnoticed, however, as he was the subject of a criminal investigation. [152] Aware of this investigation, Howard feared imminent incarceration. Concerned for the financial well being of his family, Howard had purchased a day−care facility for his wife, and later made loans to the facility to ensure its financial security. [153] Like the debtor in *Haas*, Howard used available funds for purposes other than payment of his tax liability.

Throughout the IRS investigation, Howard was completely honest and entirely cooperative with authorities. [154] In light of his honesty and cooperation, the court found that while Howard may not have used the best judgment, absent some showing that he attempted to shield assets or avoid the assessment and collection of taxes, his behavior was not indicative of willful behavior under section 523(a)(1)(C). [155] Had the court applied the civil standard of willfulness under section 6672, Howard's payment of other creditors before the IRS would have constituted a willful attempt to evade or defeat his tax liability. [156]

Williams v. United States (In re Williams)

, [157] also supports the holding in *Haas*. The debtors in this case, James and Carroll Williams (the "Williams"), were assessed additional taxes, interest, and penalties in 1990 resulting from their involvement in a tax shelter scheme from 1980 to 1984. [158] From 1984 through 1990, the Williams made substantial acquisitions and contributed a significant amount of money to a pension plan. [159] Nonetheless, the Williams failed to pay tax liabilities assessed in 1990, and filed a Chapter 7 petition in 1991. [160] The court found that because the Williams' investments were made *before* the taxes were assessed, the debtor did not willfully attempt to evade the tax liabilities. [161] Although the court did not adopt the criminal standard, it found that the Williams' failure to pay the liabilities subsequent to assessment, did not, in and of itself, constitute willful evasion. [162] Judge Paskay noted that the mere failure to pay "would not be sufficient to except the liability from the general discharge under [section] 523(a)(1)(C) because no debtor who owes taxes to the Government would be entitled to the protection of the general Bankruptcy discharge." [163]

Failure to pay a tax without some affirmative act designed to defeat its assessment has presented a special problem for courts. First, failure to pay the IRS usually means that the debtor has exhausted available funds by paying other creditors first, in a sense "preferring" other creditors over the IRS. Maybe then, this situation should be handled under the rules proscribed by Bankruptcy Code section 547. [164] The avoidance of the preferential payments under section 547 would bring the funds back into the estate and allow for the fair distribution of the debtor's assets.

The next problem in the nonpayment context is the tendency to apply section 6672 willfulness to section 523(a)(1)(C). Under section 6672, *any* expenditure resulting in the debtor's inability to pay the IRS satisfies "willfulness;" section 6672 does not distinguish between expenditures for luxuries and true necessities. If section 6672 willfulness were applied in *Haas*, the debtor's taxes would have been held nondischargeable. Considering the debtor's complete honesty and simple bad fortune, this would have produced an inequitable result contrary to the Bankruptcy Code's fresh start policy.

B. Late−Filed Returns

Section 523(a)(1)(B) addresses the nondischargeability of taxes when a debtor files a late return or fails to file. [165] "Tax liabilities reported by a tax return filed late *and* filed within two years prior to the filing of the bankruptcy petition or filed after the bankruptcy petition" are nondischargeable under section 523(a)(1)(B). [166] Late returns, however, which are filed outside of that two year "reachback" period *are* dischargeable if no other exception to discharge applies. [167] The IRS still can, and has, argued nondischargeability based upon section 523(a)(1)(C) if it feels that there was some wrongdoing in connection with the return. This is precisely what happened in *Toti v. United States (In re Toti)*. [168]

In that case, Toti, the debtor, did not file tax returns or pay his tax labilities for the years 1974 through 1981. [169] Toti's reason for not filing was that at the end of 1974 and 1975, he lacked the funds to pay the liability. [170] For the following six years, Toti failed to file because of the penalties and interest which had accrued against him. [171] In 1981, Toti was convicted of tax evasion for willfully failing to file his 1976 return. [172] Pursuant to his sentence, Toti paid the 1976 liability and filed all of his delinquent returns. [173] He then filed his 1982 and 1983 tax returns on time, but failed to make payments on the liability. [174] In 1985, Toti arranged a plan with the IRS under which he could pay his 1977 through 1983 tax liabilities. [175] Eventually, he stopped making payments on this arrangement. [176]

In 1990, Toti filed a Chapter 7 petition [177] and sought to have his tax debts discharged in bankruptcy. [178] In response, the IRS argued that Toti "willfully attempted to evade or defeat" his tax liabilities making them nondischargeable under section 523(a)(1)(C). [179] The bankruptcy court, persuaded by the similarities between the language of section 523(a)(1)(C) and sections 7201 and 7203, held that section 523(a)(1)(C) "willfulness" should be construed in light of criminal tax standards. [180] The bankruptcy court, therefore, held that under section 523(a)(1)(C), the debtor must commit an affirmative act in order to willfully attempt to evade or defeat a tax. [181] The court found that Toti knew he had a responsibility to file returns and pay federal income taxes and that he voluntarily and intentionally failed to do so. Nonetheless, Toti's tax liability was *not* excepted from discharge. [182] The court held that Toti's failure to file was due to inadequate resources, and that his fear of filing in subsequent years was an omission that did not satisfy the "willfulness" of section 523(a)(1)(C). [183] The district court reversed, [184] finding that willfulness should be construed in light of civil tax cases which do not require an affirmative act. [185]

In the first section 523(a)(1)(C) "willfulness" issue to reach a court of appeals, the Sixth Circuit affirmed the district court. [186] The Sixth Circuit's reasoning focused on the plain meaning of the statute, which it believed included "both acts of commission and acts of omission." [187] The Sixth Circuit also found that Toti did not fall within the category of "honest" debtor, which the Bankruptcy Code is intended to protect. [188] The court observed that Toti "had the wherewithal to file his return and pay his taxes, but he did not fulfill his obligation. It is undisputed that he did so voluntarily, consciously, and intentionally." [189] The court's holding that acts of commission *and acts of omission* satisfy section 523(a)(1)(C), however, was premature. Although the facts do not explain the circumstances leading to Toti's conviction, presumably, he engaged in affirmative acts sufficient to satisfy the criminal standard of willfulness. The court need not have reached the civil standard because Toti's actions had already satisfied the more stringent criminal standard.

A recent Fifth Circuit case also involved late−filed returns. In *Bruner v. United States (In re Bruner)*, [190] the debtors, Dr. and Mrs. Bruner (the "Bruners") filed a joint tax return in 1980 showing income in excess of $200,000 and federal income taxes paid in excess of $30,000. [191] The Bruners did not file a return nor did they pay taxes for the next eight years. [192] An IRS investigation revealed that the Bruners continued to earn a substantial income and had engaged in substantial cash transactions during the eight years in which they did not file returns. [193] Furthermore, the court concluded that the Bruners had established a charitable organization as a shell entity for concealing income and assets.

[194] In 1988, Dr. Bruner was indicted under IRC section 7203 for willfully failing to file federal income tax returns from 1981 through 1983. [195] After pleading guilty to willfully failing to file his 1981 return, Dr. Bruner agreed to pay his 1981 tax liability and to file returns for 1981 through 1988. [196] Although the Bruners made substantial payments towards their tax liability, large amounts remained unpaid when they filed a Chapter 7 bankruptcy petition in 1993. [197] The Bruners subsequently initiated an adversary proceeding seeking to discharge their tax liabilities for 1981, 1983, 1986, 1987, and 1988. [198] The bankruptcy court, relying on the civil standard of willfulness, found that the Bruners' actions constituted willful attempts to evade or defeat taxes under section 523(a)(1)(C), and, as a result, their tax debts were nondischargeable. [199]

The district court affirmed, stressing that the Bruners were not within the category of honest debtors which the Bankruptcy Code is designed to protect. [200] The Fifth Circuit affirmed. [201] Evaluating *Toti* and *Haas*, the *Bruner* court rejected the holding in *Haas* and found that section 523(a)(1)(C) willfulness includes both acts of commission and omission. [202] The court, arguably, need not have reached that point, however, because "[t]he Bruners were engaged in both acts of omission *and* acts of commission." [203] Since the Bruners engaged in affirmative acts constituting willful attempts to evade taxes under either standard, *i.e.*, by establishing a shell entity to conceal assets, the court need not have reached the point at which they held that acts of omission satisfied willfulness under section 523(a)(1)(C). [204]

Standing alone, failure to file returns or filing late returns should not be considered a willful attempt to evade or defeat taxes. In *Miller v. United States (In re Miller)*, [205] the debtors, Frank and Melinda Miller (the "Millers"), failed to file returns for six years. When confronted by the IRS, however, the Millers cooperated fully by turning over all of their books and records. No attempt was made to misrepresent or omit information, "nor was there any attempt . . . to mislead, hinder or delay the efforts of the IRS." [206] Although the bankruptcy court found that section 523(a)(1)(C) willfulness is satisfied by both acts of commission and omission, under these circumstances the court found that the debtors did not attempt to willfully evade or defeat their tax liabilities. [207] Judge Paskay noted that,

> [t]here is no precedent in existing case law where the debtor merely failed to file returns and lost the protection of the general discharge based on [s]ection 523(a)(1)(C). Virtually every case which addresses this issue deals with a debtor who took some action in addition to merely not filing the required tax return. [208]

C. Fraudulent Transfers

A debtor's fraudulent transfers present an interesting problem within the scope of section 523(a)(1)(C) in that such actions have been considered by some courts to be attempts to avoid the *payment* of a tax. [209] Although fraudulent transfers and attempts to conceal assets do constitute affirmative acts, they are acts aimed at avoidance of *payment or collection* of a tax, which some courts are not entirely persuaded should be included in section 523(a)(1)(C). [210]

This issue is addressed in a recent, unpublished Sixth Circuit decision. [211] In *United States v. Sumpter (In re Sumpter)*, [212] the debtors, Mr. and Mrs. Sumpter (the "Sumpters"), transferred assets to a trust in order to avoid the attachment of federal tax liens. [213] The court framed the section 523(a)(1)(C) issue as "whether evading or defeating *attachment* of assets is included in the statutory language." [214] The Sixth Circuit had previously concluded, in *Toti*, that the language of section 523(a)(1)(C) included attempts to evade or defeat *payment* of taxes. [215] *Sumpter* took this one step backward and found that since "attachment is usually the first step taken by the IRS in attempting the collection of the payment," attempts to avoid *attachment*, especially when admitted by the debtor, are sufficient to fall within section 523(a)(1)(C) willful attempts. [216]

The Sixth Circuit still, however, had to address *Haas*, in which the Eleventh Circuit held that attempts to avoid payment were *not* included within section 523(a)(1)(C). While it would seem that the Sixth Circuit would have had to reject *Haas* in light of its previous holding in *Toti*, the court merely distinguished *Haas*. The court observed that *Haas* involved the "mere nonpayment" of taxes, and that the debtor there took no affirmative steps to avoid paying his taxes, but simply opted to pay other creditors before the IRS. [217] Aside from conflicting with the Sixth Circuit's holding that nonpayment *does* fall within section 523(a)(1)(C), *Haas* also contradicts the Sixth Circuit's holding in *Toti* that affirmative acts *or omissions* satisfy section 523(a)(1)(C)'s willfulness standard. [218] By not rejecting *Haas*, the Sixth Circuit, seems to have acquiesced in the Eleventh Circuit's holding that some sort of affirmative act is necessary in the nonpayment context. The *Sumpter* court appears to condone *Haas* based on the fact that in *Haas* the debtor did *not*

engage in an affirmative act.

Cases involving fraudulent transfers in attempt to avoid *assessment* of a tax fit squarely within section 523(a)(1)(C) under the civil or criminal standard. [219] First, there should be no issue as to the requirement of an affirmative act; as long as the transfer or concealment is proved, the affirmative act requirement is satisfied. Some courts handling these cases, however, have gone beyond the facts before them to hold that omissions also satisfy willfulness. [220] Second, as long as the conduct is seen as an attempt to avoid *assessment*, there is no need to debate the issue of whether or not attempts to evade *payment* should fall within section 523(a)(1)(C). However, situations like the one presented in *Sumpter*, where the fraudulent transfer is seen as an attempt to avoid *payment*, raises a disputed issue as to whether attempts to avoid payment should be included in section 523(a)(1)(C) at all.

Conclusion

This Note concludes that absent a clear directive from Congress, the criminal standard of "willfulness," as formulated under the IRC, must be applied to the Bankruptcy Code's section 523(a)(1)(C) exception to discharge. The primary difference between the civil and criminal standards is the inclusion or exclusion of omissions as conduct satisfying the standard. The civil standard is easier for the IRS to satisfy in challenging dischargeability, and the criminal more difficult. While policy and the Bankruptcy Code dictate that the taxing authority is given priority in bankruptcy, this policy should not be incorporated into an analysis of 523(a)(1)(C). Favorable treatment for the taxing authority is found in other sections of the Bankruptcy Code; therefore, section 523(a)(1)(C) should be reserved for instances in which the debtor has engaged in culpable behavior which warrants the nondischargeability of tax liabilities. In this respect the IRS should be treated like any other creditor and the Bankruptcy Code policy requiring strict construction of exceptions to discharge should be given effect.

The cases dealing with section 523(a)(1)(C), to say the least, are disparate. The Eleventh Circuit, in *Haas v. IRS (In re Haas)*, was in the difficult position of deciding whether a debtor's mere failure to pay his tax liability should cause nondischargeability. In *Haas*, the Eleventh Circuit found that (1) the nonpayment of taxes was not intended to be included within section 523(a)(1)(C), and (2) that omissions do not satisfy section 523(a)(1)(C).

In *Toti v. United States (In re Toti)*, the Sixth Circuit, under a different set of facts, came to the opposite conclusion. The court found that the debtor's failure to file returns was an omission which led to nondischargeability under 523(a)(1)(C), and that attempts to avoid payment are included within section 523(a)(1)(C). The Fifth Circuit, in *Bruner v. United States (In re Bruner)* agreed with the Sixth Circuit. In the subsequent decision of *United States v. Sumpter (In re Sumpter)*, the Sixth Circuit, in an unpublished decision, reinforced its position that attempts to avoid payment were included within section 523(a)(1)(C). In so holding, the Sixth Circuit merely distinguished *Haas*, seeming to realize that somehow the nonpayment situation might be different from that which was presented to them in *Sumpter*.

These rulings should eventually be harmonized by some higher authority. Until then, and in the absence of some other more clearly defined standard, the criminal standard of willfulness under the IRC should apply.

Lynn M. Murtha

FOOTNOTES:

[1] Grogan v. Garner, 498 U.S. 279, 286−87 (1991).

> This Court has certainly acknowledged that the central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre−existing debt." . . . But in the same breath that we have invoked this "fresh start" policy, we have been careful to explain that the [Bankruptcy] Act limits the opportunity for a completely unencumbered new beginning to the "honest but unfortunate debtor."

Id. (quoting Local Loan Co. v. Hart, 292 U.S. 234, 244 (1934)).Back To Text

[2] C. Richard McQueen & Jack F. Williams, Tax Aspects of Bankruptcy Law and Practice § 10.01, at 10−2 (2d ed. 1995) ("The discharge is the heart of the fresh start policy promoted by the Bankruptcy Code."); *see* 11 U.S.C. §§ 727, 1141, 1228(a), 1228(b), 1328(a),(b) (1994) (Bankruptcy Code provisions relating to discharge).Back To Text

[3] 11 U.S.C. § 523 (1994). Examples of nondischargeable debt include: debt obtained under false pretenses, by false representation or by actual fraud, id. § 523(a)(2)(A); debts arising from "fraud or defalcation while acting in a fiduciary capacity . . . ," id. § 523(a)(4); and, debts related to child support or alimony, id. § 523(a)(5).Back To Text

[4] Id. § 523(a)(1)(C) (emphasis added).Back To Text

[5] *See, e.g.*, Graham v. IRS (In re Graham), No. 87−03092F, 1994 WL 777359, at *6 (Bankr. E.D. Pa. Aug. 8, 1994) (recognizing disagreement); Koehl v. United States (In re Koehl), 166 B.R. 74, 80 (Bankr. E.D. La. 1993) (same).Back To Text

[6] *See generally* Steven C. Bennett, *Discharge of Tax Obligations in Bankruptcy: The Search for a Willfulness Standard Under Bankruptcy Code Section 523(a)(1)(C)*, 62 Tax Notes 229 (1994) (analyzing "willfulness" under § 523(a)(1)(C)); Anthony M. Sabino, *When Tax Evaders Go Bankrupt: The Bankruptcy Exception to Debt Discharge and "Willfulness" in* Tax Crimes, 27 Suffolk U. L. Rev. 5, 18−29 (1993) (same).Back To Text

[7] *See, e.g.*, Haas v. IRS (In re Haas), 48 F.3d 1153, 1156−57 (11th Cir. 1995) (reviewing analogous provisions of IRC).Back To Text

[8] *See* id.Back To Text

[9] *See* discussion infra part I.B.2 (setting forth civil standard of willfulness under IRC).Back To Text

[10] Toti v. United States (In re Toti), 24 F.3d 806, 809 (6th Cir.) (applying civil standard), cert. denied, 115 S. Ct. 482 (1994); United States v. Hedgecock (In re Hedgecock), 160 B.R. 380, 385 (D. Or. 1993) (same); Pierce v. United States (In re Pierce), 184 B.R. 338, 343 (Bankr. N.D. Iowa 1995) (same); Binkley v. United States (In re Binkley), 176 B.R. 260, 265 (Bankr. M.D. Fla. 1994) (same); Irvine v. Commissioner (In re Irvine), 163 B.R. 983, 987 (Bankr. E.D. Pa. 1994) (same); Jones v. United States (In re Jones), 116 B.R. 810, 814 (Bankr. D. Kan. 1990) (same).Back To Text

[11] *See, e.g.*, Toti, 24 F.3d at 809. Some courts purport to apply the civil standard of willfulness by requiring the government to prove that: (1) the debtor had a duty to pay the tax; (2) the debtor knew of the duty to pay the tax; and (3) the debtor voluntarily and intentionally violated this duty. *See, e.g.*, Bruner v. United States (In re Bruner), 55 F.3d 195, 197 n.4 (5th Cir. 1995); Commissioner v. Peterson (In re Peterson), 152 B.R. 329, 335 (D. Wyo. 1993); Smith v. United States (In re Smith), 169 B.R. 55, 58 (Bankr. S.D. Ind. 1994); Laurin v. United States (In re Laurin), 161 B.R. 73, 75 (Bankr. D. Wyo. 1993). This standard, however, is the *criminal* standard for willfulness set forth by the Supreme Court in Cheek v. United States, 498 U.S. 192 (1990). *See* discussion infra part I.B.1 (setting forth criminal standard of willfulness under IRC provisions).Back To Text

[12] Grogan v. Garner, 498 U.S. 279, 286−91 (1991) (suggesting that IRS bears burden of proof by preponderance of evidence).Back To Text

[13] Toti, 24 F.3d at 809 (holding § 523(a)(1)(C) includes both acts of commission and acts of omission); Bruner, 55 F.3d at 200 (same); Pierce, 184 B.R. at 343 (same); United States v. Angel (In re Angel), No. 93−11683−BH, 1994 WL 69516, at *2 (Bankr. W.D. Okla. Feb. 24, 1994) (same); Binkley, 176 B.R. at 264 (same); Miller v. United States (In re Miller), 176 B.R. 266, 268 (Bankr. M.D. Fla. 1994) ("A plain reading of § 523(a)(1)(C) includes both acts of omission and acts of commission.").Back To Text

[14] *See, e.g.*, Haas v. IRS (In re Haas), 48 F.3d 1153, 1157 (11th Cir. 1995) (comparing § 523(a)(1)(C) to IRC § 7201, the IRC's criminal tax provision); Gathwright v. United States (In re Gathwright), 102 B.R. 211, 213 (Bankr. D. Or.

1989) (applying § 7201 criminal standard to § 523(a)(1)(C)); *see* discussion infra part I.B.1.Back To Text

[15] Cheek v. United States, 498 U.S. 192, 201 (1990).Back To Text

[16] Spies v. United States, 317 U.S. 492, 499 (1943).Back To Text

[17] Haas, 48 F.3d at 1158; Howard v. United States (In re Howard), 167 B.R. 684, 688 (Bankr. M.D. Fla. 1994); Gathwright, 102 B.R. at 213.Back To Text

[18] Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 557−58 (1989) (interpreting § 523(a)(7)'s exception to discharge); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1988) (interpreting § 506(b) of Bankruptcy Code); Public Serv. Co. v. New Hampshire (In re Public Serv. Co.), 108 B.R. 854, 874−80 (Bankr. D.N.H. 1989) (discussing Supreme Court's plain meaning approach); *see generally* Lowell P. Bottrell, *The Supreme Court and the "Plain Meaning" of the* Bankruptcy Code: A Review of Recent and Pending Supreme Court Decisions, 69 N.D. L. Rev. 155 (1993); Kenneth N. Klee & Frank A. Merola, Ignoring Congressional Intent: Eight Years of Judicial Legislation, 62 Am. Bankr. L.J. 1 (1988); Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 J. Wash. L.Q. 535 (1993). *But see* Thomas G. Kelch, An Apology for Plain Meaning Interpretation of the Bankruptcy Code, 10 Bankr. Dev. J. 289, 294 (1994) (asserting that Supreme Court is not, in fact, so committed to plain meaning approach).Back To Text

[19] *See, e.g.*, Ron Pair, 489 U.S. at 241.Back To Text

[20] 11 U.S.C. § 523(a)(1)(C) (1994).Back To Text

[21] *See, e.g.*, Toti v. United States (In re Toti), 24 F.3d 806, 809 (6th Cir.) (citing Ron Pair), cert. denied, 115 S. Ct. 482 (1994); *see* discussion infra part I.A.Back To Text

[22] Haas v. IRS (In re Haas), 48 F.3d 1153, 1155 (11th Cir. 1995) (quoting *Ron Pair*).Back To Text

[23] *See* discussion infra part I.C.Back To Text

[24] *See* discussion infra part I.B.Back To Text

[25] *See* S. Rep. No. 989, 95th Cong., 2d Sess. 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5799−801. Congress recognized these conflicts when it enacted § 523(a)(1)(C):

> A 3−way tension thus exists among (1) general creditors, who should not have the funds available for payment of debts exhausted by an excessive accumulation of taxes for past years; (2) the debtor, whose "fresh start" should likewise not be burdened with such an accumulation; and (3) the tax collector, who should not lose taxes which he has not had reasonable time to collect or which the law has restrained him from collecting.

Id. at 5800. *See* infra part II (analyzing policy arguments).Back To Text

[26] *See* supra note 1 and accompanying text.Back To Text

[27] Gleason v. Thaw, 236 U.S. 558, 562 (1915) (interpreting analogous provision of Bankruptcy Act).Back To Text

[28] 1A Collier on Bankruptcy ¶ 8.01 (Lawrence P. King ed., 15th ed. 1995) ("The system of taxation and the imposition and collection of taxes were designed by Congress . . . to maximize" revenues).Back To Text

[29] *See* supra notes 19−22 and accompanying text.Back To Text

[30] *See* supra notes 20−21 and accompanying text.Back To Text

[31] *See, e.g.*, Toti v. United States (In re Toti), 24 F.3d 806, 809 (6th Cir.), cert. denied, 115 S. Ct. 482 (1994); United States v. Freidus (In re Freidus), 165 B.R. 537, 542 (Bankr. E.D.N.Y. 1994).Back To Text

[32] 11 U.S.C. § 523(a)(1)(C) (1994). This section is to be read in the disjunctive. A tax is dischargeable if the debtor *either* filed a fraudulent return *or* willfully attempted to evade or defeat a tax. United States v. Angel (In re Angel), No. 93−11683−BH, 1994 WL 69516, at *2 (Bankr. W.D. Okla. Feb. 24, 1994); Graham v. IRS (In re Graham), No. 87−03092F, 1994 WL 777359, at *5 (Bankr. E.D. Pa. Aug. 8, 1994) (recognizing disjunctive nature, yet stating there is overlap between two components).Back To Text

[33] The definition of "evade" also has been subject to judicial scrutiny. Some courts have relied on the dictionary definition of "evade" which is to "fail to pay." Angel, 1994 WL 69516, at *3 (citing Webster's II New Riverside University Dictionary 447 (1st ed. 1984)); Jones v. United States (In re Jones), 116 B.R. 810, 815 (Bankr. D. Kan. 1990) (citing Webster's New Collegiate Dictionary 395 (G&C Merriam Co. 1975)); Sells v. United States, 92−1 U.S. Tax. Cas. (CCH) ¶ 50,070, at 83,283 (Bankr. D. Co. 1991). *But see* Ballantine's Law Dictionary 423 (3d ed. 1969) (defining "evade" as "[t]o escape; to slip away; to take refuge in flight or artifice."). Interpreting "evade" to mean a failure to pay brings nonpayment of taxes squarely within § 523(a)(1)(C). Acceptance of this dictionary definition, however, seems to oversimplify the issue.Back To Text

[34] Ketchum v. United States (In re Ketchum), 177 B.R. 628, 630 (E.D. Mo. 1995) (recognizing that "willfully," "attempted" and "in any manner" are not defined in Bankruptcy Code); United States v. Toti (In re Toti), 149 B.R. 829, 832 (E.D. Mich. 1993) (referring to Sells which noted that "evade" not defined under Bankruptcy Code), aff'd, 24 F.3d 806 (6th Cir.), cert. denied, 115 S. Ct. 482 (1994); Howard v. United States (In re Howard), 167 B.R. 684, 688 (Bankr. M.D. Fla. 1994) ("[A]ll courts appear to agree that there is no definition of evasion or willfulness under the Bankruptcy Code nor the Internal Revenue Code.").Back To Text

[35] Toti, 24 F.3d at 809 (citing Burlington N. R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987)).Back To Text

[36] Webster's Ninth New Collegiate Dictionary 1350 (9th ed. 1988); Angel, 1994 WL 69516, at *2 (relying on definition of willfulness from Black's Law Dictionary).Back To Text

[37] *See* supra note 13 and accompanying text (listing cases holding that acts of omission and commission satisfy "willfulness").Back To Text

[38] Haas v. IRS (In re Haas), 48 F.3d 1153 (11th Cir. 1995); *see* discussion infra part III.A (discussing cases involving failure to pay).Back To Text

[39] Fridrich v. IRS (In re Fridrich), 156 B.R. 41, 34 (D. Neb. 1993); United States v. Angel (In re Angel), No. 93−11683−BH, 1994 WL 69516, at *3 (Bankr. W.D. Okla. Feb. 24, 1994); Binkley v. United States (In re Binkley), 176 B.R. 260, 265 (Bankr. M.D. Fla. 1994); Macks v. United States (In re Macks), 167 B.R. 254, 257 n.2 (Bankr. M.D. Fla. 1994) (finding "in any manner" broad enough to include fraudulent conveyances); Smith v. United States (In re Smith), 169 B.R. 55, 58 (Bankr. S.D. Ind. 1994); Griffith v. United States (In re Griffith), 161 B.R. 727, 732−33 (Bankr. S.D. Fla. 1993); Jones v. United States (In re Jones), 116 B.R. 810, 814−15 (Bankr. D. Kan. 1990). *But see* Haas, 48 F.3d at 1158 (finding "in any manner" not intended to encompass nonpayment of taxes); Gathwright, 102 B.R. at 213.Back To Text

[40] *See* United States v. Sumpter (*In re* Sumpter), Nos. 94−1439, 94−1440, 1995 U.S. App. LEXIS 24171 (6th Cir. Aug. 22, 1995); Toti v. United States (In re Toti), 24 F.3d 806, 809 (6th Cir.), cert. denied, 115 S. Ct. 482 (1994).Back To Text

[41] *See* Haas, 48 F.3d at 1156 (noting that this result would render general rule of dischargeability an "empty letter").Back To Text

[42] Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 565 (1990) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989)).Back To Text

[43] *See* supra note 42 and accompanying text.Back To Text

[44] *See* Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184−85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").Back To Text

[45] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) (justifying use of judicial interpretation of identical language from another statute); *see also* Veiga v. McGee, 26 F.3d 1206, 1211 (1st Cir. 1994).

> [I]n the absence of a statutory definition of a term, the understanding of that term in an analogous statute is an excellent guide to interpretation . . . . The fact that one statute is formally classified as penal, whereas the other is not does not detract from the former's value as a guide to the latter, or vice versa, so long as the two statutes are genuinely analogous in substance and effect.

Id.Back To Text

[46] Haas v. IRS (In re Haas), 48 F.3d 1153, 1156 (11th Cir. 1995).Back To Text

[47] I.R.C. § 6653(b) (1988) (providing penalty "if any part of an underpayment . . . is due to fraud").Back To Text

[48] Id. § 6672(a) (Supp. V 1993). This is the so−called "100% penalty" for failure to pay "trust fund taxes." The section reads:

> Any person required to collect, truthfully account for, and pay over any tax . . . who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall . . . be liable to a penalty equal to the total amount of the tax evaded . . . .

Id.Back To Text

[49] Id. § 7201 (1988) (imposing criminal penalties upon "[a]ny person who willfully attempts in any manner to evade or defeat any tax . . . or the payment thereof").Back To Text

[50] *See* Sabino, *supra* note 6, at 6−14 (tracking progression of Supreme Court decisions on "willfulness" as applied to criminal tax statutes).Back To Text

[51] 290 U.S. 389 (1933).Back To Text

[52] Id. at 395.Back To Text

[53] Id. at 394.Back To Text

[54] Id. at 394−95 (citations omitted).Back To Text

[55] Id. at 395.Back To Text

[56] 317 U.S. 492 (1942).Back To Text

[57] Id. at 498.Back To Text

[58] Id. at 500.Back To Text

[59] Id. at 499.Back To Text

[60] Id.Back To Text

[61] 412 U.S. 346 (1973).Back To Text

[62] Id. at 347−48.Back To Text

[63] Id. at 357−58.Back To Text

[64] Id. at 358−59 (citing United States v. Vitiello, 363 F.2d 240, 243 (3d Cir. 1966)).Back To Text

[65] Id. at 360.Back To Text

[66] Bishop, 412 U.S. at 360.Back To Text

[67] 429 U.S. 10 (1976).Back To Text

[68] Id. at 12.Back To Text

[69] Id.Back To Text

[70] Id.Back To Text

[71] 498 U.S. 192 (1991).Back To Text

[72] Id. at 200−01.Back To Text

[73] Id. at 201.Back To Text

[74] *See, e.g.,* United States v. Toti, 149 B.R. 829, 833−34 (E.D. Mich. 1993), aff'd, 24 F.3d 806 (6th Cir.), cert. denied, 115 S. Ct. 482 (1994); Langlois v. United States, 155 B.R. 818, 821 (N.D.N.Y. 1993) ("This civil bankruptcy action is more analogous to a civil action under [IRC] § 6672."); Irvine v. Commissioner (In re Irvine), 163 B.R. 983, 987 (Bankr. E.D. Pa. 1994). *But see* Howard v. United States (In re Howard), 167 B.R. 684, 686 n.1 ("There is no logical connection [between] 11 U.S.C. § 523(a)(1)(C) and I.R.C. § 6672.").Back To Text

[75] I.R.C. § 6672 (Supp. V 1993).Back To Text

[76] Jones v. United States, 60 F.3d 584, 587−88 (9th Cir. 1995); Greenberg v. United States, 46 F.3d 239, 244 (3d Cir. 1994); Thomas v. United States, 41 F.3d 1109, 1114 (7th Cir. 1994); United States v. Rem, 38 F.3d 634, 642−43 (2d Cir. 1994); Jenson v. United States, 23 F.3d 1393, 1395 (8th Cir. 1994); Muck v. United States, 3 F.3d 1378, 1381 (10th Cir. 1993); Barnett v. IRS, 988 F.2d 1449, 1457 (5th Cir. 1993); Turpin v. United States, 970 F.2d 1344, 1347 (4th Cir. 1992); Thomsen v. United States, 887 F.2d 12, 17−18 (1st Cir. 1989); Collins v. United States, 848 F.2d 740, 742 (6th Cir. 1988); George v. United States, 819 F.2d 1008, 1011 (11th Cir. 1987).Back To Text

[77] *See, e.g.,* Muck, 3 F.3d at 1381; Barnett, 988 F.2d at 1457; Collins, 848 F.2d at 742.Back To Text

[78] Muck, 3 F.3d at 1381 (failure to act enough); Howard v. United States, 711 F.2d 729, 736 (5th Cir. 1983); Steffens v. United States, 882 F. Supp. 143, 146 (D. Minn. 1995); Alten v. Ellin & Tucker Chartered, 854 F. Supp. 283, 289−90 (D. Del. 1994).Back To Text

[79] Rem, 38 F.3d at 643; United States v. McCombs, 30 F.3d 310, 320 (2d Cir. 1994); Denbo v. United States, 988 F.2d 1029, 1033 (10th Cir. 1993).Back To Text

[80] McCombs, 30 F.3d at 320 (finding § 6672 willfulness established by showing of gross negligence); Ruth v. United States, 823 F.2d 1091, 1094 (7th Cir. 1987) (same). Gross negligence is triggered when a responsible person should

have understood the grave risk of his actions and was in a position to find out with minimal effort. Wright v. United States, 809 F.2d 425, 427 (7th Cir. 1987).Back To Text

[81] Binkley v. United States (In re Binkley), 176 B.R. 260, 264 (Bankr. M.D. Fla. 1994) (applying civil tax fraud standard of § 6653(b)); Teeslink v. United States (In re Teeslink), 165 B.R. 708, 716 (Bankr. S.D. Ga. 1994) (citing cases adopting § 6653(b) standard); Boch v. United States (In re Boch), 154 B.R. 647, 657−58 (Bankr. M.D. Pa. 1993); Berzon v. United States (In re Berzon), 145 B.R. 247, 250 (Bankr. N.D. Ill. 1992). Back To Text

[82] Commissioner v. Peterson (In re Peterson), 152 B.R. 329, 333 (D. Wyo. 1993); Pierce v. United States (In re Pierce), 184 B.R. 338, 343 (Bankr. N.D. Iowa 1995); Binkley, 176 B.R. at 265; Dube v. United States (In re Dube), 169 B.R. 886, 891−92 (Bankr. N.D. Ill. 1994), aff'd, No. 94C5039, 1995 WL 238674 (N.D. Ill. Apr. 20, 1995); Irvine v. Commissioner (In re Irvine), 163 B.R. 983, 986−87 (Bankr. E.D. Pa. 1994); Teeslink, 165 B.R. at 716; Griffith v. United States (In re Griffith), 161 B.R. 727, 733−34 (Bankr. S.D. Fla. 1993); Koehl v. United States (In re Koehl), 166 B.R. 74, 80 (Bankr. E.D. La. 1993); Berzon, 145 B.R. at 250 (recognizing that "intent to evade taxes is generally provable by circumstantial evidence and reasonable inferences drawn from the existence of certain fact patterns, otherwise called the badges of fraud"). Back To Text

[83] Berzon, 145 B.R. at 250.Back To Text

[84] *See* supra note 59 and accompanying text.Back To Text

[85] *See* supra notes 82−83 and accompanying text.Back To Text

[86] *See* Graham v. IRS (In re Graham), No. 87−03092F, 1994 WL 777359, at *7 (Bankr. E.D. Pa. Aug. 8, 1994) ("The distinction between a criminal and civil definition of `willfulness' may be significant when deciding whether acts of omission as opposed to acts of commission may render a tax debt nondischargeable.").Back To Text

[87] *See* supra note 44 and accompanying text; *see also* Haas v. IRS (In re Haas), 48 F.3d 1153, 1156−57 (11th Cir. 1995) (noting fact that IRC and Bankruptcy Code are not part of same title or statute does not matter).Back To Text

[88] *See* Haas, 48 F.3d at 1158.Back To Text

[89] 11 U.S.C. § 523(a)(1)(C) (1994) (emphasis added).Back To Text

[90] United States v. Haas (In re Haas), 173 B.R. 753, 756 (S.D. Ala. 1993), rev'd, 48 F.3d 1153 (11th Cir. 1995); Goff v. IRS (In re Goff), 180 B.R. 193, 198 (Bankr. W.D. Tenn. 1995); Lilley v. IRS (In re Lilley), 152 B.R. 715, 720−21 (Bankr. E.D. Pa. 1993); In re Harris, 59 B.R. 545, 547−48 (Bankr. W.D. Va. 1986); *cf.* Gilder v. United States (In re Gilder), 122 B.R. 593, 595−96 (Bankr. M.D. Fla. 1990) (finding willful evasion evidence of fraudulent intent).Back To Text

[91] S. 2266, 95th Cong., 2d Sess. (1978); S. Rep. No. 989, supra note 25, at 78, *reprinted in* 1978 U.S.C.C.A.N. at 5864.Back To Text

[92] Haas, 48 F.3d at 1158.Back To Text

[93] *See* supra note 77 and accompanying text.Back To Text

[94] 11 U.S.C. § 523(a)(1)(A) (1994); *see* id. § 507(a)(8)(C). These two sections read together provide for the nondischargeability of taxes "required to be collected or withheld and for which the debtor is liable in whatever capacity." Id.Back To Text

[95] *See* I.R.C. § 7501(a) (1988). Section 7501(a) provides:

> Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a *special fund in trust* for the United States.

Id. (emphasis added).Back To Text

[96] *See* Razorback Ready−Mix Concrete Co. v. United States (In re Razorback Ready−Mix Concrete Co.), 45 B.R. 917, 920 (Bankr. E.D. Ark. 1984) (recognizing that trust fund taxes withheld by employer never become property of employer but are considered "monies belong[ing] to the United States").Back To Text

[97] *See* Lynne J. Wehrlie, Comment, *Favoring Collection of Taxes Over Bankruptcy Discharge in* Section 6672 Actions, 25 Willamette L. Rev. 633, 634−35 (1989) (recognizing special policy considerations associated with trust fund taxes).Back To Text

[98] Haas v. IRS (In re Haas), 48 F.3d 1153, 1157 (11th Cir. 1995).Back To Text

[99] Id.Back To Text

[100] *See* supra note 27 and accompanying text.Back To Text

[101] *See* infra part III (discussing cases involving § 523(a)(1)(C)); *see also* supra text accompanying note 59 (listing affirmative acts contemplated by Supreme Court under criminal standard).Back To Text

[102] *See* supra notes 39−42 and accompanying text (discussing plain meaning of "in any manner").Back To Text

[103] *See* supra notes 44−45 and accompanying text (reciting relevant portions of §§ 6672 and 7201).Back To Text

[104] Berzon v. United States (In re Berzon), 145 B.R. 247, 250 (Bankr. N.D. Ill. 1992) (citing Jones v. United States (*In re* Jones), 116 B.R. 810 (Bankr. D. Kan. 1990)).Back To Text

[105] *See* supra notes 51−52.Back To Text

[106] Haas v. IRS (In re Haas), 48 F.3d 1153, 1159 (11th Cir. 1995); Howard v. United States (In re Howard), 167 B.R. 684, 688−89 (Bankr. N.D. Fla. 1994) (holding exception to discharge only satisfied through proof of affirmative act to evade tax payment); Gathwright v. United States (In re Gathwright), 102 B.R. 211, 213 (Bankr. D. Or. 1989).Back To Text

[107] In re Hanna, 872 F.2d 829, 831 (8th Cir. 1989) (citing H.R. Rep. No. 595, 95th Cong., 2d Sess. 274 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5693, 6231). For a general discussion of the conflicts between bankruptcy and tax policy, see 1A Collier on Bankruptcy, supra note 28, ¶ 8.01.Back To Text

[108] *See* United States v. Sotelo, 436 U.S. 268, 279 (1978) (refusing to ignore clear congressional policy with respect to payment of taxes); James I. Shepard, The Treatment of Prepetition Tax Claims, *reprinted from* The Trustee's Bankruptcy Tax Manual (1993); *see also* Jack F. Williams, Rethinking Bankruptcy and Tax Policy, 3 Am. Bankr. Inst. L. Rev. 153, 204 (1995) (suggesting that favorable treatment of tax claims is revenue, rather than policy driven).Back To Text

[109] *See* Haas, 48 F.3d at 1160.Back To Text

[110] I.R.C. § 6501(a) (1988) (imposing three year statute of limitations upon assessment of tax). The provisions granting the IRS a favorable position were drafted mindful of slow workings of the government's assessment and collection machine. *See* Molina v. United States (In re Molina), 99 B.R. 792, 795 (S.D. Ohio 1988). "`Since enforcement of the tax laws against delinquent tax debtors takes time, Congress, through section 523, intended to give the taxing authority at least three full years to pursue such debtors' . . . . " Id. (quoting In re Brickley, 70 B.R. 113, 115

(Bankr. 9th Cir. 1986)). Back To Text

[111] 11 U.S.C. § 507(a)(8) (1994); Molina, 99 B.R. at 794.Back To Text

[112] 11 U.S.C. § 523(a)(1)(A) (1994).Back To Text

[113] *See* Williams, supra note 108, at 203 (referring to the "insatiable appetite of the tax collector in bankruptcy") (citation omitted).Back To Text

[114] *See* Haas v. IRS (In re Haas), 48 F.3d 1153, 1155−56 (11th Cir. 1995) (finding fault with government's position which would swallow general rule of discharge).Back To Text

[115] *See* Williams, supra note 108, at 197. "Overextending oneself, unforeseen contingencies, the inability to pay a debt, or lack of business acumen are not reasons to deny a debtor's discharge. Fraud, criminal activity, and misconduct are grounds for denial of discharge." Id.Back To Text

[116] *See* Haas, 48 F.3d at 1159.Back To Text

[117] Id. at 1160.Back To Text

[118] *See* discussion infra part III.A.Back To Text

[119] *See* discussion infra part III.B.Back To Text

[120] *See* discussion infra part III.C.Back To Text

[121] 48 F.3d 1153 (11th Cir. 1995).Back To Text

[122] Id. at 1154.Back To Text

[123] Id.Back To Text

[124] Id.Back To Text

[125] Id.Back To Text

[126] Haas, 48 F.3d at 1154.Back To Text

[127] Id.Back To Text

[128] Id.Back To Text

[129] Id.; *see* 11 U.S.C. § 1141(d)(1)(A) (1994) (providing that Chapter 11 debtors may discharge preconfirmation debts).Back To Text

[130] Haas, 48 F.3d at 1154.Back To Text

[131] Id. at 1154−55 n.2 (citing Amended Memorandum Opinion of Bankruptcy Court (R1−21)).Back To Text

[132] United States v. Haas (In re Haas), 173 B.R. 756, 757 (S.D. Ala. 1993), rev'd, 48 F.3d 1153 (11th Cir. 1995).Back To Text

[133] Id. at 758 (noting that language of § 523(a)(1)(C) is identical to language of IRC § 6672).Back To Text

[134] Id. at 758−59 (citing United States v. Toti, 149 B.R. 829, 834 (E.D. Mich. 1993).Back To Text

[135] *See* supra notes 74−75 and accompanying text (discussing Cheek v. United States, 498 U.S. 192 (1990)).Back To Text

[136] *See* supra notes 79−80 and accompanying text.Back To Text

[137] Haas, 173 B.R. at 758−59.Back To Text

[138] Id. at 757−58 (holding that IRS must *either* prove fraudulent return *or* willful attempt to evade a tax).Back To Text

[139] Haas v. IRS (In re Haas), 48 F.3d 1153, 1161 (11th Cir. 1995).Back To Text

[140] Id. at 1155−56.Back To Text

[141] Id. at 1156.Back To Text

[142] Id.Back To Text

[143] Id. at 1155.Back To Text

[144] Haas, 48 F.3d at 1155 (citations omitted).Back To Text

[145] Id. at 1161.Back To Text

[146] Id. at 1157 (quoting Sansone v. United States, 380 U.S. 343, 350−51 (1965)).Back To Text

[147] Id.Back To Text

[148] 167 B.R. 684 (Bankr. M.D. Fla. 1994).Back To Text

[149] Id. at 688.Back To Text

[150] Id. at 685.Back To Text

[151] Id.Back To Text

[152] Id.Back To Text

[153] Howard, 167 B.R. at 689.Back To Text

[154] Id.Back To Text

[155] Id. at 689.Back To Text

[156] *See* supra notes 79−80 and accompanying text (discussing standard under § 6672).Back To Text

[157] 164 B.R. 352 (Bankr. M.D. Fla. 1994), aff'd, No. 94−10−93, 1995 WL 555801 (M.D. Fla. June 9, 1995).Back To Text

[158] Id. at 353.Back To Text

[159] Id. at 354.Back To Text

[160] Id.Back To Text

[161] Id.Back To Text

[162] Williams, 164 B.R. at 354. But see United States v. Angel (In re Angel), No. 93−11683−BH, 1994 WL 69516 (Bankr. W.D. Okla. Feb. 24, 1994). In *Angel*, the debtor also failed to pay his tax liabilities and did not in any way affirmatively attempt to evade the assessment of those taxes. In that case, the court held although *mere* nonpayment does not render the tax debts nondischargeable, that debtors with the ability to pay should have the debt declared nondischargeable. The court held:

> The result of this decision is not such as to render all tax debts excepted from discharge when they are not paid. This case distinguishes between the debtor with the present ability to pay who so refuses and the unfortunate debtor without a present ability to repay. Debtors with an inability to repay their taxes with no more culpability will have their tax debts discharged. However, the debtors who have cash in hand and, instead of responding to their tax obligations, choose to pay other creditors or purchase luxury items and expensive homes will have their tax debts excepted from discharge.

Id. at *4.Back To Text

[163] Williams, 164 B.R. at 354. Although the court found that mere nonpayment did not render the taxes nondischargeable, it seems that this was not a case of mere nonpayment and the court could have found nondischargeability based on the debtors' involvement in the tax shelter scheme.Back To Text

[164] 11 U.S.C. § 547 (1994).Back To Text

[165] Id. § 523(a)(1)(B) (1994).Back To Text

[166] McQueen & Williams, supra note 2, § 10.09, at 10−17.Back To Text

[167] 11 U.S.C. § 523(a)(1)(B)(ii) (1994).Back To Text

[168] 24 F.3d 806 (6th Cir.), cert. denied, 115 S. Ct. 482 (1994).Back To Text

[169] Id. at 807.Back To Text

[170] Id.; *see* Binkley v. United States (In re Binkley), 176 B.R. 260, 262 (Bankr. M.D. Fla. 1994) (debtor deliberately failed to file because he lacked funds to pay tax liability).Back To Text

[171] Toti, 24 F.3d at 807.Back To Text

[172] Id. Toti was only indicted for failure to file his tax returns for the years 1974 to 1976. Id. As part of a plea bargain the government agreed to drop two counts of the indictment relating to tax years 1974 and 1975. Id.Back To Text

[173] Id.Back To Text

[174] Id.Back To Text

[175] Id.Back To Text

[176] Toti, 24 F.3d at 807.Back To Text

[177] Id. at 808.Back To Text

[178] Id.Back To Text

[179] Id.Back To Text

[180] Toti v. United States (In re Toti), 141 B.R. 126, 130 (Bankr. E.D. Mich. 1992), rev'd, 149 B.R. 829 (E.D. Mich. 1993), aff'd, 24 F.3d 806 (6th Cir.), cert. denied, 115 S. Ct. 482 (1994).Back To Text

[181] Id. at 131 (relying primarily on Spies v. United States, 317 U.S. 492 (1943) and Gathwright v. United States (In re Gathwright), 102 B.R. 211 (Bankr. D. Or. 1989)).Back To Text

[182] Id.Back To Text

[183] Id.Back To Text

[184] United States v. Toti (In re Toti), 149 B.R. 829 (E.D. Mich. 1993), aff'd, 24 F.3d 806 (6th Cir.), cert. denied, 115 S. Ct. 482 (1994).Back To Text

[185] Id. at 833.Back To Text

[186] Toti v. United States (In re Toti), 24 F.3d 806, 807 (6th Cir.), cert. denied, 115 S. Ct. 482 (1994).Back To Text

[187] Id. at 809.Back To Text

[188] Id.Back To Text

[189] Id.Back To Text

[190] 55 F.3d 195 (5th Cir. 1995).Back To Text

[191] Id. at 196.Back To Text

[192] Id.Back To Text

[193] Id.Back To Text

[194] Id. at 198.Back To Text

[195] Bruner, 55 F.3d at 196.Back To Text

[196] Id.Back To Text

[197] Id.Back To Text

[198] Id.Back To Text

[199] Bruner v. United States (*In re* Bruner), No. 93BK−10619, 1994 Bankr. LEXIS 85, at *2 (Bankr. W.D. La. Jan. 21, 1994), *aff'd*, No. 94−0469, 1994 WL 461310 (W.D. La. May 23, 1994), aff'd, 55 F.3d 195 (5th Cir. 1995).Back To Text

[200] Bruner v. United States (In re Bruner), No. 94−0469, 1994 WL 461310, at *2 (W.D. La. May 23, 1994) (noting that debtors failed to cite a single case which supported the opposite conclusion under In re Gathwright, 102 B.R. 211 (Bankr. D. Or. 1989)), aff'd, 55 F.3d 195 (5th Cir. 1995).Back To Text

[201] Bruner v. United States (In re Bruner), 55 F.3d 195 (5th Cir. 1995).Back To Text

[202] Id. at 199−200.Back To Text

[203] Id. at 200 (emphasis added).Back To Text

[204] *See* Lilley v. IRS (In re Lilley), 152 B.R. 715, 718 (Bankr. E.D. Pa. 1993) (finding that debtor's claim to meritless deductions constitutes an act of commission and therefore caselaw holding that acts of commission and omission satisfy § 523(a)(1)(C) are inapplicable).Back To Text

[205] 176 B.R. 266 (Bankr. M.D. Fla. 1994).Back To Text

[206] Id. at 268.Back To Text

[207] Id.Back To Text

[208] Id. (citing Toti v. United States (In re Toti), 24 F.3d 806 (6th Cir. 1994), where debtor was convicted of criminal tax fraud, and In re Hedgecock, 160 B.R. 380 (D. Or. 1993), where the debtor pleaded guilty to willfully failing to file tax returns).Back To Text

[209] *See, e.g.*, Jones v. United States (In re Jones), 116 B.R. 810, 814−15 (Bankr. D. Kan. 1990).Back To Text

[210] Haas v. IRS (In re Haas), 48 F.3d 1153, 1155−56 (11th Cir. 1995); Gathwright v. United States (In re Gathwright), 102 B.R. 211, 213 (Bankr. D. Or. 1989); *see* supra notes 102−06 and accompanying text (discussing rules of statutory construction which assume that Congress was aware of the "or payment thereof" language in various tax statutes, and intentionally avoided this language when enacting § 523(a)(1)(C)).Back To Text

[211] The propriety of the Sixth Circuit's decision not to publish this opinion should be questioned. *See* In re Rules of United States Courts of Appeals, 955 F.2d 36 (10th Cir. 1992) (Holloway, J., dissenting). The decision clearly provides a new perspective of § 523(a)(1)(C) as applied under different factual circumstances.Back To Text

[212] Nos. 94−1439, 94−1440, 1995 U.S. App. LEXIS 24171 (6th Cir. Aug. 22, 1995).Back To Text

[213] *Id.* at *9−10.Back To Text

[214] *Id.* at *10 (emphasis added).Back To Text

[215] United States v. Toti (In re Toti), 24 F.3d 806, 809 (6th Cir.), cert. denied, 115 S. Ct. 482 (1994).Back To Text

[216] *Sumpter*, 1995 U.S. App. LEXIS, at *10.Back To Text

[217] *Sumpter*, 1995 U.S. App. LEXIS, at *11−12.Back To Text

[218] Toti, 24 F.3d at 806 ("We believe that a plain reading of section 523(a)(1)(C) includes both acts of commission and acts of omission.").Back To Text

[219] Macks v. United States (In re Macks), 167 B.R. 254, 257 (Bankr. M.D. Fla. 1994).Back To Text

[220] *See* Pierce v. United States (In re Pierce), 184 B.R. 338, 343 (Bankr. N.D. Iowa 1995). The facts in *Pierce* give the court every opportunity to find an affirmative act upon which the court could have ended its "willfulness" determination. Yet the court plainly holds "[b]oth acts of commission and acts of omission are within a plain reading" of § 523(a)(1)(C). Id.; Bruner v. United States (In re Bruner), 55 F.3d 195 (5th Cir. 1995). Debtors in *Bruner* continuously failed to file tax returns, failed to pay taxes and attempted to hide income, yet the court felt it necessary to reinforce the principle that acts of commission and omission satisfy § 523(a)(1)(C). Id. *But see* Graham v. IRS (In re Graham), No. 87−03092F, 1994 WL 777359, at *7−8 (Bankr. E.D. Pa. Aug. 8, 1994) (refusing to decide whether civil or criminal standard applied because debtor's affirmative acts satisfied both standards).Back To Text